

The Washington Post

Conversations

Conversations / Live Q&A

TODAY

March 27, 2012

1:05 P.M.

Is the individual mandate in Obama's health-care law constitutional?

ABOUT THE TOPIC

The Supreme Court [opened its historic review](#) of the national health-care overhaul Monday with an indication that it will be able to decide the constitutional question of whether Congress exceeded its powers despite arguments that the challenge was brought too soon.

Live chat with Ilya Shapiro about why [he says](#) the individual mandate portion of the health-care law is unconstitutional. Ilya can also answer questions about what it means, how it will affect you and more.

Submit questions and opinions for Ilya to respond to now.

ILYA SHAPIRO :

I just got back from the Supreme Court, where I heard the most fascinating two hours of legal argument of my life.

- March 27, 2012 1:12 PM

Q.

RECUSE

Should Justice Kagan recuse herself because she assisted Pres. Obama with the health care mandate?

- March 26, 2012 11:14 PM

A.

ILYA SHAPIRO :

This is a moot point; she's not recused -- and we knew this from the get-go because otherwise there would've been a notation on the order granting review to the case. But, after having gone through all the documents that came from the FOIA request, I can tell you that you can make an argument but there's no smoking gun compelling recusal.

– March 27, 2012 1:13 PM

Q.

REGULATING INACTIVITY ARGUMENT

Isn't your inactivity argument specious since everyone is entitled to healthcare in this country (i.e., we do not let people die)? In other words, isn't your inactivity argument only legitimate if people who decided they did not want to buy health insurance would also be prevented from getting health care when they needed it?

- March 27, 2012 12:30 PM

A.

ILYA SHAPIRO :

We actually aren't entitled to health care; health care cannot be a "right" because that implies a duty on someone else. The issue you raise, though, is EMTALA, which says that hospitals that receive federal funding (Medicare/Medicaid reimbursements, research grants, etc.) cannot turn people away from their ERs. That law, which I support, does indeed create a policy problem, but Congress does not get more constitutional powers when it creates policy problems.

– March 27, 2012 1:16 PM

Q.

REQUIRED INSURANCE

You can be most philosophical libertarian on the planet, and you can't escape the jurisdiction of the fire department, because society won't let your house burn down if it can be prevented using shared resources. And since you're getting services, you can be forced to pay for them (usually through property taxes.) Since our society isn't apathetic enough to let you bleed to death on the street or deliver a baby in an unsanitary environment, why not make everyone pay for the services they'll be force-placed anyway?

- March 27, 2012 7:46 AM

A.

ILYA SHAPIRO :

The federal government can raise taxes to pay for those services or create a Medicare-for-all, but it cannot require you to buy health insurance (or anything else) because the Constitution doesn't give it that power. The federal government can't make you pay for firemen, for that matter -- that's an area left to state regulation.

– March 27, 2012 1:19 PM

Q.

FEDERAL POWER

If the Supreme Court upholds the individual mandate on Commerce Clause grounds, what, if any restrictions on federal power will there be going forward?

- March 27, 2012 8:36 AM

A.

ILYA SHAPIRO :

This is the crux of the government's problem. If the federal government can force us to buy health insurance because we're all in the market for health care -- setting aside that these are different commodities -- then it can require us to buy cars because we're all in the market for transportation or require us to buy Coca-Cola because we're all in the market for food. The only remaining restrictions on federal power would be the Bill of Rights: the government can't violate your free speech rights, right to keep and bear arms, etc. The powers/structural side of the Constitution would not be judicially enforceable.

– March 27, 2012 1:22 PM

Q.

TWO SCENARIOS FOR YOU TO CONSIDER, PLEASE

1. Congress imposes a tax on all who fail to purchase health insurance. 2. Congress imposes a per capita tax on everyone, but exempts those who purchase health insurance. Note that this would be allowed under Article I, Section 9, Clause 4: "No Capitation, or other direct, Tax shall be laid, unless in proportion to the Census or Enumeration herein before directed to be taken." Assume the tax in each case is the same. The practical effect of these two scenarios would be the same. Those who fail to purchase health insurance pay a tax. Should the result of the legal analysis of whether they pass muster under the Constitution also be the same for both scenarios? If the first scenario fails, how could the second pass? If the second passes, how could the first fail? And do you think this would make a good law school exam question? :)

- March 27, 2012 9:21 AM

A.

ILYA SHAPIRO :

I assume by scenario 2 you mean Congress increases income taxes but grants deductions for those who buy health insurance. Yes, that's constitutional, much as Congress has enacted deductions for all sorts of things: electric vehicles, solar panels on your roof, mortgage interest, etc. The first scenario, however, would be an illegal (because not apportioned) direct tax. In any event, neither of these is what Congress actually did here, which is to mandate the purchase of health insurance, on penalty of a civil fine.

