It's Not a Mandate, It's a Tax

In a Stunning Decision, the United States Supreme Court Upholds the Constitutionality of the Patient Protection and Affordable Care Act

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A. Introduction

At 10:00AM on June 28, 2012, the United States Supreme Court issued its much anticipated decision on the constitutionality of The Patient Protection and Affordable Care Act ("ACA"). Protestors assembled outside of the United States Supreme Court. Lawyers, politicians, scholars and the American public huddled around their televisions and computers to hear the Supreme Court's pronouncement: "The ACA is ***unconstitutional*** and ***constitutional.***" Wait a minute . . . how can something be unconstitutional and, at the same time, constitutional?

In our prior article entitled, *"Did Congress Tip the Scale of Power Too Far?" – The United States Supreme Court May Soon Determine the Constitutionality of the Patient Protection and Affordable Care Act*,[1] we predicted that the Court's ruling "[was] likely to be a 5-4 decision with Justice Kennedy serving as the decisive swing vote." The Court's decision was, as predicted a 5-4 decision but, it was Chief Justice Roberts, one of the traditionally more conservative Justices, not Justice Kennedy, who served as the critical swing vote, siding with both wings of the Court on different issues.

Writing for the "majority" and siding with the more conservative wing of the Court (Justices Scalia, Kennedy, Thomas and Alito), the Chief Justice first held that Congress' enactment of the individual mandate and corresponding penalty was an ***unconstitutional*** exercise of Congressional power under the Commerce Clause of the United States Constitution. Cutting to the heart of the matter, the Chief Justice wrote that the individual mandate does not regulate ***existing*** commercial activity but, instead, compels individuals to ***become*** active in commerce by purchasing health insurance. This, the Chief Justice said, is beyond Congress' Commerce Clause power.

Then, in what seemed to be an unexpected twist of fate, Chief Justice Roberts joined the more liberal wing of the Court (Justices Ginsburg, Breyer, Sotomayor and Kagan), and next held that the shared responsibility payment, requiring individuals who do not purchase health insurance to pay a monetary penalty to the Internal Revenue Service, is a constitutional "tax." He wrote, although "the Federal Government does not have the power to order people to buy health insurance …. [t]he Federal Government does have the power to impose a tax on those without health insurance."[2]

This article will analyze the Court's Commerce Clause and Tax Clause rulings on the individual mandate. We will attempt to explain whether Chief Justice Roberts' rulings are consistent or contradictory. In the end, you may or may not agree with Chief Justice Roberts. No doubt, the Court's decision will be analyzed for years to come. But one thing is certain, Chief Justice Roberts has now claimed this Supreme Court as his own.

B. Congress Cannot Make Someone Purchase Health Insurance

Chief Justice Roberts first tackled the question of whether Congress can make someone buy a product – health insurance – that he or she does not want to buy. The individual mandate requires most Americans to maintain "minimum essential" health insurance coverage.[3] The mandate does not apply to

some individuals, such as prisoners and undocumented aliens.[4] Many individuals will receive the required coverage through their employer, or from a government program such as Medicare or Medicaid.[5] But for individuals who are not exempt and do not receive health insurance through a third party, the way to satisfy this requirement is to purchase insurance from a private company.

Beginning in 2014, individuals who do not comply with the mandate must make a "shared responsibility payment" to the Federal Government.[6] That payment, which the ACA describes as a "penalty," is calculated as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance.[7] In 2016, for example, the penalty will be 2.5 percent of an individual's household income, but no less than $695 and no more than the average yearly premium for insurance that covers 60 percent of the cost of 10 specified services.[8] The ACA provides that the penalty will be paid to the Internal Revenue Service with an individual's taxes, and "shall be assessed and collected in the same manner" as tax penalties, such as the penalty for claiming too large an income tax refund.[9] The ACA, however, bars the IRS from using several of its normal enforcement tools, such as criminal prosecution and levies.[10] And, some individuals who are subject to the mandate are nonetheless exempt from the penalty – for example those with incomes below a certain threshold and members of Indian tribes.[11]

The Commerce Clause grants Congress extraordinarily broad power to regulate activities that affect interstate commerce. For example, even if one person, conducting a commercial activity alone does not affect commerce, a hundred people conducting that same activity together may influence commerce and thus, Congress may regulate that activity. Chief Justice Roberts distinguished the individual mandate from past Congressional acts, on the ground that the individual mandate does not regulate existing commercial activity, but instead compels individuals ***to become*** active in commerce by purchasing a product because that individual's failure to do so affects interstate commerce. "[P]ermit[ting] Congress to regulate individuals precisely ***because*** they are doing nothing would open a new and potentially vast domain to congressional authority." Thus, Chief Justice Roberts writes:

> Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could ***potentially*** make within the scope of federal regulation and – under the Government's theory – empower Congress to make those decisions for him.[12]

To reach this conclusion, Chief Justice Roberts had to explain how the Government's position would improperly expand the notion of a government of limited powers well beyond those permitted by *Wickard v. Filburn,*[13] a decision that most scholars acknowledge sets the outer limits of Commerce Clause power. In *Wickard,* Congress was permitted to impose a federal penalty on a farmer for growing wheat for personal consumption on his own farm. That amount of wheat caused the farmer to exceed his quota under a program designed to support the price of wheat by limiting supply.

