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Will The Supreme Court Overturn Health-Care Reform?

Why this week's federal district court ruling is only the start of the debate over whether the individual mandate to buy health insurance is unconstitutional.

by Ben Adler (/authors/ben-adler.html) **December 15, 2010**

Tim Sloan / AFP-Getty Images

Conservatives have been quick to declare that "ObamaCare is on life support" in the wake of Monday's decision (http://www.scribd.com/doc/45213239/Commonwealth-of-Virginia-v-Sibelius-et-al) by federal district court Judge Henry E. Hudson in Virginia that the Affordable Care Act's (ACA) requirement to buy health insurance is unconstitutional. But in truth Virginia's attorney general, Ken Cuccinelli, won only a partial victory. He sought to have the entire law overturned, but instead only the section creating an individual mandate was. Hudson also declined to prevent the law's implementation while the courts sort out the constitutional question. The individual mandate is due to take effect in 2014, and implementation of the other provisions will proceed in the meantime.

Far from ensuring the eventual dissolution of health-care reform, Hudson's decision actually guarantees only one thing: that the constitutionality of the individual mandate will ultimately be decided by the Supreme Court. The result, and its timing, is unknown, but experts generally predict that the Supreme Court won't be ruling on the issue for another two years and that it will likely be a 5–4 majority—but which way that majority will go is unclear. Although it garnered less attention, the ACA has been upheld as constitutional by two district courts. (Those cases, one in Virginia and one Michigan, were lower profile because they were filed by conservative organizations rather than a state government.) If lower-court decisions had consistently upheld the law, there would have been a possibility of the Supreme Court declining to weigh in. Conservative legal scholars readily concede that Monday's Virginia court decision and a forthcoming one in Florida that is expected to follow similar lines do not mean health-care reform will necessarily be overturned. "Ultimately this is going to go to the Supreme Court, and these are the beginning skirmishes," says Ilya Shapiro, a senior fellow in constitutional studies at the libertarian Cato

Institute who filed an amicus brief in support of Cuccinelli's challenge.

When the Supreme Court does weigh in, it is presumed that the justices will generally split along partisan lines based on who appointed them, with all four Democratic appointees voting to uphold the law. (The judges who have upheld the law thus far were Democratic appointees, while Hudson was appointed by George W. Bush.) So will all five Republican appointees on the Supreme Court, who usually form a bloc in close decisions, vote to overturn the individual mandate? Justice Anthony Kennedy, who was appointed by Ronald Reagan, sometimes sides with the court's more liberal wing. And this might be such a case: since the 1930s, when the court accepted the New Deal, it has generally defined the federal government's power to regulate interstate commerce very broadly. In 1942 the court held in *Wickard v. Filburn*—the most relevant precedent for this case—that a farmer growing wheat for his own chickens, above a maximum of growth allowed per acre at the time, was subject to federal regulation under the commerce clause because the resulting extent to which a farmer does not buy wheat to feed his chickens on the market affects the national market price of wheat.

Opponents of the law argue that *Wickard* is not a controlling precedent because it regulated action, while this law regulates inaction. "This goes a step further than *Wickard* because it's the omission of action that's being defined as the interstate act," says Jonathan Turley, a constitutional law expert at George Washington University. Critics of the mandate say that if you start defining choices not to buy things as actions that affect interstate commerce then there is no limit on what Congress can make you buy; if they said you need to buy a car to bolster the economy, would that be constitutional as well?

But the decision not to buy insurance might be considered an action of sorts. If you are uninsured but get sick you can walk into an emergency room and receive treatment. The hospitals in turn pass the cost onto their insured customers to the tune of an estimated average (http://findarticles.com/p/articles/mi_m3257/is_8_59/ai_n14892439/) of roughly $1,000 per year per family in higher insurance premiums. "There's no doubt that the decision of some individuals not to insure themselves shifts tens of billions of dollars that they should be bearing onto everyone else," says Simon Lazarus, an expert on the health-care law litigation and public-policy counsel for the National Senior Citizens Law Center. "This is about Congress's ability to regulate activity that is at the core of interstate commerce. Seventeen percent of the economy is in the health sector."

