

Early Analysis of Affordable Care Act Supreme Court Challenge: Severability

The Supreme Court took up the following question on Wednesday morning: Which, if any, of the Affordable Care Act's ("ACA's") provisions would the Court allow to remain in effect if the Court were to strike down the so-called "individual mandate" provisions of the statute? Justice Ginsburg characterized answering this question as a choice between a "wrecking operation" and a "salvage job." And, Justice Kagan queried: "Does Congress want half a loaf? Is half a loaf better than no loaf?" All this, of course, could turn out to be a purely academic exercise. But after yesterday, when several Justices took turns prodding and poking the individual mandate's constitutionality, the "severability" issue has taken on heightened importance. If the individual mandate falls, it is possible the Court could throw out all of the 2,700 pages of the ACA with it—even though many of its provisions are independently constitutionally unobjectionable.

U.S. District Judge Roger Vinson did just that when he found the individual mandate unconstitutional. That is, the lower court struck down all other provisions of the statute after finding the individual mandate provision unconstitutional. On appeal, the Eleventh Circuit agreed with Judge Vinson's assessment of the mandate, but held that the rest of the ACA should stand—including the provisions relating to expanding Medicaid coverage and other coverage requirements imposed on insurance carriers and employer-sponsored group health plans.

Before the Supreme Court, the United States is arguing a position endorsed by neither court: The guaranteed-issue and community-rating provisions cannot survive without the mandate, but the rest of the ACA can. (The United States is also taking the controversial position that the severability question is not, for most of the ACA's provisions, properly before the Court.) The law's challengers urge that the mandate is the ACA's keystone, without which the rest of the legislation necessarily crumbles. That is to say, that if the Court finds the individual mandate provisions unconstitutional, the entire ACA should be struck down—leaving Congress with a "clean slate." With no party espousing the Eleventh Circuit's approach to severability, the Supreme Court appointed a private amicus lawyer to make the case that, if the mandate is found unconstitutional, the rest of the ACA should be left untouched.

The Justices' questions today focused on two main themes. First, what test is the Court supposed to use to decide the severability question? And second, once the Court knows how it is to decide, do any of the outcomes make practical sense? As previewed in their briefing, the parties disagree on the judicial standard for severability. And, the Justices all seemed to acknowledge that the case law is complicated and subject to myriad interpretations. Would the ACA function and remain faithful to its basic purpose without the unconstitutional piece? Would Congress have actually voted in favor of an amputated bill? Is there affirmative evidence that Congress would not have voted for a mandate-less bill? Highlighting the discrepancies, Justice Kennedy prompted laughter when he asked if the Court is supposed to consider the intent of the Congress that actually passed the bill or a "hypothetical Congress." He also confessed that, even during argument, he did not "know what the test is that we are supposed to apply." Indeed there is scant precedent addressing the question of severability of a congressional statute once the Court has struck a provision that lies at the "heart" of the statute. The closest analogous situation lies in a prior case striking down the Federal Criminal Sentencing Guidelines—but the Justices on Wednesday morning did not even agree on whether that case was really analogous. In the end, this threshold question of which articulation of the test should govern the Court's analysis may very well be outcome determinative. As Justice Kagan framed the issue: Is half a loaf better than no loaf? And, what branch of government is best suited to answer that question?

But, settling on a test for severability is just the first problem. The Justices' questioning today suggested that, if the Court holds the mandate to be invalid, the Supremes will face a severability trilemma. As emphasized during the private amicus's argument, if the entirety of the ACA is otherwise allowed to stand—including the guaranteed-issue and community-rating provisions—the insurance industry faces the prospect of adverse selection: Healthy people may not buy insurance until they become sick, at which point they cannot be denied insurance coverage. On the other hand, if the Court throws the rest of the ACA out with the mandate, this could result in the rolling-back of provisions that have already been implemented, including the requirement that insurers of families cover adult children to age 26 and the restrictions on rescinding coverage and on imposing lifetime dollar limits on essential benefits. It would also frustrate the Medicaid reform provisions.

The federal government's proposed middle path creates logistical issues of its own: Once the Court is tasked with picking and choosing which of the ACA's provisions can stand alone, there is no principled reason for the Court just to carve out the guaranteed-issue and community-rating provisions. The parties and Justices could not even agree that provisions relating to black lung disease, Native American health, breast feeding, "getting doctors to serve underserved areas," and restaurants having "to have a calorie count of major menus" could stay in. The Chief Justice asked, "Where is the sharp line?" Justice Scalia was exasperated at the prospect of "law clerks" going through 2,700 pages of the ACA provision-by-provision to analyze what should remain. Justice Breyer suggested that the Court's far-ranging options included appointing a special master or remanding to the lower federal courts for further consideration. Justice Sotomayor urged that striking down more of the ACA than strictly necessary would assume too much power to the Court, but Justice Kennedy pondered whether it might be the "opposite"—that fashioning a judicially mutilated act would be an over-exertion of the Court's power.

The day's takeaway may just be that the severability question is not itself severable from the merits question. Congress recited in the text of the ACA that the mandate is an "essential" component. The United States would use this to show that the mandate is a necessary and proper facet of a valid, comprehensive regulation of commerce. The challengers would use the same passage to show that, once the mandate is found to be unconstitutional, the rest of the ACA cannot proceed without its "essential" piece. If Tuesday showed the conservative Justices to be skeptical of the mandate, Wednesday forced the Court's swing voters to contemplate the thorny real-world, economic consequences of having to divine what the legislative branch would have intended without the mandate. This raises questions of separation of powers and judicial activism. And, it forces the swing voters to question their resolve: If the Court takes the extraordinary step of declaring one provision of an Act of Congress unconstitutional, is it willing to double-down on its judicial power and declare the whole of the Act void?

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