The Court rejected the farmer's argument that growing wheat for home consumption was beyond the reach of the commerce power because the farmer's decision to grow wheat for this own use allowed him to avoid purchasing wheat in the market. That farmer's decision, when considered in the aggregate along with similar decisions by other farmers, would have a substantial effect on the interstate market for wheat.[14]

The aggregate decisions of some consumers not to produce wheat have a substantial effect on the price of wheat, just as decisions not to purchase health insurance have on the price of insurance. But, the farmer in *Wickard* was at least *actively* engaged in the production of wheat. However, accepting the Government's logic on the ACA "would justify a mandatory purchase to solve almost any problem" whenever enough people "are not doing something the Government would have them do."[15]

Using a different example in the health care market, the Chief Justice explained, many Americans do not eat a balanced diet, leading to obesity and heart problems. That group of people makes up a larger percentage of the total population than those without health insurance. The failure of that group to have a healthy diet increases health care costs to a greater extent than the failure of the uninsured to purchase insurance. Those increased costs are borne, in part by other Americans who must pay more, just as the uninsured shifts costs to the insured. If Congress can address the insurance problem by ordering everyone to buy insurance, then Congress could likewise address the diet problem by ordering everyone to buy vegetables. The Chief Justice would not sanction such overreaching congressional power, stating:

> People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures – joined with the similar failures of others – can readily have a substantial effect on interstate commerce. Under the Government's

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> logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act….permitting Congress to reach beyond the natural extent of its authority, "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."[16]

Finally, the Government justified the individual mandate because, although not currently active in the health care market, the uninsured will, at some unknown point in the future, engage in a health care transaction. However, the Chief Justice made short shrift of this argument explaining that every individual will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those markets today.[17]

In a scathing dissent, Justice Ginsburg criticized Chief Justice Roberts' Commerce Clause analysis, stating that his opinion "finds no home in the text of the Constitution or our decisions."[18] She writes, "[r]equesting individuals to obtain insurance unquestionably regulates the interstate health insurance and health care markets."[19] In Justice Ginsburg's view, the uninsured, as a class of individuals, substantially affects commerce in the following ways: They consume billions of dollars of health care products and services each year; those products are produced, sold and delivered by national and regional companies who routinely transact business across state lines; and the uninsured travel across state lines to receive care, including for medical emergencies while away from home, and to neighboring states that provide better care for those who have not prepaid for care.[20]

In addition, she explains, the uninsureds' inability to pay for a significant portion of their consumption of health care goods and services "drives up market prices, foists costs on other consumers, and reduces market efficiency and stability."[21] Given these far-reaching effects on interstate commerce, an individual's decision to forgo insurance is hardly inconsequential or equivalent to "doing nothing." Any uninsured person may need medical care at any moment. Thus, the decision to forgo insurance is "an economic decision Congress has the authority to address under the Commerce Clause."[22]

C. The Individual Mandate is Constitutional as a "Tax"

While Justice Ginsburg's view on the commerce power did not carry the day, in the second half of his opinion, Chief Justice Roberts made a sharp left-hand turn and declared that his Commerce Clause ruling "does not end the matter," requiring the Court to determine whether the individual mandate may be upheld as within Congress' enumerated power to "lay and collect taxes" under Article I, § 8, clause 1 of the United States Constitution. Indeed, constitutional law makes strange bedfellows.[23] This time Chief Justice Roberts aligned himself with the liberal wing of the Court, comprising of Justices Ginsburg, Breyer, Sotomayor and Kagan, and upheld the individual mandate under the Tax Clause of the United States Constitution.

Beginning in tax year 2014, individuals who do not comply with the mandate to purchase health insurance coverage will be required to make a "[s]hared responsibility payment" to the IRS when he or she pays his or her taxes.[24] The Chief Justice began his Tax Clause analysis by reciting the legal axiom that "if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so."[25] The exaction in the ACA "looks like a tax in many respects."[26] Taxpayers pay the exaction to the Treasury when they file their tax returns.[27] It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold.[28] For taxpayers who owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status.[29] The requirement to pay is enforced by the IRS.[30] Therefore, the end result is the same as with any tax: it produces some revenue for the government – estimated at $4 billion per year by 2017.[31] Focusing on the function of this exaction as a "tax," rather than its formal label as a "penalty," the Court seemed to apply the adage on inductive reasoning: if it looks like a tax, swims like a tax, and quacks like a tax, then it probably is a tax,[32] and therefore, constitutional.[33]

