

# WONKBLOG

## Wonkbook: Do today's oral arguments matter?

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Monday was the warm-up. The Supreme Court was simply hearing arguments over whether it should take the health-care case at all. Both the defenders of the law and the challengers of the law urged the justices to move forward with the arguments. The Court had to appoint an outside lawyer to make the case for backing down. But from the tone of the questioning, it seemed clear the justices had decided already on this question: They weren't going to turn back, not now.

But have they already made up their minds on the other questions, too? That is to say, do today's oral arguments, which will attract so much attention and media frenzy, actually matter?

There is, after all, something slightly odd about the idea that the members of the Court are genuinely open to being moved by today's discussion over the precise nature of the individual mandate. For one thing, almost no one else involved in this process seems particularly doubtful about the right answer. The cable news shows and the op-ed pages are full of voices confidently declaring, without a shadow of a doubt, that the mandate is either clearly constitutional or obviously unconstitutional. (FULL DISCLOSURE: I am one of these voices.) What reason is there to believe that, over the past two years, the various justices haven't come to a similarly firm conclusion?

And, even if they had somehow managed to shut down the part of their brain that develops opinions and entrenches biases over these past few years, why would a few hours of theatrical argument be key to their decision-making process? Prior to these arguments, the Court received dozens of briefs laying out the possible arguments for and against every provision at issue in this case. Here's [one](#), for instance, in which a Who's Who of health-care economists and scholars try to persuade the Court that "the decision to forgo insurance is not 'inactivity.' Studies demonstrate the decision to forgo insurance is typically not inadvertent but made on a reasoned and conscious basis: to assume the risk that significant medical costs can be avoided and to rely on the safety net of free care if that assumption proves faulty."

Frankly, every single signatory to that letter is in a better position to assess whether the mandate is or is not necessary to the regulation of a national market than the lawyers currently making arguments before the Court. And that is, of course, not the only brief the Supreme Court has in its possession. You can read the others -- which include submissions from Blue Cross and Blue Shield of Massachusetts, the American Cancer Association, the Cato Institute, Senator Harry Reid, Speaker John Boehner, 104 health law professors, and many more -- [here](#). You can be assured that the Justice's clerks have already read these briefs, and the Justices have likely read the best of them.

You can either take that as evidence that they've thus been exposed to more than enough reasoned argument, from more than enough different directions, to either make up their minds or fortify whichever positions they had already intended to take. Either way, it seems unlikely today's oral arguments will dislodge the justice's conclusions. Indeed, it would seem faintly ridiculous, and possibly even irresponsible, for the justices to permit one lawyer having a particularly bad or good day before the bench to flip such a consequential case. But what do the experts think?

I posed the questions to some legal scholars and reporters. "There is never any way to know," says Erwin Chemerinsky, dean of the law school at the University of California at Irvine. "As a lawyer, I always view oral arguments as my chance to answer concerns from the judge about my position. I want oral arguments and questions and the chance to answer -- even if usually they won't change the outcome."

Jeffrey Toobin, who covers the Supreme Court for the New Yorker, was more skeptical. "Most Justices say their minds are changed by oral arguments a handful of times -- fewer than five -- per year," he e-mailed. "In my experience, the higher profile the case, the less oral arguments matter, because the Justices have strong and longstanding views about major constitutional issues. The Justices mostly use oral argument to talk to, and lobby, each other, through their questions to the lawyers." In other words: The minds the justices are looking to change may not be their own.

That last bit is important, agreed Dahlia Lithwick, who reports on the Court for Slate. Oral arguments are "the first time the Justices get to talk to each other about the case, so it can matter in terms of probing weaknesses and also getting a sense of what types of arguments one would need to deploy to get to five. In that sense it can matter a lot because you can begin to see what you need to do to move your colleagues."

She also made another point worth considering: "Even if it were merely public spectacle it would still matter because in a branch that does everything else in secret, it is the only chance to see them do their jobs."