2019

*Texas v United States: The Affordable Care Act Is Constitutional and Will Remain So*

Lawrence O. Gostin  
*Georgetown University Law Center, gostin@law.georgetown.edu*

This paper can be downloaded free of charge from:  
https://scholarship.law.georgetown.edu/facpub/2123  
https://ssrn.com/abstract=3317124

JAMA. Published online January 9, 2019.

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub  
Part of the [Constitutional Law Commons](https://scholarship.law.georgetown.edu/facpub), and the [Health Law and Policy Commons](https://scholarship.law.georgetown.edu/facpub)
On December 14, 2018, in a widely reported decision, a federal judge in Texas ruled that the entire Affordable Care Act (ACA) is unconstitutional. The judge reasoned that since the ACA’s “individual mandate” is unconstitutional, the rest of the law cannot stand without it. However, the ACA will remain in place pending appeal, and it is highly unlikely that this ruling will stand.

The ACA in 2010 created an individual mandate to expand health insurance coverage, along with Medicaid expansion and subsidies for moderate and low-income households. The mandate required most Americans to maintain “minimum essential” coverage, enforced through a “shared responsibility payment” in the form of a tax. The Supreme Court in National Federation of Independent Business v Sebelius (2012) upheld the individual mandate as within Congress’ power to tax. (It rejected the commerce power as a constitutional justification for the mandate.)

Challenging the Individual Mandate

In December 2017, Congress enacted the Tax Cuts and Jobs Act, which reduced the tax penalty to $0. That action effectively eliminated the individual mandate. Thereafter, 18 Republican state attorneys general and 2 GOP governors challenged the constitutionality of the individual mandate. They went further, urging the court to strike down the entire ACA, including 2 pivotal, highly popular reforms: “guaranteed-issue” (insurers must cover all applicants, irrespective of preexisting conditions) and “community-rating” (insurers cannot charge individuals higher premiums based on their health status).

Usually, the administration defends existing law, but in an unusual move, the Department of Justice declined to fully defend the ACA. Instead it argued that the court should invalidate the preexisting condition protections. It argued that “guaranteed-issue” was so closely tied to the individual mandate that both should be overturned. Several distinguished career Department of Justice attorneys refused to make that argument, which has been described by some legal experts as “frivolous.”

Texas, which led the states’ challenge to the ACA, appeared to “forum shop,” choosing a conservative judge in Texas who had previously ruled against the ACA. On December 14, in Texas v United States, Judge Reed C. O’Connor invalidated the entire ACA but did not issue an injunction; the law remains in place pending appeal. Judge O’Connor ruled the individual mandate is unconstitutional without the tax penalty. That much virtually all legal scholars agree on because it follows Chief Justice Robert’s constitutional reasoning in 2012.

That is, the mandate cannot be based on Congress’s taxing power when Congress has, in effect, removed the tax. However, Judge O’Connor went on to rule that all the ACA must fall, because the act’s provisions are inextricably linked to the mandate.

The case turns on the legal doctrine of “severability.” If one provision in a law is deemed unconstitutional, should the rest of that law remain intact? A “severable” statute remains self-sustaining and capable of enforcement even if one or more of its provisions have been struck down. The courts look to Congress’s intent to determine if a law is “severable” from its unconstitutional provision. That is where Judge O’Connor’s opinion falls apart—a view taken by prominent legal scholars on both sides of the political divide.

From a legal perspective, finding the ACA severable from the tax penalty isn’t a hard question. When Congress originally enacted the ACA, it didn’t consider whether a $0 tax would be severable from the act itself. It couldn’t have expressed any intent on that question because it would not have foreseen that a future Congress would lower the tax penalty to $0. Moreover, the courts have made very clear that a future Congress is perfectly free to amend any decisions by a previous Congress. In other words, Congress was fully entitled to eliminate the tax penalty for the individual mandate in the 2017 tax bill, while keeping the rest of the law intact.

That is exactly what Congress decided in the Tax Cuts and Jobs Act. In that Act, Congress had the opportunity to fully repeal the ACA, but explicitly declined to do so. Instead, Congress took the relatively modest action of reducing the tax penalty to $0, while leaving the rest of the ACA in place. Congress in 2017 repealed the individual mandate because it deemed it unfair and coercive. But it manifestly did not believe, or say, that the rest of the Act should fall. Eliminating the mandate was all Congress did, no more, no less.

Legislative Intent

Thus, it was certainly Congress’s legislative intent to “sever” the individual mandate from all the other parts of the act. Indeed, the legislative history demonstrates how widely popular preexisting conditions protections were, not only with the public, but also with lawmakers. In the run-up to the midterm elections, Congress specifically did not seek to overturn an entitlement that has overwhelming electoral support. If Congress had desired to remove affordable health coverage for individuals with preexisting conditions, it would have said so.

Members of Congress did not want to go to their constituents with the position that health insurers could lawfully decline to cover or could charge exorbitant rates to individuals who are or have been sick, such as persons living with cancer or cardiovascular disease.
And here is another reason why *Texas v United States* is out of step with judicial precedent and commonsense reasoning. By tradition, judges must make every effort to uphold the will of the elected legislature. This means upholding duly enacted statutes unless they are clearly unconstitutional. In this case, Congress not just desired but affirmatively acted to keep the ACA in place. After all, Congress tried 70 times to repeal the ACA, failing each time.

*Texas v United States* was decided just as ACA’s open enrollment period was about to end in most states. The case might cast a doubt on the ACA’s future in the public’s mind, dampening final-stage enrollment. That conclusion would be unwarranted. The ACA will remain in place pending appeal.

The case will certainly be appealed, and the outcome is virtually assured. If Congress wishes to repeal the ACA, it is certainly free to do so. But lacking the votes for repeal, it is unrealistic to think the Supreme Court will invalidate the law on constitutional grounds. There may perhaps be as many as 4 highly conservative votes in the Court to find parts, or all, of the ACA unconstitutional, but a majority will not do so. In fact, if *Texas v United States* does find its way to the Supreme Court, I predict a solid court majority will find the law severable, and thus constitutional.

President Trump will certainly continue to chip away at vital ACA protections, and the electorate in the 2020 elections will assess the merits of that choice. But don’t expect the judiciary to act as a super-legislature. It is not going to repeal the edifice of the ACA, with all its highly popular protections.

**Author Affiliation:** University Professor and Faculty Director, O’Neill Institute for National and Global Health Law, Georgetown University Law Center, Washington, DC.

**Corresponding Author:** Lawrence O. Gostin, JD (gostin@law.georgetown.edu).

**Published Online:** December 17, 2018, at https://newsatjama.jama.com/category/the-jama-forum/.

**Disclaimer:** Each entry in The JAMA Forum expresses the opinions of the author but does not necessarily reflect the views or opinions of JAMA, the editorial staff, or the American Medical Association.

**Additional Information:** Information about The JAMA Forum, including disclosures of potential conflicts of interest, is available at https://newsatjama.jama.com/about/.

**Note:** Source references are available through embedded hyperlinks in the article text online.