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# The future of Obamacare after 2 years of Trump: Did tax 'reform' kill the Affordable Care Act?

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**APRIL 5, 2019**

Nine years have passed since the Patient Protection and Affordable Care Act was signed into law March 23, 2010. During that time, the ACA has enabled more than 20 million Americans who either could not afford health insurance or were unable to purchase insurance due to pre-existing conditions to obtain health insurance.

However, the ACA's legal future — and the well-being of those 20 million Americans — has never been fully secure. The U.S. Supreme Court's decision to reject a constitutional challenge to the statute in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566 (2012), did not stop litigation challenging the Obama administration's implementation of the law. Moreover, the Republican Party's capture of both the legislative and executive branches of government in the 2016 election accelerated attempts to undermine the statute.

While the late Sen. John McCain's now-famous thumbs-down blocked Republican efforts to repeal the law in its entirety, the ACA still faces existential threats in the courts.

As 2018 drew to a close, attorneys general in states controlled by the Republican Party, with the support of the Trump administration, convinced a federal judge in Texas that an obscure provision in the Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 State 2054 (2017), is effectively a Trojan horse that renders the entire ACA unconstitutional. This commentary examines the court's decision in that case, which has been appealed.

## IS THE TCJA THE POISON PILL THAT KILLED THE ACA?

The reluctance of politicians to mention taxes is a principal reason why Congress enacted the ACA in lieu of relatively simple proposals for an automatic enrollment, Medicare-for-all, single government payor health insurance system.

Unlike previous Democratic proposals, the ACA builds on the structure of the private health insurance industry, requires all Americans to take personal responsibility for their health care by obtaining insurance, and relies, in part, on market forces to lower the price of health insurance.

To ensure a sufficiently large and broad risk pool to support its "anti-discrimination" provisions, which require health insurers to issue insurance to all applicants at prices that do not discriminate against the sick, the ACA contains two mandates: the employer mandate, which requires employers with at least 50 employees to offer employees acceptable health insurance or pay a penalty; and the individual mandate, which requires most Americans to maintain "minimum essential" health insurance coverage.

Beginning in 2014, those who did not comply with the mandate were required to make a "shared responsibility payment" to the federal government. The ACA describes the shared responsibility payment as a "penalty." The ACA's Democratic proponents scrupulously avoided mentioning the "T" word or invoking the taxing power during the debate leading to the ACA's passage.

Given this background, the Supreme Court's 2012 decision in to uphold the individual mandate under Congress' taxing power, rather than its power to regulate interstate commerce, took many by surprise. *Nat'l Fed'n of Independent Bus. v. Sebelius*, 567 U.S. 519 (2012).

> The 2017 Congress eliminated the Affordable Care Act's only mechanism for enforcing the individual mandate but kept the rest of the ACA in place because it did not have the votes to repeal any part of it.

In a remarkable lead opinion, Chief Justice John Roberts joined forces with the four "liberal" justices — Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan — to uphold most of the ACA under Congress' taxing power on the ground that the shared responsibility payment was a tax.

However, in 2017, without repealing the individual mandate or changing a word of the ACA, Congress reduced the amount of the shared responsibility payment to "zero percent" and "$0,"effective Jan. 1, 2019, in Section 11081(a) of the TCJA.

Given that the only basis the Supreme Court could find for upholding the individual mandate in *Sebelius* was Congress' taxing power under Article I, § 8, clause 3 of the Constitution, opponents of the ACA began to argue that the TCJA removed the ACA's constitutional underpinnings.

They maintained that Congress' repeal of the only "tax" the Supreme Court invoked in upholding the individual mandate

effectively repealed the entire statute — accomplishing what a Republican-controlled Congress had failed to accomplish in numerous attempts during the second Obama administration and the first two years of the Trump administration.

U.S. District Judge Reed O'Connor of the Northern District of Texas, appointed by President George W. Bush, agreed, holding Dec. 18 that the repeal of the penalty in the TCJA "sawed off the last leg [the ACA] stood on." *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018).

Moreover, reasoning that the ACA itself characterizes the individual mandate as "essential" to the ACA, Judge O'Connor concluded that the mandate is inseverable and thus renders the entire law invalid.

Judge O'Connor's decision has been stayed pending appeal to the 5th U.S. Circuit Court of Appeals.

## CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE ABSENT A PENALTY

Unlike the Supreme Court in *Sebelius*, which focused on how the individual mandate and the shared responsibility payment function together, Judge O'Connor drew a clear distinction between the two and concluded that the reduction of the shared responsibility payment to zero in the TCJA precluded invocation of Congress' taxing power to support the mandate.

The court reasoned that the individual mandate, standing alone, cannot be construed as a tax under the criteria set forth by Chief Justice Roberts in *Sebelius*. According to the chief justice, the "essential feature of any tax" is that "it produces at least some revenue for the government."

