



Obamacare Remains a Constitutional Minefield

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Majority Leader Eric Cantor said Thursday that the U.S. House of Representatives would once again vote on a measure completely repealing Obamacare on July 11.

"The people of America are going to have a choice to make in November and clearly it's a choice that will bear upon the direction of this country as far as our healthcare is concerned," the Virginia Republican said after the U.S. Supreme Court issued a decision upholding the constitutionality of the individual mandate that is at the core of the new law.

"We have entered an age in which government—Washington—will be controlling healthcare unless something changes," Cantor said in a release. "Most Americans, I believe, still like the healthcare that they have. The president has continued to say that his law will allow folks to keep the healthcare they like. What we've seen is that's just not the case. Obamacare will preclude people from having the healthcare that they like."

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The likely outcome of this effort is that it will pass the House but stall in the U.S. Senate, where the Democrats, led by Majority Leader Harry Reid, are unlikely to let it come to the floor.

Full repeal may have to wait until after the November election, when the Republicans are likely to constitute a majority of the U.S. Senate and there may be a new president. This does not mean, however, that all the legal options are exhausted. And, in point of fact, the court's ruling is not the slam-dunk that the most ardent supporters of Obamacare are making it out to be.

"First, the ruling severely limited the Obama health law's Medicaid expansion, effectively giving states the green light to refuse to expand their Medicaid programs," said healthcare scholar Michael Cannon of the Cato Institute. "Coupled with the fact that the statute already enables states to block the other half-trillion dollars of new entitlement spending, the law is in a very precarious position."

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Second, say Cannon and others, the decision written for the 5-4 majority by Chief Justice John Roberts, found the individual mandate only permissible as a tax. Under the Constitution's "Commerce Clause," where the Obama administration argued it belonged, the court found the mandate is illegitimate and, therefore, would be

unconstitutional. Even so, the mandate as a tax may still be vulnerable to a legal challenge.

In his opinion, Chief Justice Roberts wrote, "The Federal Government 'is acknowledged by all to be one of enumerated powers,'" and, "The Constitution's express conferral of some powers makes clear that it does not grant others" which, Cannon points out, should be enough to give legal scholars pause because "Roberts did not specify exactly what type of constitutionally authorized tax the mandate is."

The mandate and accompanying penalty is not an income tax, which is authorized by the Constitution under the 16th Amendment. It is also not an excise tax meeting constitutional muster, Cannon says, because it is not applied uniformly across the states and "the penalty varies by location." It is also not, apparently, a lawful direct tax—again because it is not apportioned among the states by population.

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Cannon concludes his analysis by writing:

It seems to me there may be room here for the same individual citizens who brought this case to again file suit against the federal government for trying to impose an unconstitutional tax. It may seem unlikely that Roberts would reverse himself on the Tax Power issue. Then again, since he never specified what type of constitutionally permissible tax the mandate is, perhaps voting to strike the mandate would not be reversing himself.

It's an interesting hypothesis, one that seems to confirm the idea that the supporters of Obamacare spiked the football once the decision was announced without realizing they were standing in a constitutional minefield at the time. It may be, as time passes, that the court's decision actually raised more groundbreaking constitutional questions than it answered.