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Health care hearings – what to listen for (Part 1 of 2)

By Lyle Denniston
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Editor's note: The Supreme Court holds three days of hearings next week on the constitutionality of major parts of the new federal health care law, the Patient Protection and Affordable Care Act. Tonight at 6pm EST the National Constitution Center's Peter Jennings Project for Journalists and the Constitution presents a moot court on the constitutional issues surrounding the central feature of the Act – the mandate requiring virtually all Americans to obtain health insurance by the year 2014. Constitution Daily will provide a live webcast and chat with Lyle Denniston.

The description below will serve as a guide to that mock hearing, and also as a guide to the actual Supreme Court hearing on the mandate; the Court will release the audiotape of the hearing on the mandate next Tuesday afternoon, on its website. This Thursday, Constitution Daily will provide a second guide on what to expect when the Court, next Wednesday afternoon, releases the audiotape of its hearing on the impact on the Affordable Care Act as a whole, if the mandate were to be struck down.

As the new health care law has made its way through the federal courts, and as it has unfolded so far in the written legal filings by lawyers in the Supreme Court, two very clear but conflicting story lines may shape the constitutional fate of the individual mandate (technically called the "minimum coverage provision") – the heart of the new Act.

The lawyer for the government will tell the Court that Congress, in choosing a series of "market reforms" of the nationwide health insurance industry, was doing what Congress has done many times before. That is, it has faced a national problem, affecting commerce that goes beyond individual state boundaries so individual states can't solve it, and has worked out a national solution. The mandate, that lawyer will say, is a critical feature of that economic response. (*See this recent story from Akhil Amar and Todd Brewster*.)

The lawyer for the challengers will tell the Court that Congress is not really seeking to regulate commerce, but rather is seeking to *create* commerce – by forcing individuals who do not have health insurance, and do not want it, to go out into the marketplace and buy an economic product. Never before, that lawyer will say, has Congress done anything like that, and it has no constitutional authority to do it now. (*For this perspective see Ilya Shapiro's recent post*.)

The lawyer for the government will argue first, because a federal appeals court struck down the mandate and the government is appealing that result. That attorney will assume that the Court is quite familiar with the facts about the mandate, but will go over how it works and why Congress chose it. The problem that Congress was facing was that some 50 million Americans do not have health insurance, but they someday will definitely need medical care, as everyone does, and so some means must be found to pay for that.

Americans, according to that lawyer, have for many years paid for such care by having insurance and they get it before they actually need it. That is all that Congress aimed to do in adopting the mandate.

But, the attorney will note that Congress had found that 50 million Americans don't have health insurance, some because they were turned away, some because they can't afford it, some because they prefer to pay out of their own pockets. But Congress wanted to be sure that, when all of the uninsured actually needed medical care, the cost of providing it did not have to be covered by the hospital or clinic or doctor, or by a rise in premiums to those who do have health insurance.

Congress, according to that lawyer, was aiming for nearly universal coverage at affordable rates, and it concluded that the only way to have both was to assure a sufficient number of customers for the health insurance industry that it can afford to write a policy for virtually all Americans. The mandate will bring in the customers, the lawyer will note.

Do not be surprised if the lawyer says something like "this is classic economic regulation of economic conduct." A person without insurance is not really outside of the market for health care; they just don't need it yet. Congress wanted to make sure they could pay when they do need it.

Because the government believes that a series of prior Supreme Court rulings interpreting the Constitution's Commerce Clause support the new mandate, the government's part of the hearing will feature mention of those precedents – especially *Wickard v. Filburn* in 1942 and *Gonzales v. Raich* in 2005. Neither one had anything to do with medical care or health insurance, but both gave Congress broad authority to regulate not only business that runs across state lines, but even local business that can have a significant impact on that wider commerce.

Reacting to the government lawyer, the members of the Court will question whether there is any precedent that even comes close to what was done with the mandate. Prompted by

having read the challengers' briefs, they will want to know whether Congress was just subsidizing the insurance industry to get it to go along with a new health law after years of resisting.

But, most of all, the Court's members will want to know where the limiting point is. Some may actually say that, whatever they decide about the mandate, they have to think about what that will mean down the road, when a future Congress may try something else that is novel. They will be interested in what their precedents have said, and may actually disagree with the lesson the government lawyer draws from them.

If the lawyer tries to press a back-up argument that, even if the mandate is not justified under Congress's power over commerce, it can still be upheld under its taxing power, that is likely to stir considerable skepticism from the bench.

The government lawyer will not use all of his time in his first turn, saving some to answer the other side's argument.

When the challengers' lawyer starts, he will turn very quickly to the claim that there is absolutely nothing in the Constitution – not the Commerce Clause, not the Necessary and Proper Clause, and not taxing power under the General Welfare Clause – that can justify such a deep intrusion by the national government into the lives of ordinary citizens. The perceived threat to individual liberty will be a very prominent theme.

But early in the argument, that lawyer also will take on the economic claims that the government lawyer has made, suggesting that the mandate will not work the way the government says it will, because the people who are the most frequent customers for medical care are not even covered by the mandate, or will get covered by some government program like Medicaid for the poor.

That lawyer will probably tell the Court that Congress was "conscripting" healthy people – particularly, young and healthy people – into becoming insurance customers in order to provide an economic benefit for the insurance companies and their present policyholders.

When the challengers' attorney talks about the Supreme Court's prior rulings, he will say that none of them authorized Congress to drum up business for a private industry. The farmer in the *Filburn* case and the grower of medical marijuana in the *Raich* case were already taking part in an economic market, and were not being dragged into it by Congress.

Along with the claims about the threat to individual liberty, that lawyer will say that the Constitution meant to leave it to the states to control health care policy, and that the Tenth Amendment was designed to keep Congress from acting as if it had a form of national "police power" to intrude on the states' prerogatives. Federalism – the division of power between national and state governments – itself was designed to protect individuals' liberty, will be another likely point of emphasis.

On the future implications from any decision against the mandate, the challengers' attorney probably will say that the Court need not disturb any other federal law because the mandate is such a novel approach that it can be nullified with no secondary effects. The attorney will want to persuade the Court that what is revolutionary here is what Congress did, not what the Court would do to restore the constitutional balance.

The members of the Court will test that lawyer about whether the Court has the authority, when Congress has made an economic judgment, to second-guess the lawmakers. They may remind that attorney that economic regulation is judged by the most lenient constitutional test, so as not to infringe on Congress's power over interstate commerce. Some on the bench may say that judges do not have the economic understanding to judge how to deliver health care or how to pay for it.

To the lawyer's argument that states' dignity and sovereignty will be deeply impaired by the mandate, some of the Court's members probably will suggest that the Court has already crossed that bridge in prior precedents. They may even suggest that the challengers are trying to undo the entire field of jurisprudence over commercial regulation.

For both lawyers, most of the questions coming from the bench probably will be about Congress's powers under the Commerce Clause, though some will explore the Necessary and Proper Clause, and at least a few questions may focus on the mandate as a form of tax.

(With the real Supreme Court, the decision on the mandate, and on the other issues it is considering, will not be announced until weeks from now, close to the end of the current term in late June. However, the "Justices" on the Jennings moot court will conference in the open and reach a decision at the conclusion of the program.)

Lyle Denniston is the National Constitution Center's Adviser on Constitutional Literacy. He has reported on the Supreme Court for 53 years, currently covering it for SCOTUSblog, an online clearing house of information about the Supreme Court's work. Denniston will be live chatting during the Peter Jennings Project moot court webcast.