Other criteria include whether the exaction is paid into the Treasury, whether the payment requirement is set forth in the Internal Revenue Code, and whether the amount paid is determined by "familiar factors" such as income — and assessed and collected in the same manner as taxes.

Judge O'Connor determined that "only one of those factors applies to the individual mandate, Section 5000A(a): it is in the Internal Revenue Code."

An issue on appeal will be whether the individual mandate can be sustained as an exercise of Congress' taxing power because it will continue to trigger revenue from the shared responsibility payment for years to come as the IRS collects taxes for the years 2014-2018 (when the penalty for failing to comply was higher than zero).

Judge O'Connor acknowledged the likelihood that the penalty would continue to produce revenue but deemed that revenue irrelevant. The relevant time frame for determining whether the shared responsibility payment produced revenue, he explained, was the year in which it was assessed, not the year in which it was paid.

He pointed out that the plaintiffs did not challenge enforcement of the individual mandate between 2014 and 2018, but only after the penalty was reduced to zero Jan. 1, 2019.

Another issue will be whether production of "some revenue" is a necessary element of a tax for purposes of invoking the taxing power. The 5th Circuit, in *United States v. Ardoin*, recognized that a statute's "preserved, but unused, power to tax" is a legitimate use of the taxing power regardless of whether the statute raises any revenue for the government.[1]

Arguably, Congress preserved the power to tax for failure to purchase insurance in the TCJA. After all, Section 11081(a) of that law leaves in place both the individual mandate and the shared responsibility payment — it only reduces the amount of that payment to zero.

Defenders of Judge O'Connor's ruling are likely to argue that *Ardoin* is distinguishable. There, the amount of the tax at issue was greater than zero but the government did not enforce the tax in light of later legislation.

> The Supreme Court has counseled against treating the tainted portion of a statute as inseparable from other parts of the statute unless it is "evident" that Congress would have done so.

It also remains to be seen whether *Ardoin* remains good law after Sebelius. It is unclear whether the Supreme Court treated revenue generation as sine qua non of a tax or merely one of several factors to consider.

## SEVERABILITY OF THE INDIVIDUAL MANDATE

If Judge O'Connor had stopped after ruling that the individual mandate no longer has a constitutional basis because it can no longer be enforced as a tax, his decision would have little consequence because the TCJA renders the mandate unenforceable after Jan. 1, 2019.

But Judge O'Connor also held that the individual mandate is inseverable from the ACA and therefore the rest of the ACA must fall with it. He reasoned that the individual mandate is so integral to the ACA that the rest of the statute cannot operate without it.

Judge O'Connor purported to base his severability ruling on the intent of both the 2010 Congress that passed the ACA and the 2017 Congress that passed the TCJA, but he relied primarily on the intent of the 2010 Congress. He divined the 2010 Congress' intent to kill the entire ACA if the individual mandate were ever invalidated from what he described as "unambiguous text, Supreme Court guidance and historical context."

## INTENT OF THE 2010 CONGRESS

The text of the ACA to which Judge O'Connor referred is found largely in 42 U.S.C.A. § 18091, which is titled "Requirement to maintain minimum essential coverage; findings." Among the codified findings is that the mandate "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold."

Judge O'Connor treated the findings in Section 18091 as "unequivocal" evidence of Congress' intent to make the individual mandate inseverable from the rest of the ACA. Relying on language in a 1987 Supreme Court opinion, he reasoned that the mandate is inseverable because a mandate-free ACA "is incapable of functioning independently."[2]

In so doing, Judge O'Connor ignored the limited nature of the findings in Section 18091. Congress' findings relate only to the ACA's health insurance provisions. They do not address, for example, the ACA's provisions related to Medicaid, Medicare, the Food and Drug Administration, or public health. The same is true of the Supreme Court guidance on which Judge O'Connor relies, which largely reiterates Congress' findings in Section 18091.

Finally, the "historical context" to which Judge O'Connor refers is the experience of states that in the 1990s imposed a "guaranteed issue" requirement for people with pre-existing conditions without mandating the purchase of insurance.

The result was a phenomenon known as "adverse selection," meaning that insureds would forgo buying coverage until they were sick. The adverse selection would result in less healthy risk pools for insurers, which would in turn create a death spiral of higher costs for insurers and higher premiums for policyholders.

Judge O'Connor, however, ignores the reality that we have faced this scenario since Congress passed the TCJA in 2017. The "death spiral" conjured up by Judge O'Connor simply has not materialized. In fact, quite the opposite has occurred. The marketplaces are at perhaps their most stable point, there has been a slight drop in nationwide average benchmark premiums, and fewer areas of the country have only one insurer.

## INTENT OF THE 2017 CONGRESS

Judge O'Connor described looking for any severability-related intent of the 2017 Congress as "a fool's errand" because the 2017 Congress did not repeal any part of the ACA — it merely reduced the shared responsibility payment to zero.

