



Experts shed light on court's health care decision



By NCC Staff | National Constitution Center

Two leading experts on President Obama's health-care reform plan say the Supreme Court will have the final word on the Affordable Care Act, and gave a lot of insight into the arguments the justices considered on this important issue.

Jack Balkin of Yale Law and Randy Barnett of Georgetown Law headlined an event, moderated by Emmy-winning journalist John Hockenberry, on the Commerce Clause at the National Constitution Center on Wednesday night.

Expert guests included Stephanos Bibas (University of Pennsylvania Law), Jamal Greene (Columbia Law), Ilya Shapiro (Cato Institute) and Neil Siegel (Duke University School of Law). The event was presented by the Center's Peter Jennings Project and The Constitutional Sources Project (ConSource).

The health-care issue is "one of the most pivotal Supreme Court cases of our time—a decision that will impact not only America's health care system but the very definition and regulation of 'commerce,'" said David Eisner, President and CEO of the National Constitution Center, as the event started.

The Commerce Clause is the sticking point in the health-care case. The high court has decided already (but hasn't made public) the constitutionality of the ACA, based on a potential conflict between the Commerce Clause and the individual mandate section of the ACA.

It's About The Mandate

The individual mandate requires consumers carry health insurance or pay a penalty as part of President Barack Obama's overall plan to widen health care coverage and allow anyone with a pre-existing condition to buy a policy.

In 2009, few legal experts argued that the ACA and the individual mandate violated the Commerce Clause.

The clause is an enumerated power listed in the Article I, Section 8, Clause 3, of the Constitution, and it gives Congress the power, "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Georgetown's Barnett was one of the few voices more than two years ago making the case for the Commerce Clause as the Achilles' heel of the ACA.

Audio: Randy Barnett Makes His Argument

But on Wednesday night, Barnett and Balkin agreed that the clause was a key factor in the Supreme Court's decision.

Two Opinions

"The question is, 'Is this the kind of power Congress ought to have?'" Barnett asked, when Hockenberry brought up the Commerce Clause and the individual mandate.

Barnett called the attempt to use the mandate "novel" and he quizzed the audience if they could recall if such a mandate existed before.

Balkin's argument was that the "mandate" was a tax and Congress had the power to tax.

He said media and legal types haven't read the ACA carefully and the individual mandate is described as a tax in the law.

At one point, Balkin produced a copy of a page of the ACA out of his pocket, and read passages that gave taxpayers the option of paying a penalty or buying insurance.

Audio: Balkin Pulls The ACA Out Of His Pocket

"I don't think the individual mandate is going to sneak up on the public," Balkin said. "It's a tax, you pay on your tax return."

"That was deliberate on the part of the drafters of the bill, they did not want to require everyone to purchase insurance. They did not insist on 100 percent coverage," he said.

Barnett said the mandate goes against the basic concepts of contract law, and it is a "coerced contract."

"All contracts, I can tell you as a contracts professor, are supposed to be based on the consent of the parties, they are not supposed to be coerced. If they are coerced you actually have a defense to a contract ordinarily," Barnett said.

Earlier this week, Balkin argued in an editorial in *The Atlantic* that Barnett's case about the mandate, "moved from crazy to plausible, and — following this March's Supreme Court oral arguments — many now hope (or fear) that it might actually become the law of the land."

What Happens Next

The experts also debated the direction health care was heading after the court's ruling, which is widely expected to be on June 25.

Balkin is already on record as believing the individual mandate will survive judicial review. Barnett is convinced it won't, for a number of reasons.

The court could invalidate the part of the ACA with the individual mandate, uphold the mandate (and the entire act), or shoot down the entire act as unconstitutional.

The issue of severability – cutting the individual mandate but keeping the rest of the act – has health-care providers and insurers scratching their heads, since no one has a consensus forecast on how much extra such a move would cost and who it would affect.

What's for sure is that the court's decision will be the most highly watched one since *Bush v. Gore* in 2000, which settled that year's presidential election.

One issue Barnett and Balkin pointed out is that the process of how the ACA was made into a law will get more scrutiny, since technically the House has the power to raise revenue, but the Senate crafted much of the bill.