Anticipating Another Supreme Court Test for the Affordable Care Act

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When the U.S. Supreme Court validated the Patient Protection and Affordable Care Act (ACA) in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012) (*NFIB*), the common belief was that the controversy over the constitutionality of the nation's health insurance law was at an end. There the majority concluded that the so-called individual mandate, a statute which commanded taxpayers to purchase health insurance or pay a penalty, was a proper exercise of Congress' power to tax, notwithstanding that the High Court condemned the proviso as a violation of the Commerce Clause. Few contemplated what might happen if the exaction enforcing the individual mandate was ever removed.

That question is now upon us. In *Texas v. U.S.*, ___ F.Supp.2d ___ (No. 18-cv-00167) (N.D. Tex.) (Dec. 14, 2018) (*Texas*), a federal district judge has ruled that when Congress abrogated the individual mandate's penalty, it rendered all of ACA unconstitutional. With the expectation that this holding shall eventually reach the Supreme Court, this article is purposed to view *Texas* in light of the constitutional principles it implicates, and which are expected to be of overriding interest to the justices.

The instant controversy pitted the named plaintiff, 18 other jurisdictions, and a few taxpayers against the federal government, and, more so, states supporting ACA's continued vitality. The complaining parties reminded that the majority in *NFIB* concluded that since the individual mandate "established a condition—not owning health insurance—that triggers a tax," the statute could fairly be read as an exercise of Congress' tax power. See *NFIB*, 567 U.S. at 563. See also U.S. Const., Art. I, §8, cl. 1. Therefore, the plaintiffs argued, when the lawmakers eliminated that same exaction via the Tax Cuts and Jobs Act of 2017, Congress demolished ACA's sole ground of constitutionality.

No Tax Means No Constitutionality

District Judge Reed O'Connor commenced his analysis from that point, and declared himself in accord with the complaining parties. The trial court related that, as first enacted, the individual mandate imposed a penalty calculated as the greater of $695 or 2.5 per cent of household income upon anyone who failed to procure a minimum of health insurance coverage.

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Without question, said the district bench, this was a true exercise of the Taxing Power, for reason that it met the three basic characteristics of a tax, as identified in *NFIB*: it is paid into the U.S. Treasury when taxpayers file their returns; it is calculated upon "familiar factors," such as taxable income, dependents, and filing status; the penalty is set out in the Internal Revenue Code; and it is enforced by the IRS. Above all else, the exaction generates revenue for the federal government. See *NFIB*, 567 U.S. at 563-64.

But the 2017 revisions reduced both the fixed dollar sanction and the percentage assessment to zero. The district court concluded that a tax of zero is no longer an exercise of the Article I power, and thus the constitutional justification for the individual mandate had ceased to exist. Judge O'Connor penned a pithy metaphor; the exaction was the high tide lifting ACA to constitutionality; absent the penalty, "the tide has gone out."

No Reprieve under The Commerce Clause

Next, the trial court turned to the plea of ACA's supporters to conduct a renewed Commerce Clause analysis, notwithstanding that the majority in *NFIB* had concluded the individual mandate transgressed the limits of Article I. The defendants in the case at bar alleged that, stripped of its tax, this acknowledged keystone to the health insurance law was now a statute which regulated nothing.

And so, the defendants rationalized, the individual mandate could not possibly overstep the boundaries of the Commerce Clause, as established by the high Court in *NFIB*. The *Texas* bench flatly rejected this novel interpretation.

First, said O'Connor, there is the matter of plain meaning in statutory construction. It does violence to the meaning of the word "regulate" to claim that the individual mandate was now a nullity, simply because Congress had absolved taxpayers of the associated penalty. Even *sans* the exaction, the statute persists in compelling the procurement of health insurance, precisely the reason the Supreme Court found the mandate in violation of Article I's constraints.

