

Health Headlines

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Supreme Court Oral Argument Raises Specter That Entire Health Reform Law Could Be Overturned

Last week's big news was the highly unusual three days of oral arguments held by the Supreme Court on various aspects of the Patient Protection and Affordable Care Act (ACA), including whether the individual mandate, requiring every individual to have insurance coverage or pay a penalty, was constitutional. While it would be foolhardy to predict how the Supreme Court will decide the case, the tenor of the arguments was such that the possibility of the entire 2700 page law being struck down no longer appears far-fetched. The Court's decision is expected in late June.

On Monday, the Court heard argument on whether the challenge to the individual mandate was premature because, under the Anti-Injunction Act (AIA), a "tax" cannot be challenged until it is actually assessed. The justices, who had appointed a lawyer to argue the issue since both the 26 states bringing the challenge and the Government itself argued that the AIA should not bar the suit, appeared skeptical that the penalty under the ACA was a "tax." It therefore appears likely the Court will decide the merits of the case now.

Tuesday's oral argument was dedicated to the key issue of the case, whether Congress exceeded its constitutional authority in enacting the individual mandate. Court watchers expect the Court to split along ideological lines with Justice Kennedy and, to a lesser extent, Chief Justice Roberts, being the swing-votes on the issue. Both these justices had skeptical questions for the Government's lawyer, Solicitor General Verrilli, and made it clear they were grappling with what limiting principle could be applied if the Court allowed the mandate to stand. It was clear, therefore, that both justices were taking the constitutional challenge very seriously, though they also had tough questions for the lawyer representing the states.

Wednesday's arguments addressed two issues. First, was the question of "severability," that is, the question of how much of the ACA must fall if the individual mandate is found to be unconstitutional. Once again, the tenor of the oral argument showed the justices are, at a minimum, seriously considering striking down the entire law. Justice Kennedy, for example, suggested that it might show greater judicial restraint to strike down the entire law than for the justices to go through the law section by section deciding which provisions should fall and which should stand. The second issue argued on Wednesday was whether the ACA effectively coerced states to significantly expand Medicaid. The plaintiff states argument on this issue appeared to get less traction with the justices.

Headlines such as Slaters's "**A Moment of Silence for Obamacare**," while admittedly sensational and certainly premature, are indicative of the mood after the oral arguments. The worst case scenario for hospitals, but not one that appears particularly likely, would be if the Court strikes down the provisions expanding insurance coverage, such as the individual mandate and Medicaid expansions, while leaving in place the cost-reduction measures predicated upon a decrease in the uninsured population.

The transcripts and audio recordings of the oral arguments are available **here** at the Supreme Court's website under case numbers 11-398 and 11-400.

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