

# How the Power to Tax Saved Health Care Reform

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On June 28, the Supreme Court issued its much anticipated decision in *National Federation of Independent Business v. Sebelius*, which upheld the constitutionality of the key components of the Patient Protection and Affordable Care Act (aka Obamacare). Although most of the debate surrounding the constitutionality of the act focused on the applicability of the commerce clause, in the end, Chief Justice John G. Roberts Jr. joined the four justices constituting the "liberal wing" of the court and held that the act could be sustained pursuant to the power to levy taxes vested in Congress pursuant to Article 1 of the Constitution.

The most controversial provision of the act is the individual mandate, which requires most individuals to maintain "minimum essential" health insurance coverage. For individuals who are not otherwise exempt and who do not receive health insurance through an employer or government program, the way to satisfy this requirement is to purchase insurance from a private carrier. Beginning in 2014, those individuals who do not comply with the mandate must make a "shared responsibility payment" to the federal government. The act characterizes this payment as a "penalty" to be paid to the Internal Revenue Service with an individual's income taxes, and is to be assessed and collected in the same manner as tax penalties. The operational provisions of the individual mandate are contained in Section 5000A of the Internal Revenue Code.

A majority of the justices (Roberts, Antonin Scalia, Anthony M. Kennedy, Samuel A. Alito Jr. and Clarence Thomas) concluded that the individual mandate could not be justified under the commerce clause. According to the majority, there must be some level of commercial "activity" to trigger the government's authority to regulate. In the context of the mandate, an individual who opts not to obtain insurance coverage is, in effect, electing not to participate in commerce and is therefore beyond the reach of government regulation. In the view of the majority, the individual mandate impermissibly compels individuals to become active in commerce.

In the words of Roberts, an examination of the individual mandate under the commerce clause "is not the end of the matter." Roberts joined his four liberal colleagues (Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan) in concluding that the individual mandate could be sustained pursuant to the congressional authority to levy taxes.

Article 1 of the Constitution authorizes Congress to "lay and collect taxes, duties, imposts and excises." Roberts noted that this power to tax gives the federal government considerable influence, even in areas where it cannot directly regulate. In essence, this

authority allows the federal government to enact a tax on an activity that it cannot otherwise authorize, forbid or control. While Roberts joined the more conservative justices in concluding that the commerce clause is limited in what it can control, he adopted the view that the power to tax can allow the government to influence (albeit not control) a much broader scope of activities.

Before the court could consider whether the individual mandate was a proper exercise of the congressional power to tax, it first had to determine whether the challenge to the mandate could even be considered by a court pursuant to the Anti-Injunction Act, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." This statute is intended to protect the government's ability to collect taxes by barring litigation to enjoin or otherwise obstruct the collection of taxes. As a result, taxes can ordinarily be challenged only after they are paid by suing for a refund.

In concluding that the Anti-Injunction Act did not apply, Roberts noted that the Affordable Care Act describes the shared responsibility payment imposed on those who forgo health insurance coverage as a "penalty" and not as a tax. The court essentially held that, because the Anti-Injunction Act is a statute passed by Congress that, by its terms, only applies to taxes, and because the Affordable Care Act, also a statute enacted by Congress, specifically identifies the payment at issue as a "penalty," the Anti-Injunction Act is not applicable. As discussed below, although Roberts ultimately concluded that, for purposes of passing constitutional muster, the shared responsibility payment is in substance a tax regardless of its label, for purposes of statutory construction, labels do matter and Congress intended only for items labeled as a "tax" to be covered by the Anti-Injunction Act. Therefore, the substance of the Affordable Care Act was subject to judicial review.

Having established that labels do matter for purposes of statutory construction, Roberts proceeded to explain why the shared responsibility payment described as a "penalty" in Code Section 5000A is really a "tax" for purposes of the Constitution.

To reach that result, Roberts applied a "functional" approach to determine whether the shared responsibility payment is a "tax" as opposed to a penalty. In concluding that the payment functions as a tax, Roberts noted that the amount of the payment is not punitive because it will be far less than the actual price of insurance and, by its terms, can never be more. In addition, the court concluded that the individual mandate contains no "scienter" requirement found in most penalty provisions because it does not make the failure to obtain insurance a violation of the law, but rather makes the absence of coverage "just another thing" subject to tax. Finally, the court noted that the shared responsibility payment is collected solely by the IRS through the normal means of taxation — except that the IRS is not allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution.

Desiring to demonstrate the difference between the scope of the congressional power to tax and the congressional power to regulate commercial activity pursuant to the commerce clause, Roberts went to great lengths in explaining the broad scope of the Constitution's taxing authority and its ability to modify individual behavior. Roberts cited a litany of existing taxes that are primarily intended to modify individual conduct with the raising of revenue as only a secondary consideration. The items cited include taxes on cigarettes, marijuana and sawed-off shotguns and the tax incentives provided to encourage home ownership.

Having held that the commerce clause does not allow Congress to enact a statute that compels commercial activity, Roberts deftly concluded that the Constitution does not prohibit Congress from taxing inactivity. In the end, the distinction may be that the government does not have the constitutional authority to compel any specific behavior but it does have the authority to "encourage" specific behavior through tax incentives.

Finally, the court addressed the issue of whether the shared responsibility payment constitutes a "direct tax" that must be apportioned so that each state pays in proportion to its population. Article I, §9, Clause 4 of the Constitution provides: "No capitation, or other direct tax shall be paid, unless in proportion of the census or enumeration herein before directed to be taken." In concluding that the only known "direct" taxes subject to apportionment are a capitation tax (also known as a "poll tax") and a land tax, the court held that going without health insurance does not fall within any recognized category of direct tax. Therefore, the court rejected the direct tax challenge.

There has been much speculation about the route Roberts traveled in arriving to the point where he authored the decision upholding the constitutionality of the Affordable Care Act. The obvious irony is that in delivering the Obama administration a huge policy and political victory, Roberts concluded that the shared responsibility payment is a tax even as the president argues that it is not a tax and the Republican opposition insists that it is.

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