Health Affairs | Robert Wood Johnson Foundation

Health Policy Brief

SEPTEMBER 27, 2012

The Supreme Court and Health Reform. The future of federal-state programs is more uncertain now that the high court has limited the expansion of Medicaid.

WHAT'S THE ISSUE?

In a groundbreaking decision announced on June 28, 2012, the Supreme Court upheld the constitutionality of most of the Affordable Care Act. At the same time, it declared the law's Medicaid expansion unconstitutional because the law threatened states that did not expand Medicaid with a loss of all their Medicaid funding. The court's remedy was to block the potential cutoff of all Medicaid funding, in effect making the expansion of Medicaid optional for states.

The court's Medicaid decision dealt a blow to a major element of the government's strategy to expand health insurance coverage to millions of uninsured Americans. It is unclear how many states will now move forward with the expansion, or what options they have to undertake partial expansions.

This brief reviews the Supreme Court's decision and its implications, particularly for federal-state programs going forward.

WHAT'S THE BACKGROUND?

The Supreme Court was asked by litigants in the cases against the Affordable Care Act to resolve four matters: the applicability of the Tax Anti-Injunction Act, a law that bars court challenges to a federal tax until the tax is actually collected; the constitutionality of the individual mandate, which requires most people to have health insurance coverage or pay a penalty; what sections of the law were "severable" and able to stand on their own if the individual mandate were struck down; and the constitutionality of the law's requirement that states must expand their Medicaid eligibility to adults having incomes up to 133 percent of the federal poverty line.

ANTI-INJUNCTION ACT: Before weighing any of the substantive questions about the law itself, the high court first had to determine whether the Anti-Injunction Act applied. This 1867 federal law requires that before any tax can be challenged in court, it must first be paid. But the penalty for not complying with the individual mandate is not scheduled to take effect until 2015. If the penalty were considered to be a tax, the Anti-Injunction Act might bar the court from ruling on any portion of the law until that time.

In writing the 5–4 majority opinion, Chief Justice John Roberts, however, concluded that Congress deliberately labeled the exaction for failing to pay the "shared responsibility payment" to be a "penalty" and not a "tax," and thus the Anti-Injunction Act did not apply.

Interestingly, in evaluating the constitutionality of the Affordable Care Act, the chief justice adopted a very different position on whether the penalty was a tax. The constitutionality test, Roberts wrote, looks not at how the law is labeled but how it functions. In this case, because the penalty functions like a tax,

10.1377/hpb2012.18

it falls under Congress' taxing authority, and thus the law is constitutional.

INDIVIDUAL MANDATE: The individual insurance mandate requires people to maintain "minimum essential" health insurance coverage unless they are exempt for reasons spelled out in the law. Nearly all of the arguments over the constitutionality of the individual mandate focused on the Commerce Clause of the Constitution, which grants Congress the authority to regulate economic activity that constitutes or that substantially affects interstate commerce. The administration argued that because sickness and injury are inevitable and can happen at any time, people without health insurance place an undue "cost-shifting" burden on the country's health care system, which Congress can regulate because it is part of interstate commerce.

Roberts, in writing the court's lead opinion, concluded that Congress did not have the authority to require the purchase of insurance under the Commerce Clause. The court focused on the mechanics of the activity or, more precisely, the inactivity of those people who choose not to obtain health insurance. "Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority," Roberts wrote.

The high court ultimately fell back on the administration's second argument: that the mandate can "reasonably" be upheld within Congress' specified power under the Constitution to "lay and collect taxes." It interpreted the Affordable Care Act as "not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product," Roberts wrote. And because the court upheld the individual mandate, it did not have to rule on its severability.

DISSENTING ARGUMENTS: The majority's opinion on the individual mandate generated two strong dissents, the first by Associate Justice Ruth Bader Ginsburg on the Commerce Clause argument, and the second on the taxing power argument by Associate Justice Antonin Scalia and three other justices, including Anthony Kennedy, who many had predicted erroneously would be the crucial swing vote to uphold the law.

Maintaining that the law could be upheld under the Commerce Clause, Ginsburg argued that the market for purchasing health care was unlike markets for automobiles or broccoli (examples cited by Roberts). "The market for medical care is one in which all individuals inevitably participate," Ginsburg wrote, arguing that the decision to forgo insurance is an economic decision that Congress can address under the Commerce Clause.

Scalia's dissent from the chief justice's taxing power argument accused Roberts (though not by name) of rewriting the statute, not interpreting it. Penalties, including those mandated in the Affordable Care Act for failing to purchase health insurance, are punishments for violations of the law, while taxes are contributions to support the government, he wrote.