The Chief Justice's holding pitted him directly against his common allies, Justices Scalia, Kennedy, Thomas and Alito. In an equally scathing dissent, Justice Scalia disagreed with the characterization of the individual mandate as a "tax." The question, in his mind, is not whether Congress possesses the power to frame the individual mandate provisions as a tax, but rather, whether it did so. The answer to this question, he notes, is of paramount importance because the individual mandate can be either a penalty or a tax but not both. "The two are mutually exclusive" and since the Court had already declared the penalty to be unconstitutional, the Court should "stop there."[34]

The dissenters believed that Congress did not intend to frame the individual mandate as a tax. In fact, both President Obama and Congress have denied that the individual mandate is a tax and, in an interview of the President's Chief of Staff, Jack Lew, given after the case was decided, the Obama Administration refused to admit that the Supreme Court upheld the validity of the individual mandate as a tax.[35] "In this case," the dissent continues, "there is simply no way . . . to escape what Congress enacted: a mandate that individuals maintain minimum essential coverage, enforced by a penalty."[36]

Justice Scalia emphasized:

> In a few cases, this Court has held that a "tax" imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held – *never* – that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that *any* exaction imposed for violation of the law is an exercise of Congress' taxing power – even when the statute *calls* it a tax, much less when (as here) the statute repeatedly calls it a penalty.[37]

Based upon their common definitions, these dissenting justices viewed the individual mandate provision as a regulatory penalty, not a tax.

Finally, Justice Scalia took note of the fact that tax-writing is constitutionally required to originate in the House of Representatives, the legislative body most accountable to the people, and here, not only did the ACA originate in the Senate, but there was a prior version of the law that sought to impose a straight tax instead of a mandate and penalty and Congress rejected that version.

Accordingly, Justices Scalia, Kennedy, Thomas and Alito believed the entire statute was inoperative and therefore should have been struck down as unconstitutional.

D. The New World Order for the Supreme Court

While no one will probably ever know for sure given the Court's policy of strict confidentiality regarding deliberations among the justices, there has nonetheless been no shortage of speculation following the Court's decision about why Chief Justice Roberts departed from the conservative justices to uphold the ACA.

In the days immediately following the decision, there was speculation that even though Chief Justice Roberts voted preliminarily with the conservative justices to strike down the law, he changed his mind at the last minute and aligned himself with the liberal justices to uphold most of the ACA. Many, including the authors of this article, originally believed that Justice Kennedy would ultimately cast the swing and decisive vote. Indeed, there have been reports that after Chief Justice Roberts switched his vote, Justice Kennedy led the effort to persuade the Chief Justice to rejoin the conservative justices. These efforts, however, proved unsuccessful as Chief Justice Roberts held firm to his position.[38]

Nevertheless, the million dollar question still remains: Why the change of heart? To date, no one knows for sure. Indeed, we may never know. However, based upon information that has been reported, one can make an educated supposition of what happened. It is clear that Chief Justice Roberts was in full agreement that the individual mandate was unconstitutional as outlined in his Commerce Clause analysis. However, the question of whether to strike the entire ACA or only the individual mandate provision may have ultimately led to an irreconcilable disagreement between him and the conservative justices because the conservative justices were clearly resolved to strike the entire law. This speculation is supported by a statement made by Justice Ginsburg who, in a rare interview, specifically noted that the question of the individual mandate's severability from the rest of the ACA was a pivotal issue the Court would need to address.[39] This, coupled with reports that the Chief Justice may have been feeling some pressure to find a way to avoid striking the entire ACA, may have convinced him to make the tax argument the linchpin of upholding the constitutionality of the ACA. Indeed, it would be unusual, as was the case here, for Justice Scalia to write a dissenting opinion with a 16-page concurring discussion of Chief Justice Roberts' Commerce Clause analysis unless, for example, Justice Scalia's dissent was originally written to be the majority opinion before Chief Justice Roberts' change of heart.

Whatever the case, Chief Justice Roberts' decision appears to hold true to his conservative jurisprudence, and at the same time stakes out an intellectual "middle ground." His conservative jurisprudence would find every way to honor the will of the people and would not overturn a validly enacted act of Congress absent the act doing clear violence to the Constitution; the liberal wing of the Court succeeded in upholding this critical piece of legislation from the Obama administration; the conservative wing of the Court solidified a severe limitation on the continued expansion of Congress' Commerce Clause power. Some legal scholars view this limitation on commerce power to be even more significant than the Court's ultimate determination of the ACA's constitutionality.

What is certain to the authors of this article, however, is that Chief Justice Roberts has now decisively carved out a place for himself in the Court's history and has taken full leadership of the present Court as its Chief Justice.