Rather than infer an intent to leave the ACA intact from Congress' inaction, Judge O'Connor observed that the 2017 Congress did not repeal the ACA because it could not do so through the budget reconciliation procedures it used to eliminate the penalty for failing to comply with the mandate. He noted that the 2017 Congress "must have agreed" that the individual mandate was "essential to the ACA."

Simply put, Judge O'Connor's ruling effectively deprives the 2017 Congress — the only Congress that eliminated the penalty and therefore the only Congress whose intent is relevant — of the right to amend a statute based on a highly problematic analysis of what he believes the prior Congress that enacted the statute intended.

The judge ignores the fact that the 2017 Congress, not his ruling and not the 2010 Congress, eliminated the ACA's only mechanism for enforcing the individual mandate and nevertheless kept the rest of the ACA in place because it did not have the votes to repeal any part of the ACA.

## IMPLICATIONS

Judge O'Connor's severability opinion is a truly radical departure from the traditional view of the constitutional separation of powers, under which the judiciary is considered the "least dangerous branch."[3]

He strikes down a statute that is now part of the fabric of the American health care system despite admitting "it is impossible to know" which provisions Congress would have enacted absent the individual mandate. He clearly does not like the ACA, and he made no attempt to preserve the remainder of the law once he found the mandate unconstitutional.

The chief problem with Judge O'Connor's analysis is that it is completely at odds with the Supreme Court's guidance on the jurisprudence of severability in general and the significance of severability clauses in particular. The Supreme Court has counseled against treating the tainted portion of a statute as inseparable from other parts of the statute unless it is "evident" that Congress would have done so.[4]

Even a cursory review of the ACA reveals many provisions that Congress could have enacted without the individual mandate. Indeed, many ACA provisions originally were proposed as stand-alone legislation.

Moreover, many of the statute's provisions were already active when the individual mandate went into effect, and functioned independently of the minimum coverage provision. Many of those provisions bear absolutely no relation to the individual mandate.

This is also true of many of the ACA's core insurance reforms. For example, the act's health insurance exchange provisions do not depend on the mandate to operate as "organized and transparent marketplace[s] for the purchase of health insurance where individuals and employers ... can shop and compare health insurance options." The same can be said about the requirement that health plans offer a minimum level of "essential health benefits."

Two provisions — the guaranteed issue requirement and the community rating requirement[5] — will stand on shakier ground once the individual mandate is invalidated. This is partly because the Obama administration made the tactical decision not to defend these provisions of the ACA if the mandate was struck down before the Supreme Court in Sebelius. The administration conceded before the Supreme Court that the guaranteed issue and community rating provisions are inseverable from the mandate and must fall if the mandate falls.

Whether the guaranteed issue and community rating provisions are inseverable depends on the severity of the adverse selection problem and its effect on the cost of insurance under an ACA without an individual mandate. This depends on how critical the mandate is to reducing the population of people without insurance under the ACA. The requirement that employers provide their employees with coverage, which remains in effect, will add to the pool of insureds.

In addition, the subsidies available to people who cannot now afford insurance and the opportunity to purchase insurance in a more competitive environment on the exchanges should entice and encourage people who formerly did not buy insurance to become insured.

And the ACA's allowance for special open enrollment periods removes some of the incentive for adverse selection. The special enrollment period provisions allow insurers to restrict enrollment of new policyholders to specified times of the year. If the uninsured choose to forgo enrollment during the specified period, they must bear the risk of illnesses or injury suffered before the next enrollment period and thus will be less likely to take a wait-and-see approach to purchasing.

So courts may find that Congress has already addressed the so-called death spiral of adverse selection and increased premiums that might result from invalidation of the mandate and allow the guaranteed issue provisions to stand.

## WHAT'S NEXT

On Dec. 30, 2018, Judge O'Connor issued a stay and partial final judgment in *Texas v. United States*. The Trump administration chose not to defend the ACA before Judge O'Connor or to appeal his ruling. Consequently, Democratic state attorneys general from 16 states intervened and appealed the ruling to the 5th Circuit in early January.

On Feb. 14 the circuit court allowed the U.S. House of Representatives and attorneys general from four more states to intervene to challenge Judge O'Connor's ruling.

On March 25, the Justice Department filed a two-sentence letter with the circuit court, backing Judge O'Connor's decision that the entire ACA is unconstitutional.

A decision is expected this summer.

## NOTES

[1] *United States v. Ardoin,* 19 F.3d 177 (5th Cir. 1994) (emphasis added).

[2] 340 F. Supp. at 606, *quoting Alaska Airlines Inc. v. Brock,* 107 S. Ct. 1476 (1987).

[3] Federalist # 78, Alexander Hamilton, "The Judiciary Department," The Independent Journal, June 14, 1788. See also Alexander Bickel, The Supreme Court at the Bar of Politics, (Yale University Press 1986).

[4] 130 S. Ct. at 3161-3162.

[5] The guaranteed issue requirement bars insurers from denying coverage to any person because of his or health. The "community rating" requirement bars insurers from charging a person higher premiums for the same reason.

## ABOUT THE AUTHOR

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