– March 27, 2012 1:28 PM

Q.

TAX OR PENALTY?

It sounds like those trying to argue that the ACA is unconstitutional have an uphill battle on their hands. The federal government is not requiring anyone to purchase a specific product or service. If someone refuses, they must pay what is essentially a tax (it's administered by the IRS). There is no other punishment specified. Do you agree?

- March 27, 2012 10:21 AM

A.

ILYA SHAPIRO :

The taxing power argument has not gotten anywhere and, based on the argument at the Supreme Court today, won't go anywhere there either. This is a regulation (requiring the purchase of certain approved insurance policies), not a tax, and so must be analyzed under Congress's power to regulate interstate commerce (Commerce Clause) and to make laws necessary and proper for carrying that power into execution (Necessary & Proper Clause).

– March 27, 2012 1:30 PM

Q.

WHY THE BIG QUESTION?

Seriously, the government mandates me to drive under 55 on the beltway. They mandate me to take my kids to school. They mandate me to wear clothes in public. Why is this any different? Why is this even up for debate?

- March 27, 2012 10:42 AM

A.

ILYA SHAPIRO :

The government regulates your driving; you don't have to drive on the interstate, or even drive at all -- but if you do drive on the Beltway, it says you have to go 55. State governments require you to send your kids to school and to wear clothes, as part of the general police power that states have but the federal government lacks. The federal government gets all its powers from the U.S. Constitution.

- March 27, 2012 1:32 PM

Q.

FINAL DECISION

Is there a chance that it won't be a 5-4 decision on the mandate argument?

- March 27, 2012 11:08 AM

A.

ILYA SHAPIRO :

If Justice Kennedy votes to uphold the mandate, it's possible that Chief Justice Roberts would join him, to better control (and narrow) the opinion and also to have the Court speak with more of one voice. If Kennedy votes to strike down, it will be 5-4 because none of the liberal justices see any structural limits on Congress's Commerce Clause power.

- March 27, 2012 1:35 PM

Q.

IF PPACA IS NOT CONSTITUTIONAL, WHY IS EMTALA?

My understanding is that the Emergency Medical Treatment and Active Labor Act was passed by Congress, is tied to receiving Medicare and Medicaid (M&M), and requires hospitals to treat anyone who comes into their ER, regardless of whether they have insurance. But why is it Constitutional? How can Congress make mandatory medical treatment part of receiving M&M if the uninsured people don't have/don't qualify for M&M? Couldn't the hospitals en masse push for judgement on that? Thank you!

- March 27, 2012 12:33 PM

A.

ILYA SHAPIRO :

EMTALA is a function of the government's spending power. Hospitals don't have to accept federal funds (M&M reimbursements as you put it), but if they do, they have to accept the strings that come with them.

- March 27, 2012 1:37 PM

Q.

BETS?

Ilya, after attending the session today, would you care to wager on which side will prevail?

- March 27, 2012 1:17 PM

A.

ILYA SHAPIRO :

I think Justice Kennedy is the swing vote and I have about a 60% confidence that he'll vote to strike down the individual mandate.

- March 27, 2012 1:39 PM

Q.

TAXPAYERS ON THE HOOK

Our Nebraska county regularly writes off charges for ambulance service on behalf of uninsured people. What would be wrong with requiring insurance so the taxpayers wouldn't be stuck with these bills?

- March 27, 2012 1:25 PM

A.

ILYA SHAPIRO :

Your county and state could indeed impose such requirements (at least given current jurisprudence relating to economic liberty) but the federal government gets its powers from the Constitution, which by my reading does not give it the power to enact economic mandates.

- March 27, 2012 1:41 PM

Q.

ARE THERE ANY GOOD ANALOGIES TO HEALTH CARE

I heard that one of the justices used funeral insurance as an analogy and that it didn't fly. Are there any good parallels?

- March 27, 2012 1:30 PM

A.

ILYA SHAPIRO :

That was Justice Alito and it was a very good analogy indeed. Even more people than will use health care, after all, will die, so if anything there's greater constitutional warrant for a burial insurance mandate than for a health insurance mandate.

- March 27, 2012 1:43 PM

Q.

UNINSURED

OK, so who pays for the care of those who don't buy insurance? Do we just let them die?

- March 27, 2012 1:33 PM

A.

ILYA SHAPIRO :

That's a difficult issue indeed. The taxpayers pay, of course -- we don't in our country let people die in the street (though the rich often have the ability to buy better care). But just because there's a difficult public policy issue doesn't mean the government can do anything it wants in an attempt to solve it.

- March 27, 2012 1:46 PM

Q.

SINGLE PAYER SYSTEM

How will this ruling impact the legality of a single payer system?

- March 27, 2012 1:29 PM

A.

ILYA SHAPIRO :

It won't.

- March 27, 2012 1:47 PM

Q.

