



How Will the Supreme Court Rule on Obamacare?

Andrew Sullivan, Richard Epstein, and others place their final bets.

Tim Cavanaugh | June 21, 2012

Over three days in late March, the U.S. Supreme Court held its [longest oral arguments](#) in 45 years. At issue: The future of the 2009 Patient Protection and Affordable Care Act (ACA), the Obama Administration's signature achievement.

The arguments about ACA, popularly known as Obamacare, encompass a large number of challenges and range over various topics: Is the [penalty associated with the individual mandate a tax](#), and if so are preemptive challenges to the law forbidden? Does the U.S. [Constitution give Congress the authority to impose the individual mandate](#), which would require every American to purchase health insurance? And if it doesn't, could the high court rule out Obamacare's Title I, which includes the individual mandate, but [leave the rest of the law in place](#)? And what about the law's [massive expansion of Medicaid](#), which is being challenged as an unconstitutional power grab by the federal government of state tax dollars?

While both supporters and opponents of Obamacare seemed to agree that the administration's solicitor general, Donald Verrilli, [bombed](#) during oral arguments, the court's modern jurisprudence still makes it a long shot that the individual mandate will be overturned. Through much of the 20th and 21st centuries, the Supreme Court has upheld an extremely broad definition of the Constitution's interstate [commerce clause](#), ruling that Article 1, Section 8, Clause 3 gives Congress the authority to regulate everything from growing wheat for family consumption to cultivating cannabis for personal pain relief.

There's been plenty of speculation since oral arguments ended on March 28, and sometime in the next week - or even the next few hours - the court will release its decision. Will the Supreme Court endorse Obamacare, throw out just the individual mandate, throw out the entire

law, or render some other split decision? Reason asked experts, supporters, and detractors to handicap the decision. Here are their answers:

Richard A. Epstein

It will be a close call, but here are my predictions

Strike down mandate, because Justice Anthony Kennedy will decide that insurance (at least real insurance) always covers risk. Health care not unique. 5 -4; straight conservative liberal split.

Marjority will strike down Title I, which sets up exchanges etc. Too closely integrated. Same vote, same reasons. The liberals will be narrow, and strike down only those provisions that implement the mandate proper.

Medicaid extension: upheld alas. A bone to the left from the right. One of the four liberals will write. It will be a horrendous opinion. Indeed not a single opinion that upheld that extension understood its implications.

Richard Allen Epstein is the Laurence A. Tisch Professor of Law at the New York University School of Law.

Avik Roy

They will strike down Title I, and uphold the rest of the law, in a 5-4 decision (along conservative-liberal lines).

It will be on balance a significant victory. We'll need to repeal the rest of the law, of course...

*Avik Roy is a Senior Fellow at the Manhattan Institute and author of *The Apothecary*, the *Forbes* blog on health-care and entitlement reform. He also serves as an adviser to Mitt Romney on health care issues.*

Devon Herrick

A few months ago I read a poll of Supreme Court insiders – formers clerks and attorneys who had practiced before the High Court. Their collective vision put the odds of striking down the individual mandate at just below 50 percent; with the chances of striking down the Medicaid expansion at only about 20%. That is consistent my own opinion; and with conversations I've had with attorneys who watch the Supreme Court.

I put the odds of striking down the individual mandate at 50 percent.

I put the odds of striking down the Medicaid expansion at only 20 percent.

I put the odds of striking down the entire law at only about 20 percent. In the event the individual mandate is struck down, the odds of striking down the remaining (non-Medicaid) insurance regulations is probably 30 percent to 40 percent.

Devon M. Herrick, PhD, is a senior fellow at the National Center for Policy Analysis in Dallas, Texas.

Ilya Somin

I think it's 50-50 whether the mandate gets struck down or not.

If it does get struck down, it will be by 5-4 with the 5 conservative justices in the majority. If it gets upheld, it will be either 5-4 or 6-3, with Kennedy and possibly Roberts joining the 4 liberals.

If it gets struck down, I think it's more likely that the Court will rule that the community rating and preexisting conditions mandate go down with the insurance purchase mandate that they they will rule either that the whole rest of the act stays or that the whole rest of it goes.

I am more confident about points 1 and 2 above than about point 3. Severability doctrine is pretty murky, and I'm not really an expert on it.

Ilya Somin is an associate professor of law and editor of the Supreme Court Economic Review at George Mason University School of Law.

Sally Pipes

I believe the SCOTUS will strike down the whole law. If not, and they only strike down the mandate, people will buy insurance when sick and drop coverage when well. This will push costs up and increase the number of uninsured.

Sally C. Pipes is President and CEO of Pacific Research Institute

Timothy Sandefur

I am hopeful that the Court will issue a narrow ruling finding that the Individual Mandate goes too far under existing precedent and exceeds Congress' commerce clause power, and that it is not saved by the Necessary and Proper Clause. This latter issue, I believe, will elicit separate opinions from Justices Scalia and Kennedy. If the Court does rule the Mandate unconstitutional, I am reasonably confident that the Court will rule the entire Act unconstitutional, and that this will be done by a larger majority of the justices than the Individual Mandate issue. I believe the Court will then find it unnecessary to rule on the Medicaid question, although some justices might write separate opinions focusing on that issue--in particular, Justice Thomas and Justice Scalia will, I

think, write about this issue. And of course I believe the Court will unanimously conclude that the Anti-Injunction Act does not bar its jurisdiction to hear the case. The resulting decision will be interesting and elicit a lot of controversy, but will actually be much narrower in its effect than political leaders will claim, for the reasons Prof. Ilya Somin highlighted on the Volokh Conspiracy recently.

Timothy Sandefur is a Principal Attorney at the Pacific Legal Foundation.

Ilya Shapiro

No justice will hold that the Anti-Injunction Act bars the legal challenge, though the Court will split, possibly in three or more opinions, as to why exactly.

I give 2-1 odds on the Court's striking down the individual mandate – 5-4 on conventional lines, with Justice Kennedy writing the opinion – and then more likely than not that “substantially all” of the rest will fall with it (with Chief Justice Roberts writing the severability opinion for more than just five justices). By “substantially all,” I mean Titles I and II, which cover the laws relating to health insurance policies and Medicaid expansion, respectively, the two big chunks that fundamentally transform the health care system. That would be a wonderful decision for individual liberty and constitutionalism and allow the next Congress to go back to the health care drawing board and come up with actual market reforms rather than combining the worst elements of socialism and crony capitalism.

If my prediction is correct and Title II falls, then the Court will not need to – and therefore won't – reach the Medicaid expansion/coercion issue. This issue really gave the Court heartburn at oral argument, so avoiding having to grapple with it may alone sway some justices to go bigger on severability than they might otherwise.

If Kennedy votes to uphold – which ruling would no doubt be based on some quixotic articulation of “health care is unique” – I could see Roberts going with him to depoliticize the decision and, perhaps, control/narrow it.

In short on the key issue, 67 percent 5-4 striking down the mandate, 22% 5-4 upholding it, 11% 6-3 upholding it.

Ilya Shapiro is a Senior Fellow in Constitutional Studies and Editor-in-Chief of the Cato Supreme Court Review at the Cato Institute.

Andrew Sullivan

It will strike down the mandate alone.

*Andrew Sullivan is author and editor of The Dish blog at
TheDailyBeast.com.*