Second, the *Texas* court found the defendants' contention that the individual mandate was completely neutralized contravened the evidence adduced at the bench trial. Various of the individual plaintiffs had testified they were still bound by the statute's insistence that they participate in commerce by purchasing an essential minimum of health insurance. O'Connor found ACA's supporters guilty of "logical gymnastics" in their » Page 8

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Care Act

« Continued from page 4

effort to reclassify the individual mandate as extraneous.

Last in this triad of its Commerce Clause scrutiny, the trial court implicated not only separation of powers, but notions of judicial restraint as well. Invoking the constraints of the doctrine of surplusage, O'Connor proclaimed that it is impermissible for courts to add or subtract from legislation; rather, their task to give effect to the whole. To ignore the individual mandate, as ACA's supporters now propose, would violate that precept. Thus, the trial bench found no reason to adopt the defendants' position that the individual mandate was now inoperative, and therefore no longer violated the limits of Article I, as defined in *NFIB*.

Severability

Finally, the trial court was asked if the offending individual mandate could be severed, leaving the bulk of ACA unscathed. Responding in the negative, the *Texas* court explained its rationale for ousting the entire statutory text.

Severability, O'Connor noted, is rooted in separation of powers. In order to avoid intruding upon the domain of the legislative branch, courts should refrain from excising more of a statute than is strictly necessary. Similarly, if invalidating some portion of an enactment alters the workings of the whole, then the entire text must be expunged. Otherwise, jurists become the authors of law, and not its interpreters.

In the instant case, the *Texas* bench counted well over a dozen instances where Congress proclaimed that the individual mandate was essential to the health insurance enactment, and ACA could not function "as intended" without it. Such assertions preordained the trial judge's holding herein.

Declining to usurp the lawmakers' oft-stated views, the lower court concluded that to extract of being severed, the *Texas* court declared the entire statutory text unconstitutional.

Supreme Court Review Warranted

We have, to this point, strictly delimited this overview to matters of constitutional law. Yet this synthesis would be incomplete without some discussion of the imperatives of public policy and economics, as revealed in the trial court's opinion.

As noted by Judge O'Connor, Congress intended to reshape the health care industry by compelling many more individuals to purchase health insurance. This would greatly expand the insurance sector's customer base, reallocate risk, lower premiums, and soften the entry of insureds with pre-existing conditions into a more efficient market.

Yet most, if not all, of this exquisitely interlocking scheme was dependent upon the validity of the individual mandate. Absent its compulsion to purchase health care insurance, most likely health care providers and insurers would suffer from billions of dollars in additional costs, without the offset of new and healthier customers. This would reignite the very ills ACA was intended to remedy.

Much like the *Texas* court, we are left to ponder these extrajudicial matters, which might very well factor into the calculus of a reviewing court. In our estimation, the magnitude of such concerns justifies not only appellate consideration, but, ultimately, examination by the Supreme Court itself.

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Conclusion

Texas is best analyzed in light of the constitutional precepts which it implicates. First, there is separation of powers. Article I grants Congress the power to, among other things, levy taxes and regulate interstate commerce. The former was the sole reason the Supreme Court held ACA constitutional in *NFIB*.

In the case at hand, the lower court properly found that when Congress eradicated the tax associated with the individual mandate, the exercise of the Taxing Power was no more. Deprived of its exaction, the law ceased to be valid pursuant to that subpart of Article I.

Next, the lower court found that, even without its associated tax, the individual mandate still purported to regulate. And since Article I delimits Congress to regulating commerce, not compelling participation therein, there was no reason to alter *NFIB*'s declarations on that point.

Finally, separation of powers also prohibits the judiciary from writing the law. When the *Texas* court found that the lawmakers, by their own words, had elevated the individual mandate to a level where severance from the rest of ACA was impossible, the lower court properly refused to reconstitute Congress' vision. It thus declared the entirety of the health insurance law unconstitutional, and left the rest to the Article I branch.

In closing, the constitutional aspects of *Texas* are self-evident. That is why we hope for eventual review by the Supreme Court, for only the high bench can authoritatively resolve such solemn matters. Moreover, it will be interesting to witness if the next iteration of *Texas* closely resembles *NFIB* or charts a different course.