The ACA's defenders say that there are recent decisions, supported by current members of the court's conservative majority, requiring upholding the law. In 2005 in *Gonzales v. Raich (http://www.law.cornell.edu/supct/html/03-1454.ZS.html)* , the court held that the commerce clause entitles the federal government to outlaw California residents from growing marijuana for personal medicinal use. Kennedy signed the majority opinion, and Scalia wrote a concurring opinion.

Virginia Attorney General Cuccinelli told (http://www.nationalreview.com/articles/255311/cuccinelli-victorious-interview?page=1) the *National Review* he thinks he can count on Kennedy's vote, but legal experts, even those who are sympathetic to arguments against the mandate, say Kennedy's leanings may be hard to predict. And some actually posit that Justice Samuel Alito or Chief Justice John Roberts, both appointed by George W. Bush, might be even harder to win over than Kennedy because Alito and Roberts are usually deferential to governmental power. Certainly liberals will be quick to see hypocrisy on the part of the court's conservative branch if they do ultimately overturn any part of the ACA. "If Roberts and his colleagues mean what they say about judicial restraint and legislating from the bench and are consistent with other decisions they've made, they'll uphold it," says Lazarus.

But what if they don't? Judge Hudson was very explicit in his ruling that only the mandate that

individuals have coverage and "directly-dependent provisions which make specific reference" to it will be affected. Technically, this means virtually nothing but the mandate is eliminated. But as a practical matter, the requirements placed on insurance companies to make coverage more generous and available to everyone are economically dependent on the mandate. You cannot tell companies that they must cover people with serious illnesses, for example, if you are not also guaranteeing them an offsetting group of healthy clients who are more profitable customers. To keep the rest of the bill in place without the mandate would provoke the wrath of the insurance companies' powerful lobby and set premiums on an upward-spiraling trajectory. If you then get rid of the requirements on insurance companies, you are left with a law that does a little bit to cover the uninsured—expanding access to Medicaid and subsidies for lower-income working people to buy insurance—but falls far short of the vision of universal coverage that Democrats have sought for decades.

This does not mean that universal insurance cannot be obtained constitutionally. Medicaid and Medicare, after all, are already constitutional. If you were to simply expand Medicare eligibility to all Americans—in essence, creating a universal single-payer program like the ones in most Western democracies—that would also be constitutional because Medicare and Medicaid are justified by Congress's taxation powers, which are more clearly applicable than interstate commerce. It would be a terrific irony if the conservatives who are so outraged by the individual mandate—a deal Democrats concocted to mollify insurers that had been previously endorsed by such Republican luminaries as former Senate majority leader Bob Dole and Sen. Orrin Hatch of Utah—were to defeat it, only to ultimately be stuck with a far more socialistic single-payer system like Medicaid for everyone. But, while that may be a long-term possibility, after escalating health-care costs finally force Washington to again take action on health-insurance reform, in two years a single-payer system will be as politically infeasible as it was in 2009.

If Democrats control the White House and Congress when the Supreme Court rules on the individual mandate and the ruling doesn't go their way, they could seek to find a more constitutionally acceptable substitute. Paul Starr, who served as a health-care adviser to Bill Clinton, proposed (http://www.prospect.org/cs/articles?article=averting_a_health_care_backlash) such a compromise: let people opt out of the mandate if they signed a form saying they cannot opt in for the following five years. Another possibility, which Turley suggested in congressional testimony, is giving states the option of opting in, with federal health-care dollars being contingent upon doing so.

Of course, if Republicans control the political process, none of those things is likely to happen. And Supreme Court watchers on all sides say that public opinion could affect the ruling itself. The court safeguards its public esteem carefully, and the justices' willingness to overturn an act of Congress depends in part on how much public backlash they think it will provoke.

All of which just goes to show that if opponents of health-care reform really want to banish it for good, they will need to win an argument in a much more important court than a district court in Virginia: the court of public opinion.