MEDICAID EXPANSION: For most observers, the Supreme Court's decision to place limits on the law's mandatory expansion of Medicaid coverage was unexpected. The Affordable Care Act required states to increase their Medicaid rolls substantially to cover everyone under age 65 with incomes up to 133 percent of the federal poverty level. The federal government would pay 100 percent of the cost for these new enrollees from 2014 through 2017 and then gradually reduce its contribution to 90 percent by 2020 and indefinitely thereafter—a far more generous match than is normally the case. However, if states failed to expand Medicaid as the law required, states would lose all Medicaid funding from the federal government, not just money to pay for the expansion.

Twenty-six states argued that the Medicaid expansion requirement was impermissible under the Constitution's spending clause. They contended that the potential loss of funding was so great if states did not go along that the higher federal match they were offered could not be considered a mere inducement but, instead, was unduly coercive. They argued that under the country's federalist system of government, Washington can never tell states how to govern, but it can entice states to do what it would like them to do with a very large "carrot."

In his opinion, Roberts agreed with the "coercion" argument, calling the threat to cut off all Medicaid funding a "gun to the head" of the states. He noted that Medicaid spending accounts for more than one-fifth of the average state's budget, with federal funds covering anywhere from half to more than three-quarters of the cost. "The threatened loss…is economic dragooning that leaves the states with no real option but to acquiesce in the Medicaid expansion," he wrote. Instead, the court ruled

133%

Federal poverty line
The Supreme Court rejected the requirement that states must expand Medicaid to adults under age 65 with incomes up to 133 percent of the federal poverty level.

"The court's Medicaid decision dealt a blow to a major element of the government's strategy to expand health insurance coverage to millions of uninsured Americans."

that only the funding for the expansion could be withheld if a state declined to participate.

SURPRISE SPLIT: Two of the court's more liberal justices, Elena Kagan and Stephen Breyer, joined Chief Justice Roberts in a 7–2 decision rejecting the Medicaid expansion. Kagan's participation was particularly surprising because she had been President Obama's solicitor general immediately prior to taking the bench, and several conservative groups had demanded she recuse herself because she had e-mailed colleagues about the health care law while serving in that capacity. (Similarly, some liberal groups had demanded that Justice Clarence Thomas recuse himself because his wife was associated with an organization working to repeal the Affordable Care Act.)

But some Supreme Court watchers believe that Kagan's vote may have been strategically designed to save the health care law from being completely overturned. The four conservative justices who dissented from Roberts's taxing power argument believed not only that the Medicaid expansion was unconstitutionally coercive but that it also was not "severable" from the rest of the law, meaning that the entire Affordable Care Act must fall if the Medicaid expansion falls.

Some court watchers speculated that Kagan and Breyer (along with the two other liberal justices, Sonia Sotomayor and Ginsburg) joined with Roberts to allow the chief justice room to craft a compromise: Medicaid expansion would proceed if the penalty for noncompliance was only to forgo additional Medicaid funding, and the decision is severable and does not render the entire law invalid.

100%

Federal government portion
The federal government would pay 100 percent of the coverage costs of the Medicaid expansion during the first three years.

"For the first time, the ruling limits the ability of the federal government to attach strings to grants to states."

WHAT ARE THE IMPLICATIONS?

The court's ruling means that unless the political context changes dramatically, the bulk of the health care law will probably take effect. There is the possibility that the health care law could be repealed, but that would first require Republicans to win the White House in November 2012, gain control in the Senate, and maintain control of the House of Representatives. Because the Congressional Budget Office (CBO) has determined that the law in its entirety will reduce the federal budget deficit, lawmakers seeking to repeal the Affordable Care Act would also need to find offsetting provisions or risk widening the deficits.

A further obstacle is that several popular provisions of the law are already in effect. These include allowing children to stay on their parents' health insurance plans until they reach age 26, reducing annual dollar limits on benefits, eliminating lifetime limits on insurance coverage, prohibiting insurance companies from rescinding coverage when people get sick or from denying coverage to children with preexisting conditions, and requiring new plans to cover certain preventive services without cost sharing.

AMBIGUOUS IMPLICATIONS: The implications of the ruling on Medicaid expansion are more ambiguous. States may forgo the law's Medicaid expansion without forfeiting the rest of their federal Medicaid funding, but it is unclear how many states will choose to do so. Some Republican governors may choose not to expand their state's program to make a political statement; others, including states led by Democrats, may feel that paying 10 percent of the expansion costs after 2019 will be excessive if their ongoing budget shortfalls persist.

In its analysis of the Supreme Court's decision, the CBO on July 24, 2012, predicted that 6 million fewer people would be insured by Medicaid because some states will have chosen to opt out of the Medicaid expansion. Half of these people, or 3 million, would probably be eligible to purchase private insurance with the aid of federal subsidies through state-based insurance exchanges, CBO said. That would leave a total of 30 million people uninsured in 2022, compared to its estimate of 27 million before the high court's ruling.

On September 19, 2012, the CBO revised its estimate of the number of people who would be required to pay a penalty for not having health coverage from about 4 million to about 6 million people in 2016. About 15 percent of this increase is due to the Supreme Court decision and the likelihood that more people will not be covered by an expanded Medicaid program. The rest is tied to the likelihood that slower-than-expected economic growth will lead to higher unemployment, lower wages, and less coverage.

