ACA AT SCOTUS: SOME THOUGHTS ON THE MANDATE

As you likely know by now, we stand on the cusp of historic oral arguments this week in the Supreme Court on the Patient Protection and Affordable Care Act (ACA), otherwise popularly known as “Obamacare”. The arguments will occur over three days, for a total of six hours, Monday through Wednesday. Yes, they really are that historic, as Lyle Denniston explains in SCOTUSBlog. The schedule is as follows: Monday: 90 minutes on whether the Anti Injunction Act (AIJA) prevents consideration of a challenge to the individual mandate until it takes effect in 2014; Tuesday: Two hours on the Constitutionality of the individual mandate; and Wednesday: 90 minutes on severability of the main law from the mandate and 60 minutes on state sovereignty concerns of Medicaid reform.

There are two areas of particular interest for me and which really are the meat on the bone of the overall consideration. The first is Monday’s technical argument on the AIJA, which I actually think may be much more in play than most commentators believe, because the Supremes may want to punt the politically sticky part of the case down the road until after the 2012 elections, and the AIJA argument is a ready made vehicle to do just that. Judge Brett Kavanaugh’s dissent in *Seven Sky v. Holder* explains how that would go should the Supreme beings decide to punt. This is by no means likely, but do not be shocked if it occurs; can kicking down the road

is certainly not unknown at SCOTUS on politically sensitive cases.

By far, however, the biggest, and most contentious, kahuna of the healthcare debate is the individual mandate, and that is where I want to focus. The two sides, pro (predominantly liberal left) and con (predominantly conservative right), have been selling their respective wares since before the law was passed and signed by the President. As we truly head into the arguments, however, the pro left have crystallized around a matched pair of articles by Dahlia Lithwick and Linda Greenhouse, and the con right around response pieces by James Taranto and Ed Whelan.

Now this hardly seems like a fair fight, as Taranto has no degree, nor legal training, whatsoever; that said he and Whelan actually lay out the contra to Dahlia and Linda pretty well. Each side effectively accuses the other of being vapid and hollow in argument construct. I will leave aside any vapidity discussion because I think both sides genuinely believe in their positions; as to the hollowness, though, I think both sides are pretty much guilty. Which is understandable, there is simply not a lot of law directly on point with such a sweeping political question as presented by the mandate. "Unprecedented" may be overused in this discussion, but it is not necessarily wrong (no, sorry, *Raich v. Gonzales* is not that close; it just isn't).

In short, I think both sides are guilty of puffery as to the quality of *legal* support for their respective arguments, and I believe both are guilty of trying to pass off effective political posturing as solid legal argument. Certainty is just not there for either side. This is a real controversy, and the Supreme Court has proved it by allotting the, well, almost "unprecedented" amount of time it has to oral argument.

All of the above said, I join my friend Dahlia (and, more nebulously, Linda) in predicting the

mandate will be considered (i.e. the AIJA argument discarded) on its merits, and the mandate will survive by either a solid 6-3 or 7-2 vote. There is one caveat to that, however. I have long maintained John Roberts will never be the fifth, and swing, vote to uphold the mandate/Obamacare by a narrow split of 5-4. If it comes down to that, Tony Kennedy would have had to have thrown in with the conservatives, and Roberts will never be the swing, nor would Alito or Scalia. But, if Kennedy goes with the liberal bloc, so that 5-4 is already there, Roberts will sign on to make it 6-3 and there might even be one more that signs up to make it 7-2. So, Obamacare either wins by 6-3 or 7-2, or loses by 5-4, and I think the former. You heard it here.

Now, I want to explain why, at least in my eyes, the mandate is no slam dunk and why I think even my friends on the liberal side are perhaps a little rah rahed and puffered on how awesomely clear cut the mandate is. In that regard, a couple of examples of just how important the mandate consideration is, because of how largely writ it can be extrapolated out, should be considered.