FASCINATING?

OK, what made the arguments fascinating?

- March 27, 2012 1:28 PM

A.

ILYA SHAPIRO :

First of all there was a bit of a Washington "who's who" in the courtroom, with about a dozen senators and multiple other government officials there and the press corps craning their necks looking to make sure they get all the names. more importantly, two hours of argument from superb advocates on the most important case since Brown v. Board of Education can't but be fascinating, particularly for us legal nerds. ;-)

- March 27, 2012 1:49 PM

Q.

PEOPLE DYING IN HOSPITAL PARKING LOTS

Why do you support the law that hospitals must treat uninsured patients who show up at their ER's? This is at great cost to taxpayers and those with insurance. A true libertarian would let'em suffer at the door. Ron Paul was somewhat shocked at a debate about this solution but why?

- March 27, 2012 1:28 PM

A.

ILYA SHAPIRO :

It's tied to federal funding. If hospitals don't like it, they shouldn't accept those funds.

- March 27, 2012 1:50 PM

Q.

MANDATORY HEALTH COVERAGE : FICA

If the mandate under President Obama's health provisions is unconstitutional, then, for the same reason, why wouldn't section 3101 of the Internal Revenue Code (collection of tax for "health insurance" - Part A Medicare) also be unconstitutional?

- March 27, 2012 1:36 PM

A.

ILYA SHAPIRO :

No, precisely because the Medicare payroll tax is just that, a tax on employment. The individual mandate, on the other hand, is a regulation with an attendant civil penalty (the fact that it's enforced via the Internal Revenue Code isn't significant as a matter of constitutional law).

- March 27, 2012 1:51 PM

Q.

SUPREME COURT HEALTHCARE LAW

"That law (EMTALA), which I support, does indeed create a policy problem, but Congress does not get more constitutional powers when it creates policy problems." - Would you please expand your answer on this point?

- March 27, 2012 1:39 PM

A.

ILYA SHAPIRO :

An unconstitutional exercise of federal power does not somehow automatically become constitutional if it's part of a broader national regulation. Otherwise, Congress could pass lots of laws with huge economic holes -- it does that all the time! -- and fill those holes with any number of otherwise unconstitutional actions.

- March 27, 2012 1:54 PM

Q.

INSURANCE VS. HEALTHY OUTCOMES

If the mandate for insurance is judged constitutional, then shouldn't the Federal government start mandating health care, outcomes, and how we live? If people really cared about healthy outcomes, then, instead of insurance, they should ban smoking, fatty foods, and running with scissors and require daily exercise.

- March 27, 2012 1:51 PM

A.

ILYA SHAPIRO :

You joke, but actually by the government's logic, there is greater constitutional warrant for mandating the purchase of healthy food or gym memberships than for the purchase of health insurance. That's because, as health care economists will tell you, diet and exercise have a greater effect on taxpayer spending on health care than rates of ownership of health insurance policies.

- March 27, 2012 1:56 PM

Q.

FUNERALS?

Well, but funerals don't cost anywhere near as much as health care.

- March 27, 2012 1:55 PM

A.

ILYA SHAPIRO :

That's not a constitutional distinction. Judges don't -- and we wouldn't want them to -- evaluate whether something is a "big enough" economic problem before deciding whether a law designed to remedy it is constitutional.

- March 27, 2012 1:57 PM

Q.

ASSUMING (I KNOW) THAT THE COURT STRIKES DOWN THE MANDATE

How would they write the opinion to get around the marijuana decision?

- March 27, 2012 1:47 PM

A.

ILYA SHAPIRO :

The distinction between *Raich v. Gonzalez* and *HHS v. Florida* is that *Raich* involved a prohibition of certain economic activity (just like *Wickard v. Filburn*, the 1942 wheat-farming case, involved a regulation of certain economic activity), while here we have a mandate of economic activity.

- March 27, 2012 2:00 PM

Q.

WHY FOCUS ON THE MANDATE IN ISOLATION?

Hello, thanks for your time. What is your response to the argument that the mandate's constitutionality doesn't need to be considered in a vacuum, because it is not the core of the Obamacare law? That is, the core of the law is the Guaranteed Issue and Community Rating requirements, which are pretty clearly constitutional; the individual mandate, one might argue, is "necessary and proper" to effectively put those pieces of the law into action.

- March 27, 2012 1:57 PM

A.

ILYA SHAPIRO :

The individual mandate is indeed absolutely essential to the functioning of the larger regulatory scheme -- nobody disputes that -- but, as I wrote previously this hour, Congress doesn't get unlimited powers to fix problems of its own creation.

- March 27, 2012 2:01 PM

ILYA SHAPIRO :

I have to run. Thanks for the stimulating discussion. Stay tuned for the severability and Medicaid arguments tomorrow.

- March 27, 2012 2:02 PM