UNANSWERED QUESTIONS: Another option that some states may prefer is a partial expansion of Medicaid to some, but not all, of the people who would otherwise be enrolled. But as of the publication date of this brief, it is unclear whether the Department of Health and Human Services (HHS) has the legal authority or the desire to offer that as an alternative to full Medicaid expansion, along with a commensurately smaller amount of federal aid.

Similarly, although some governors have stated that the ruling frees them from having to comply with "maintenance-of-effort" provisions that require states to seek federal waivers if they want to tighten their Medicaid eligibility rules before 2014, HHS and CBO maintain that the Supreme Court's ruling does not alter those requirements. HHS is expected to issue additional guidance on these questions but most likely not until after the November 2012 elections. And additional litigation to settle these issues could follow.

The Medicaid decision also has implications beyond the Affordable Care Act. For the first time, the ruling limits the ability of the federal government to attach strings to grants to states. But the questions of at what point a conditional federal grant crosses the line from being a legally permissible inducement to becoming an unconstitutional coercion, or when a modification of an existing program makes it a new program, remain unanswered. This lack of clarity opens the door for lawsuits on everything from federal highway funds to environmental proscriptions to educational reforms—areas in which the states are encouraged to undertake federal initiatives in exchange for billions of dollars in grants.

WHAT'S NEXT?

The Supreme Court's decision upholding the Affordable Care Act makes moot almost all of the trial and appellate court cases that had been moving through the judicial system. Still, there are a number of other cases challenging specific provisions of the health care law and at least one case challenging the law on different grounds than those that made it to the Supreme Court.

US Citizens Association v. Sebelius, now in the US Court of Appeals for the Sixth Circuit in Cincinnati, Ohio, argues that the Affordable Care Act violates the Constitution's First Amendment by forcing people to affiliate with health insurers to buy a specific product; violates the Fifth and Ninth Amendments by taking away the choice to refuse the purchase of an unwanted good or service; and violates the First, Third, Fourth, Fifth, and Ninth Amendments by forcing people to divulge private medical information.

About two dozen lawsuits are also challenging the Obama administration's rulemaking determination that the law requires most health insurance plans to cover contraceptive services. A number of educational and charitable entities as well as businesses have filed suit, arguing that the rule would require them to provide such coverage to their employees against their religious beliefs.

It is also expected that one or more persons will challenge the statutory basis for paying federal subsidies to people who enroll in health insurance exchanges operated by the federal government in those states that do not set up their own exchanges. It has been argued that the language of the law allows only those who enroll in state-operated exchanges to be eligible for the federal subsidy, which would mean that those who enrolled in a federal backup exchange would not be eligible. The administration has rejected this contention.

In addition, a pending case is challenging whether it was constitutional for Congress to delegate important health policy functions to the Independent Payment Advisory Board, a new panel that will have substantial authority as of 2013 to take steps to curb rising Medicare spending if other measures don't prove successful. A federal judge in August 2012 dismissed some but not all portions of that case.

Taken together, these various lawsuits suggest that even in the aftermath of the Supreme Court decision, many aspects of the Affordable Care Act will be before the nation's courts for the indefinite future.■

RESOURCES

Jost, Timothy S., "The Affordable Care Act Largely Survives the Supreme Court's Scrutiny—But Barely," *Health Affairs* 31, no. 8 (2012): 1659–62.

Rosenbaum, Sara, and Timothy M. Westmoreland, "CBO's Updated Affordable Care Act Estimates: Resting on Shaky Assumptions?" *Health Affairs* Blog, July 31, 2012.

Rosenbaum, Sara, and Timothy M. Westmoreland, "The Supreme Court's Surprising Decision on the Medicaid Expansion: How Will the Federal Government and States Proceed?" *Health Affairs* 31, no. 8 (2012): 1663–71.

Supreme Court of the United States, *National Federation of Independent Business v. Sebelius,* No. 11-393, June 28, 2012.

About Health Policy Briefs

Written by
T.R. Goldman
(Goldman is a veteran legal affairs writer and editor in Washington, D.C.)

Editorial review by
Mark A. Hall
Professor of Law and Public Health
Health Care Policy and Research
Wake Forest University
School of Law

Timothy S. Jost
Professor of Law
Washington and Lee University
School of Law

Ted Agres
Senior Editor for Special Content
Health Affairs

Anne Schwartz
Deputy Editor
Health Affairs

Susan Dentzer
Editor-in-Chief
Health Affairs

Health Policy Briefs are produced under a partnership of *Health Affairs* and the Robert Wood Johnson Foundation.

Cite as:
"Health Policy Brief: The Supreme Court and Health Reform," *Health Affairs*, September 27, 2012.

Sign up for free policy briefs at:
www.healthaffairs.org/healthpolicybriefs