The first analogy comes courtesy of David Bernstein at Volokh:

> But let's say the Federal government decided to pass legislation, modeled on longstanding state laws, requiring all residents of the United States to attend school until age 18 or face [some penalty—a fine, or being drafted into "national service" or whatever]. A resident of a state where schooling is only mandatory until age 16 sues, claiming that this is beyond Congress's enumerated powers.
>
> The government claims that it has the authority under its Commerce power to require school attendance. After all, not only is education is a huge percentage of the American economy, the

> federal government already regulates the education market to a substantial degree and spends tens of billions of dollars annually for education, money that will to some extent be wasted if children don't continue their education at least through high school. Thus, it's both necessary and proper that the government impose an education mandate to ensure that it's education policies will be successful.
>
> To the argument that a sixteen year old dropout isn't engaged in economic activity, the government argues that staying out of school is itself an economic activity, because, among other things, it reduces the amount of federal and state aid to one's school, makes one less marketable in the employment market, reallocates resources that would otherwise be spend on the dropout's education, and makes it more likely that one will need to spend money on education in the future. Moreover, no one is really "out" of the education market, because everyone is learning things all the time, whether from t.v., one's friends, Facebook, or formal schooling. Finally, by dropping out of school, a sixteen year old is raising the expected costs to the government and society of future crime, welfare payments, and the like.
>
> Anyone think the government should win?

Actually David, yeah I wouldn't have a real problem with that. As a sage friend related to me this morning, there is a direct correlation between a nation's ability to compete in a world market and the level of education provided to it's citizens. Citizens with less, or poorer, education harm the entire nation – it's welfare, it's defense, its very liberties and it's ability to defend itself against threats and enemies, foreign and domestic. I think that is

exactly right; if you accept the individual mandate is constitutionally agreeable, it would be hard to see how you could disagree with an "education mandate".

I would hazard a guess, contrary to David Bernstein's point, most liberals, and maybe even many from the right, might have no problem with mandatory education as a corollary act to the healthcare mandate under the Commerce/Necessary & Proper Clauses (though they may, of course, want vouchers and church school subsidization).

Problem is, the analogies can get harder. Much harder. Let's try this one of my own construct:

> Guns and armament are necessary for the national defense, as is a strong and robust domestic weapons industry. It is important to not only encourage adequate arming of the citizenry for protection from terrorists and foreign agents, but to also encourage the manufacturing capability here in the homeland.
>
> Ergo, every citizen, regardless of their age, shall from here forward be mandated to buy a gun (parents will be in charge of, and responsible for, the guns on behalf of the minors until they reach the age of majority). You will, of course, be able to opt out and pay a $750.00 per person, per year, tax penalty for not complying with the mandatory gun purchase and ownership.

You okay with this one too? If so, is there any mandatory purchase legislation you would not be okay with? What would be the threshold discrimination for a compelled commerce purchase law that would *not* be appropriate to you be then?

The question of whether one believes there is any limit whatsoever on the commerce power of Congress, and whether that is a good or bad thing, exists irrespective of SCOTUS, at least until they rule on this ACA extravaganza. This

stuff matters. A lot. I personally find the analogies extremely useful to explore just how committed people are to the political blarney that has been casually cast about as legal argument on this issue – by both sides.

Are the liberal proponents of the mandate, who bellow "it is absurd to even question the issue, obviously the mandate is within the Commerce power!" really willing to follow the import and implication of their arguments out to their conclusion?

Are the conservative opponents of the mandate, who screech "this is unprecedented, and of course Article III courts have the innate power and authority to ban a facially valid law of Congress under the Commerce/Necessary and Proper Clauses!" really willing to accept that authority, control and micromanagement of Article I Congressional will by the Article III courts? Because that is not exactly what they normally say.

There is actually a bit of a paradox in both side's positions vis a vis their normal views; liberals usually accept more control and regulation by courts on Congressional action as a check and balance, conservatives usually vehemently argue courts have no such proper role.

This is about far more than Obama's questionably cobbled together ACA law; the law is inane in how it soaks Americans to benefit craven insurance companies. Either way, sooner or later, healthcare as constructed and/or mandated by the ACA will die a painful death, but will continue to decimate American families for years, irrespective of the ruling by the Supreme Court on its nominal constitutionality. At some point, single payer, such as "Medicare For All" is inevitable.

However, the pervasive effects of the Commerce/Necessary & Proper Clause determination on the individual mandate, caused by the nightmarishly cobbled together Obamacare, will

shape the direction of the Supreme Court in relation to commerce, business interests and, indeed, potentially American life across the board, for decades, if not lifetimes, to come.

That is what is at stake this week. Yes, it is *that* big. No, it is not *that* easy or clear cut. I do not know how it all sorts out for sure, but I do I do think, unlike the vast majority of the political commentators opining in the ether, the Supreme Court understands the consequences for the long run and the gravity of what they are considering. That said, it is still a very political decision for the Supreme beings, and how they calculate that, vis a vis history, is anybody's guess.

One thing IS certain, when the dust has settled, one side will say the Supremes are beautiful minds, and the other will say they are craven activist tyrants. That is life in the modern Article III existence. Game on!