



Legal Scholars React: 'Many People Were Stunned'

01:15 pm

by LIZ HALLORAN

In the most anticipated and politicized Supreme Court ruling since justices picked the winner of the U.S. presidential contest in 2000, the high court Thursday in a 5-4 decision let stand the centerpiece of President Obama's health care legislation.

Chief Justice John Roberts, providing the deciding vote and writing the majority opinion, laid out the rationale, which says that Congress under the Commerce Clause does not have the authority to require people to buy insurance — but it *does* have the authority to tax people who do not have coverage.

The so-called individual mandate embedded in the health care legislation, Roberts wrote, "must be construed as imposing a tax on those who do not have health insurance, if such a construction is reasonable."

He and four other justices from the more liberal wing of the court concluded that Congress, under its power to "lay and collect taxes," created a reasonable tax.

Roberts, delivering the opinion of the court, said that though the health care legislation language describes that "shared responsibility payment" as a "penalty" and not a tax, the "label is not fatal," and the "shared responsibility payment may for constitutional purposes be considered a tax."

The court also narrowed Congress's ability to require states to expand their Medicaid coverage for low-income people.

For legal analysis on this blockbuster decision, we turned to prominent scholars and lawyers on both sides of the issue:



Matt Cashore/Courtesy Notre Dame

Richard Garnett

Associate dean for faculty research and professor of law and political science at the University of Notre Dame and a former law clerk for the late Chief Justice William Rehnquist.

"The decision is complicated and interesting. Chief Justice Roberts' opinion opens with a five-page summary of basic, fundamental principles of constitutional law and the limits of power in a decision that, at the end of the day, upholds this sprawling, landmark federal law. It also found that Congress's power is limited, and courts can enforce those limits.

"The key to the mandate's survival appears to be that people who don't comply with the mandate still pay a fine. Existence of the pay-a-fine option permits the government to say that it functions like a tax, and so it's permissible. If the court had regarded this policy as a mandate, period, it appears that a majority would have thought it was unconstitutional. It's a mandate with an escape hatch, the court says, so it's permissible.

"For people like me, interested in Federalism and judicial review of federal power, the decision had a lot of emphasis of how the Commerce Clause does have limits. The Medicaid expansion decision puts teeth into the notion that the federal government can't coerce states. At the end of the day, the act is upheld, and that's a win for the administration. But there was strong emphasis from Chief Justice Roberts on the continuing importance of Federalism, the continuing importance of judicial review.

"In many ways, it echoes the [Lopez opinion](#) of (the late Chief Justice William) Rehnquist: The Commerce Clause is not a blank check, the Supreme Court has the power to enforce limits on commerce power regulations, and that's just as important as enforcing the bill of rights."



Courtesy UC-Irvine

Erwin Chemerinsky

Founding dean of the School of Law, University of California, Irvin, and author of The Conservative Assault on the Constitution and other books. He has frequently argued before the Supreme Court.

"The Supreme Court's decision does not change the law in the way that striking down the law would have. Since 1937, not one federal taxing or spending program has been declared unconstitutional. Today's decision follows from that.

"The individual mandate really is a tax — it is a flat rate or a small percentage of income collected by the IRS on those who do not have health insurance. All will need health care and thus all should be paying for the system.

"Although the Obama administration did not call it a tax, many members of Congress did and that is what it is. At oral argument, Justice [Sonia] Sotomayor asked Paul Clement, why couldn't Congress simply tax everyone for health care and then give an exemption for those who already have health insurance. Clement, for all of his brilliance, did not have an answer to that question.

"That is exactly what the individual mandate does: impose a tax on those who do not have health insurance."

[Clement served as U.S. solicitor general during the George W. Bush administration and in March argued the case against the health care act before the Supreme Court.]



Courtesy Cato

Ilya Shapiro

Cato Institute senior fellow in constitutional studies, editor-in-chief of the Cato Supreme Court Review and former law clerk to Appeals Court Judge E. Grady Jolly. Also worked as special assistant to the Multinational Force in Iraq on rule-of-law issues.

"Nobody expected this on either side. It's a baby-splitting ruling that rewrites the ACA in order to save it. Roberts rewrote the legislation in order to save it.

