

Can The Affordable Care Act Survive The Latest Challenge?

By **Michael King and Emily Felder**

On May 1, the U.S. Department of Justice, on behalf of the Trump administration, filed a brief in *Texas v. U.S.*,^[1] arguing that, given the elimination of the penalty for noncompliance with the individual mandate, the entire ACA should be declared unconstitutional because the individual mandate is inseparable from the ACA as a whole.

With *Texas v. U.S.* most likely on a collision course with the U.S. Supreme Court, the court's reasoning on prior ACA litigation offers crucial insight — and may point toward the ACA minus the penalty for noncompliance being found unconstitutional in whole or in part.

Background

In December 2017, Congress passed the Tax Cuts and Jobs Act^[2] and President Donald Trump signed it into law. Among a number of tax cuts granted for individuals and businesses, Congress changed an important tax provision in the ACA, effectively eliminating the tax penalty for not purchasing health insurance.

The ACA's "individual mandate" had required individuals to purchase health insurance or incur a tax penalty. The TCJA that penalty amount to \$0 starting in January 2019. Still smarting from the failure to repeal and replace the ACA, congressional Republicans and the White House were eager for a victory on health care, settling for a policy to weaken the individual mandate that could be neatly tucked into the tax law.

In February 2018, two months after Congress eliminated the individual mandate penalty, the Texas attorney general joined with 17 states and two individuals to bring a suit, *Texas v. U.S.*, challenging the constitutionality of the ACA.

The Department of Justice, then led by Attorney General Jeff Sessions, declined to defend the ACA in its entirety, and agreed that the individual mandate and related provisions should be struck down by the court as unconstitutional. The Justice Department took the position, however, that the rest of the ACA should be upheld. A group of 18 attorneys general, led by California, intervened to defend the law.

In December 2018, Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas ruled for the plaintiffs and declared the entirety of the ACA to be invalid.^[3]

Complicating matters, in March 2019, the Justice Department under the new leadership of Attorney General William Barr, reversed its position. The Department of Justice will now argue to affirm Judge O'Connor's opinion that the entirety of the ACA — not just the individual mandate — should be struck down.

The case has been appealed to the U.S. Court of Appeals for the Fifth Circuit and oral arguments have been scheduled for July 2019. The case will likely be appealed to the U.S. Supreme Court for next year's session.



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The ACA's Constitutionality: Before and After the Tax Cuts and Jobs Act

In *National Federation of Independent Business v. Sebelius*,^[4] the Supreme Court upheld the power of Congress to enact most provisions of the Patient Protection and Affordable Care Act. In an opinion written by Chief Justice John Roberts, the Supreme Court found by a vote of five to four that Congress has the power under the U.S. Constitution to enact an individual mandate requiring the purchase of insurance.

Justice Roberts reasoned that with the requirement that individuals "shall" maintain coverage, the "most straightforward reading of the mandate is that it commands individuals to purchase insurance." Justice Roberts agreed with the four dissenters, Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas and Samuel Alito, that the "Commerce Clause does not authorize such command."

Justice Roberts also concurred with the four dissenters that the individual mandate could not be upheld under the necessary and proper clause of the Constitution.

However, Justice Roberts saved the ACA by determining that the mandate should be interpreted "as imposing a tax on those who do not buy" health insurance instead of "ordering individuals to buy insurance." Justice Roberts noted the importance of the individual mandate to the success of the ACA. In passing the ACA, Congress found that the individual mandate "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold." Justice Roberts found that the "individual mandate was Congress' solution to these problems," noting that "[b]y requiring that individuals purchase health insurance, the mandate prevents cost shifting by those who would otherwise go without it" and "forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses."

The TCJA changed the ACA landscape by eliminating the individual mandate tax for noncompliance. With Justice Roberts having ruled out the commerce clause and the necessary and proper clause as grounds for upholding the ACA, and having asserted that the ACA would not "function in a coherent way and as Congress would have intended" without the individual mandate working in tandem with the guarantee of insurance despite preexisting conditions, avenues for the majority to spare the individual mandate portion of the ACA appear limited.

The Day After: What Comes Next?

For the past decade, health care industry participants and patients have calibrated their systems and behaviors around the ACA. In the event that the Supreme Court invalidates the ACA in its entirety, Congress will face enormous pressure to act.

The Fifth Circuit will consider the case in July, setting the Supreme Court up to render a final decision in the summer of 2020, months before the presidential election. While a "Medicare for all" or single payer system has become a virtual litmus test for Democrats, the RAND Corporation estimates that such a system will increase federal government health care spending from \$1.09 trillion to \$3.5 trillion. Some proposals would also eliminate private insurance coverage entirely, shifting approximately 160 million Americans off employer-sponsored coverage and onto a government-sponsored plan. Some Democrats believe that a Medicare "buy in" or public option to purchase Medicare coverage is a more realistic solution, but that would still come at a cost to the taxpayer.

Meanwhile, the GOP may wish to implement its 2017 proposals, or something similar, giving more power to the states to decide how to spend federal dollars, with an increased emphasis on health savings accounts and cost-sharing. With its American Health Care Act in 2017, the GOP would have eliminated penalties for Americans who do not purchase health insurance — eliminating the individual mandate — but would have deterred Americans from allowing their coverage to lapse by allowing insurers to charge them more when they next sought insurance. The American Health Care Act also would have block-granted Medicaid, capping the amount of federal spending on Medicaid by distributing a set amount to each state, but allowing states to have greater latitude in how they spend that amount. With Medicaid moving to block grants to the states, the American Health Care Act would have curtailed the ACA’s expansion of Medicaid to an additional 11 million low-income people.

While each party may find one another’s core proposals unpalatable, could the urgency of losing the ACA prompt a bipartisan “grand compromise” with a blend of public support for those in need and market-oriented solutions? In the current environment, on the polarizing issue of health care, the parties may fail to reach common ground, leaving a stalemate over the path forward for a sector comprising over 18% of U.S. gross domestic product.

State legislatures may offer laboratories for ideas to drive health care savings, from legislation addressing surprise medical bills to permitting pharmaceutical imports from Canada. In the last three years, eight states have implemented their own reinsurance programs to bring down health care costs for their citizens, and many states have worked with government officials to negotiate expanding partial Medicaid benefits to a greater number of beneficiaries in a cost-effective manner.

In our current political environment, in the absence of bipartisan federal leadership, states are perhaps best situated for swift action. But if the Supreme Court overturns the ACA in whole or in part, it will be Congress — not the states — that must face that reality in the months leading up to the 2020 election. With health care stocks approximately 16% lower than broader stock indices thus far in 2019, the stakes for confusion and uncertainty are high and warrant careful attention as leaders navigate the shoals of health care policy.

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[1] Texas v. U.S., Civil Action No. 4:18-cv-00167-O.

[2] 115 P.L. 97 

[3] Texas v. United States , 340 F Supp 3d 579 (ND Tex 2018)

[4] National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012)