

## *On Predictions, the Supreme Court and the Health Law*

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Last week's coverage of oral arguments before the Supreme Court debating the constitutionality of the health reform law was like the Super Bowl for health policy types. But instead of being glued to my computer screen, parsing the Justices' questions and the lawyers' answers and reading the flood of game-day analysis following each two-hour session, I unthinkingly had made plans to go hiking, mountain biking and rappelling down 180-foot cliffs in the spectacular and isolated environs of Moab, UT.

Instead of witnessing live theater, I read as much as I



could before setting off in the morning or before falling asleep that night. And I talked to pretty much anyone I ran into about how they felt about the new health law and how it would impact their lives. Mostly, I learned that for the many young, uninsured people who worked two or three jobs to survive in that

town, health reform offered the chance for affordable health coverage. As removed as I was from the doings in Washington, media coverage began to feel like breathless conjecture; the fate of the health law seemed to vacillate widely with every pointed question from one of the justices or a poor performance by the Solicitor General. I am not a constitutional scholar, nor am I an economist. But now, back in New York and a week removed from the reporting frenzy and after digesting commentary by both knowledgeable experts and political hacks (and those in between) the emphasis has shifted to the ramifications of the Supreme Court's eventual ruling. I will expand on some of these issues in future posts, but first I want to address the science and politics of predictions.

1) On Monday, [President Obama said of the health law](#), “We are confident that this will be upheld because it should be upheld,” adding firmly: “It’s constitutional.” He also warned that an “unelected” group of justices should not overrule the will of Congress. That is tough talk; perhaps the right kind of talk to set the tone for the next few months while the Supreme Court considers the legislation. Nancy Pelosi is also on board: Last week she told reporters, “I have no idea. None of us does,” when asked how the Supreme Court would rule on the health law. But on Tuesday she also expressed this new confidence, telling an audience at The Paley Center for Media, “**Me, I’m predicting 6-3 in favor.**”

But is the administration’s confidence realistic? I turn to some stalwarts; the legal scholars and policy wonks who have insisted for nearly two years that the constitutional challenge is legally unsupportable. Have they changed their tunes at all?

2) [Jonathan Gruber](#), MIT economist and a chief architect of both Massachusetts’s health plan and the ACA tells the *Daily Beast*; “Going into the hearings I was very confident. Now I am less so. Almost all experts have said this was a very clear legal call in favor of the mandate, but the conservative justices appear to be taking a very libertarian stand in their questioning. **I still think it will pass muster, but 5–4 at best.**”

3) In January, [Timothy Jost](#), law professor at Washington and Lee University School of Law, told *Health & Hospital Networks* that he suspected that the Supreme Court will hold “everything to be constitutional” and “[t]hat should put to rest the argument that the statute is unconstitutional.” Jost, who has exhaustively read and analyzed the ACA was not completely sanguine—raising the specter that the Court will uphold all but one or two provisions of the health law like the minimum coverage requirement, but leave the rest of the statute in place. “Then there is a real question as to how that is going to work.”

Last week, after the arguments, [Jost wrote in Health Affairs](#), “**I find it hard to predict where the Court will end up.** The Court seems to have little appetite for going through the ACA section by section deciding which provisions stay and which go. The justices did not seem to be convinced by the federal government’s textual argument that only the community rating and guaranteed issue provisions had to go with the minimum coverage requirements. Justice Scalia seemed ready to jettison the whole statute, but, although Justice Kennedy seemed troubled by the cost to insurers of dumping only the coverage

requirement, the justices did listen respectfully to Mr. Farr's (court-appointed attorney H. Bartow Farr III) argument that all of the statute should be preserved if the coverage requirement is stricken."

4) [Renée Landers](#), Professor of Law at Suffolk University Law School and Deputy General Counsel for the U.S. Department of Health and Human Services under Clinton thinks the mandate itself might survive. "It's very hard to tell what can happen as a result of the oral arguments," [she writes, also in Health Affairs](#). But based on the arguments, Landers puts Justice Alito "firmly into my 'no' vote column." Yet she adds that either Chief Justice Roberts and/or Kennedy could still vote for the health law—along with the four Democratic appointees. **"I don't think all bets are off yet," she said. "Reports of its demise are premature."**

Of course there are more partisan commentators who are predicting a clear win or a sure demise for the health law. (On the sure demise side is Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute who helped write a brief opposing the law, and [told Bloomberg](#) that he sees Justices Scalia, Thomas, and Alito "joining together to **invalidate the Patient Protection and Affordable Care Act's individual mandate**, with Chief Justice John G. Roberts Jr. and Justice Anthony M. Kennedy likely tagging along.")

Aside from experts, there is also a cadre of professional odds-makers when it comes to Supreme Court rulings that uses elaborate models to predict how the court will rule. But, [as Brian Palmer explains in Slate](#), "[a]s a general rule, legal scholars are able to call around 60 percent of cases correctly, simply on the basis of their expertise and intuition." Oral arguments were thought to be less important in how a case will ultimately be decided. But that has recently changed. There is growing evidence that oral arguments do, in fact, offer very useful data for predicting the outcome of a Supreme Court case, writes Palmer. "Drawing on this insight, many political scientists now incorporate language analysis of the arguments into their models." What do they look for? Justices seem to ask more questions of the side that ultimately loses so analysts might simply perform word counts. The emotional content of the wording of what Justices direct toward lawyers seems to also be important; the side that receives the most "unpleasant" questioning and commentary is more likely to lose. As Palmer notes parenthetically, "(Justice Scalia has a habit of telegraphing his vote by using words like "idiotic" during oral argument.)"

A "state-of-the-art" model that includes language analysis of the Supreme Court arguments **"suggests that the court will declare the individual mandate unconstitutional by a 5-4 vote,"** according to Palmer. "The big question mark, of course, is swing voter Justice Kennedy. He asked Solicitor General Donald Verrilli Jr. two more questions than he asked the challenger's attorney, Paul Clement, with 14 percent more negative language, suggesting a slight preference for overturning the law."

Experts, partisans and computer models are clearly not of one opinion—all are hedging their bets. That's not surprising when you consider that there are multiple critical issues at play—Medicaid expansion, the individual mandate and important coverage provisions

that prevent discrimination against people with ongoing illness, as well as Congressional limits and questions about taxation—in deciding the fate of the health reform law. In the case of the ACA, constitutional law issues are hard to separate from economic issues, which are hard to separate from communitarian vs. individual benefits. And then there is the heightened political atmosphere surrounding this, the signature legislation of President Obama's term. The Justices have conceded that if the health law is dismantled, the sharply divided Congress will not be able to salvage it any time soon. Either way the decision will factor greatly in the 2012 elections. The first political salvos have already been launched, in late June we will find out their impact.