"I'm not questioning his motives. He did not want to strike it down. It is certainly gratifying that a majority rejected the government's dangerous insertion of power to force people to engage in activity in order to have government regulate activity. That vindicates the focus of those of us who have been fighting the case from the beginning.

"But justifying the individual mandate under Congress's taxing power in no way rehabilitates its excesses. In his dissent, Justice Anthony Kennedy said 'structure means liberty.' If Congress can flip constitutional structural limits by taxing anything it likes, its power is no more limited than what it could have done under the Commerce Clause.

"The state of health care and constitutional governance now returns to the people from whence it came. As the constitutional debate has been elevated, and people have come to understand the importance of keeping the government to limited and enumerated powers, they should keep these principles in mind, as they vote for president and Congress.

"There are lots of other cases that have been stayed pending the resolution of this one. Those continue now. [Among those cases: one that [challenges an advisory board](#) established to recommend ways to reduce health care spending, and the Catholic Church's challenge of contraception coverage requirements.] Those will now continue. The court has not given and guidance."



Courtesy Columbia

Jamal Greene

Columbia Law School associate professor of law who clerked for Supreme Court Justice John Paul Stevens. Also clerked for federal appeals court Judge Guido Calabrese.

"This is a very significant day for the court and especially for the legacy of Chief Justice Roberts. For everyone who has ever said the court is solely political, he can say he bucked the entire Republican Party establishment in a very big case. He can say he vindicated his principle of deference to the political

branches and not engaging in what some would call judicial activism. That said, there are a number of surprising developments here.

"First, the bottom line upholding the mandate is not surprising to me — I have maintained this all along — but it was surprising to many people, reasonably, based on the tone of oral arguments.

"Second, Chief Justice Roberts joins the four more left-leaning members of the court on the bottom line without the vote of Justice Kennedy. Many observers assumed, as I did, that that was unlikely.

"Third, Chief Justice Roberts upholds based on the taxing power. This was urged by many in the scholarly community, but it has not been the focus of the public debate and it received relatively little attention at oral argument. But it makes a lot of sense in light of the fact that there are no criminal penalties attached to failure to purchase insurance, and the tax is collected by the IRS through its ordinary methods of tax collection.

"Fourth, Roberts says the mandate is upheld, but also says that it would have exceeded congressional power under the Commerce Clause. That's a bit odd. Roberts has famously been described as a 'minimalist,' once saying that 'if it is not necessary to decide a question, then it is necessary that the court not decide it.'

"It was not necessary to decide the Commerce Clause question, so why even discuss it? Roberts defends his doing this, but I don't find his defense very compelling."



David Hills/Courtesy Heritage

Robert Alt

Senior legal fellow and deputy director of the Center for Legal and Judicial Studies at The Heritage Foundation, where he also directs the rule of law programs.

"Many people were stunned. I think the core phrase in the opinion was one in which looking at the tax question, the court essentially said it was good enough for government work, that we could read it as a tax, so we will. That said, there are a couple of things that have to be disappointing to the Obama administration and to the [those] that argued this was constitutional under the Commerce Clause.

"And the big sleeper issue: The court found some limitation to the spending power of Congress. The court found that the Congress couldn't withhold all funding from the states for Medicaid if states didn't agree to the new expansion in Obamacare. We hadn't seen much from Chief Justice Roberts in regard to the Commerce Clause.

"This tells us he does think there are limitations to the Commerce Clause. On the taxing power, it seemed like a very pragmatic approach to interpreting the statute. He didn't stretch the Constitution, but he stretched the statute in order to save it. I think it reaffirms something that has been said previously: that he tends to be relatively deferential to the other branches of government."



Megan Morr/Courtesy Duke

Neil Siegel

Duke University professor of law and political science, who clerked for Justice Ruth Bader Ginsburg. He also served as special counsel to then Sen. Joe Biden during the Senate confirmation hearings of John Roberts and Samuel Alito.

"It's a tax because it operates like a tax, giving people the choice to either obtain health insurance or else make a modest payment to the government if they choose to go without insurance. The payment discourages going without insurance without being so coercive as to remove all reasonable choice. The court has long said that it doesn't matter what label Congress affixes to an exaction."