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The Constitutionality of the Affordable Care Act: An Update

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On June 28, 2012, the U.S. Supreme Court upheld key provisions of the Patient Protection and Affordable Care Act (ACA) after 26 states had challenged its constitutionality in lower courts. In last November's *Virtual Mentor* health law column, we summarized some of the key legal issues the court would consider in the ACA case, and now we examine their ruling, including the basis for the court's decision and relevant legal considerations as the ACA is implemented [1].

The Court's Holding

The Supreme Court's 5-4 decision determined the constitutionality of two key substantive provisions in the ACA: the individual mandate and a requirement that states expand eligibility criteria for Medicaid coverage [2].

Individual mandate. The most legally and politically controversial aspect of the ACA, the individual mandate requires Americans to purchase health insurance or face a government penalty, with some exceptions—particularly for low-income individuals who cannot afford to buy insurance [3]. The individual mandate has been considered necessary to cover the cost of U.S. health care. Without a mandate, fewer healthy people would pay into the system to counterbalance the cost associated with care for the sick. The healthy, mostly younger people would be able to "free ride," purchasing health insurance only when they got sick, after paying little or nothing up front when their use of services was lower [4, 5].

States that challenged the ACA argued that the individual mandate was an overreach of Congress's commerce clause powers, the government's well-recognized (but not limitless) power to regulate certain economic activity that either occurs between states or substantially affects the states in the aggregate [6, 7]. The court reasoned that the commerce clause allows the government to regulate actions of those who participate in a market but not the inactions of those who choose *not* to participate in that market [8]. Without this distinction, the government could regulate practically anything. Justices analogized that, for example, persons with poor diets are pervasive and more costly to the health care system than the uninsured, yet it would be seen as a strong liberty breach for the government to mandate that citizens purchase only health food [8].

While the court rejected the claim that the individual mandate was within Congress's commerce power, the mandate was found to be constitutional as a tax [9]. The penalty, though not labeled a tax in the ACA, is similar in several ways to other

taxes. Its amount is determined by income, number of dependents, and filing status, and it is paid into the treasury when filing income tax. It is not a punishment for an illegal action: failure to purchase health insurance is not illegal, the penalty for refusing to purchase health insurance is less than the cost of paying for actual insurance, and there are no criminal sanctions attached. (The Congressional Budget Office has predicted that approximately 4 million people will opt to pay the IRS instead of an insurance company [10].) Moreover, while the individual mandate is clearly intended as an incentive to purchase health insurance, many other taxes are also in place to promote certain behaviors—for example, the government taxes cigarettes to reduce nicotine consumption. Thus the Court found the mandate well within Congress's power to tax. While Congress doesn't have the power to require individuals to purchase health insurance, it *does* have the power to tax those individuals who do not.

Medicaid expansion. The second provision challenged by the states required them to expand their Medicaid programs to cover adults with incomes up to 33 percent above the poverty level by 2014 or to face a penalty (including withdrawal of all federal Medicaid funds) [11]. Most states only cover much poorer individuals and sometimes only low-income families with children [11]. The intended goal of the Medicaid expansion was to increase the pool of people covered under state and federal health insurance programs to include those who would have difficulty affording insurance under the individual mandate.

Striking down as unconstitutional a penalty on nonparticipating states, the court reasoned that Medicaid originally intended to cover four types of needy persons: the blind, the disabled, the elderly, and families with children [11]. It argued that, while Congress has the right to redefine who may fall into the categories of those covered and to provide monetary incentives to states to cover certain populations of persons, the Medicaid expansion changed the original goal of the program itself—making it a not just a program to cover needy persons, but a national health care plan intended to provide universal coverage that, moreover, uses penalties rather than incentives to encourage compliance [11]. Deeming the provision too coercive, the court held instead that the government cannot penalize those states that choose not to expand Medicaid in this way [11].

The Aftermath of the Ruling

Politicians, journalists, and academics alike have speculated about the ramifications of the court's mixed ruling on the constitutionality of the ACA.

The ACA's timeline of implementation continues into 2014, but certain provisions have already begun or will begin soon. For example, in October 2012, the value-based purchasing program began to give hospitals financial incentives to improve their quality of care and to implement electronic health records [12]. The federal government bolstered state-run health coverage in 2012, allocating funds to the states to cover more preventive medicine, increasing payments for family practitioners, and increasing the resources of the Children's Health Insurance Program [12]. And in

2014, insurance overhauls will roll out: insurers will be prohibited from discriminating on the basis of preexisting conditions, annual limits on insurance coverage will no longer be permitted, insurers will be required to cover people participating in clinical trials, and tax credits to help individuals and small businesses afford insurance will begin [12]. Most importantly, the individual mandates and the optional Medicaid expansion will begin on January 1, 2014 [12].

In the meantime, the ACA remains a politically controversial law, and some states still seek to oppose or avoid certain requirements. Five states (Missouri, Montana, New Hampshire, Utah, and Wyoming) have passed restrictions on compliance with the ACA until the state legislature approves its implementation [13]. Sixteen states have provisions that say the state government will not enforce the individual mandate [13]. However, because federal law trumps state law and the individual mandate mainly governs the conduct of individuals and their employers, not the states, these laws will have little impact on how the ACA is enforced [13].

Georgia, Indiana, Missouri, Oklahoma, South Carolina, Utah, and Texas have all enacted interstate health compacts that seek to allow them to join together in an effort to establish broad health care programs for their citizens independent of federal control [13]. Interstate compacts have been used in the past when states agree to improve or work together on a shared resource, often such things as responsibility for roadways or bodies of water or land, the collecting of taxes by companies that do business between states, or, sometimes, interstate law enforcement efforts [14]. Such compacts require Congress's approval to prevent states from overstepping federal authority [15]. Health compacts have been a vehicle for politicians to show their disapproval of the ACA, but some commentators think it unlikely that Congress would approve a compact that so significantly shielded the states from federal law [16].

While the headlines and the excitement over the Supreme Court's ruling has begun to diminish, the central controversies of the ACA, including the proper role of federal and state government in matters of health and the challenges of covering the uninsured, will remain at the forefront during the 2012 election and well into 2014.

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