E. Where Do Health Care Providers Go From Here?

Despite Mitt Romney and Paul Ryan's promise to repeal,[40] and the Republican-controlled Congress' efforts to defund,[41] the ACA, states, providers, insurers and employers alike are well under way in their efforts to implement the ACA. There is a belief that many of the new health care delivery systems and reforms that have been developed in the wake of the ACA will survive even if the ACA is ultimately repealed or defunded. So, in all likelihood, health care reform is here to stay.

In future editions of *FOCUS,* we will turn our attention to the nuts-and-bolts of how to implement specific (and per-

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haps confusing) provisions of the ACA so that the readers of this publication are prepared for the next phase of the ongoing debate over health care reform and compliance with the ACA.

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Footnotes

[1] *Garden State Focus,* vol. 58 no. 3, pp. 19-23 (Nov./Dec. 2011).

[2] *National Federation of Independent Business et al. v. Sebelius,* 567 U.S. __, slip opinion at pp. 44-45 (2012).

[3] 26 *U.S.C.* §5000A(a).

[4] 26 *U.S.C.* §5000A(d).

[5] See 26 *U.S.C.* §5000A(f).

[6] 26 *U.S.C.* §5000A(b)(1).

[7] 26 *U.S.C.* §5000A(c).

[8] *Ibid.;* 42 *U.S.C.* §18022.

[9] 26 *U.S.C.* §5000A(g)(1).

[10] 26 *U.S.C.* §5000A(g)(2).

[11] 26 *U.S.C.* §5000A(e).

[12] *Nat'l Fed., supra,* slip op. at pp. 20-21.

[13] 317 *U.S.* 111 (1942).

[14] *Id.* at 127-129.

[15] *Nat'l Fed., supra,* slip op. at p. 22.

[16] *Id.,* slip. op at p. 23, *quoting,* The Federalist No. 48, at 309 (J. Madison).

[17] *Id.,* slip op. at p. 26.

[18] *Nat'l Fed.,* dissenting opinion at p. 23 (Ginsburg dissenting).

[19] *Id.* at p. 24.

[20] *Id.* at p. 16.

[21] *Id.* at p. 16.

[22] *Id. at p. 16-17.*

[23] Charles Dudley Warner (1829-1900), adaptation of a line from William Shakespeare's play, *The Tempest,* where Shakespeare writes, "Misery acquaints a man with strange bedfellows." (1611).

[24] 26 *U.S.C.* §5000A(b)(1).

[25] *Nat'l Fed.,* slip op. at p. 31.

[26] *Id.* at p. 33.

[27] 26 *U.S.C.* §5000A(b); *Nat'l Fed.,* supra, slip op. at p. 33.

[28] 26 *U.S.C.* §5000A (e)(2).

[29] 26 *U.S.C.* §5000A(b)(3), (c)(2), (c)(4); *Nat'l Fed.,* supra, slip op. at p. 33.

[30] 26 *U.S.C.* §5000A(g).

[31] *Nat'l Fed.,* supra, slip op. at p. 33.

[32] Indiana poet James Whitcomb Riley (1849-1916) may have coined this adage when he wrote "when I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck."

[33] The Anti-Injunction Act ("AIA"), found at 26 U.S.C. §7421(a), bars lawsuits filed "for the purpose of restraining the assessment or collection of any tax." However, the Court unanimously found that the "penalty" label was dispositive, stating "Congress's decision to label this exaction a 'penalty' rather than a 'tax' is significant because the [ACA] describes many other exactions it creates as 'taxes.'" The decision to label this exaction as a "penalty" was said to be illustrative of Congress' intent to define it as such. Because the AIA and the ACA are both "creatures of Congress'[] own creation[, h] ow they relate to each other is up to Congress, and the best evidence of Congress'[] intent is the statutory text." *Nat'l Fed., supra,* slip op. at pp. 12-13.

[34] *Nat'l Fed, supra,* dissenting opinion at p. 16-17 (Scalia dissenting).

[35] http://abcnews.go.com/blogs/politics/2012/07/despite-ruling-jack-lew-refuses-to-call-mandate-a-tax/

[36] *Nat'l Fed. supra,* at p. 18.

[37] *Id.* at p. 18.

[38] *Roberts Switched Views to Uphold Health Care Law.* Crawford, Jan. http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/ (July 1, 2012).

[39] *On Eve of Health Ruling, Ruth Bader Ginsburg Predicts 'Sharp Disagreement.'* Cheney, Kyle. http://www.politico.com/news/stories/0612/77479.html (June 15, 2012).

[40] http://abcnews.go.com/blogs/politics/2012/07/house-obamacare-repeal-thirty-third-times-the-charm/

[41] http://blogs.wsj.com/washwire/2012/06/28/transcript-of-romneys-remarks-on-the-supreme-court-ruling/