

## Early Analysis of Affordable Care Act Supreme Court Challenge: The “Individual Mandate”

On Tuesday, the Supreme Court held its second of three days of arguments on the Affordable Care Act. Tuesday’s arguments considered the health care law’s most controversial provision: the “individual mandate,” or the requirement that most Americans obtain health insurance or else pay a financial penalty. The arguments centered on whether Congress has the authority to adopt the individual mandate under its powers to regulate commerce and levy taxes.

Much of the questioning during Tuesday’s arguments appeared to split along ideological lines: four Justices (Sotomayor, Breyer, Ginsburg, and Kagan) seemed ready to uphold the individual mandate, while four other Justices (Scalia, Roberts, Kennedy, and Alito) expressed considerable concern about whether the law, if upheld, would mean that Congress’s powers are virtually limitless.

The Supreme Court has seldom found that Congress overstepped its commerce authority since the New Deal. But in two cases in 1995 and 2000, the Supreme Court struck down federal laws—one regulating carrying guns near schools and another relating to domestic violence—that the Court found were outside of the federal government’s power to regulate interstate commerce. In recent years, the Supreme Court has upheld other laws under Congress’ commerce power, including regulations on the sale of drugs and a law that civilly committed sex-offenders.

The Solicitor General, arguing on behalf of the U.S. government in favor of the individual mandate, focused most of his argument on Congress’ authority to enact the individual mandate under the commerce power. This argument was met with skepticism from several Justices, who questioned whether the government’s position would leave any limits on Congress’ power. They suggested that the mandate forces individuals to enter into commerce by buying compulsory insurance, and then seeks to regulate this “market.” These Justices suggested that if the government’s position was adopted, Congress could force Americans to purchase other private goods, like cars or healthy foods. Justice Scalia, for example, asked “[i]f the government can do this, what else can it not do?” and suggested that the government would be able to force people to go to the gym or eat broccoli. Justice Breyer countered that the health insurance market was unique because one person’s decision not to purchase health insurance has external costs: if that person becomes ill and uses health services he is unable to afford, his healthcare costs are imposed on others. Justice Kennedy expressed concern that the mandate, by forcing people to act, “changes the relationship of the government to the individual in a very fundamental way” and that the government has a “heavy burden” to justify the law. The Solicitor General suggested this line of inquiry would return the Supreme Court to the now repudiated pre-New Deal “Lochner-era” case law in which the Supreme Court enforced its own view of economic freedom under the banner of the United States Constitution. Toward the end of the argument, Justice Kennedy and Chief Justice Roberts asked questions that seemed to indicate that they were at least open to the possibility that the health insurance market was sufficiently unique to distinguish it from other markets and provide authority for the mandate.

The healthcare law’s challengers were pressed on the economic effects of individuals choosing not to be covered by health insurance and whether the challengers’ position would impose too many limitations on the federal government. Justice Breyer questioned whether there was a distinction between inactivity and activity, and noted that in prior cases the Supreme Court had already held that Congress can require consumers to affirmatively take action. The Justices also pressed the challengers on the differences between the healthcare market and other markets—most importantly, that everyone participates in the healthcare market at some

point, since everyone will at one point get sick. The challengers, however, faced substantially fewer difficult questions from the Justices.

During the argument, both parties also addressed Congress' authority to enact the individual mandate pursuant to its tax levying authority. However, somewhat unexpectedly, this argument played a subsidiary role.

At this stage, divining how the court will rule on the individual mandate is a difficult task. However, it is clear that the court is deeply divided on this issue.

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