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Justices ask tough questions on health care law

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An artist's sketch depicts Paul Clement, himself a former U.S. solicitor general, arguing against President Barack Obama's health insurance law before the U.S. Supreme Court on Tuesday. Clement suggested the law would be analogous to the government compelling its citizens to deposit their money in a government-established bank.



Nicole Bengiveno/THE NEW YORK TIMES

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Supporters and opponents of the health care law demonstrate Tuesday at the Supreme Court. Arguments today will focus on whether the law could stand without the insurance mandate.

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By Adam Liptak
THE NEW YORK TIMES

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WASHINGTON — With the fate of President Barack Obama's health care law hanging in the balance, a lawyer for the administration faced a barrage of skeptical questions Tuesday from four of the Supreme Court's more conservative justices, suggesting that a 5-to-4 decision to strike down the law was a real possibility.

Predicting the result in any Supreme Court case is nothing like a science, and the case could still turn in various directions. But the tough questioning by several of the justices Tuesday indicated that the heart of the health care law is in peril.

The court's decision is expected by June, and much may change as the justices deliberate and exchange draft opinions in the coming months. If the indications from Tuesday's arguments are correct, though, the court's ultimate decision might undo parts or all of the sweeping overhaul of the health insurance system, deal Obama a political blow in the midst of the presidential election season and revise the constitutional relationship between the federal government and the states.

The tone of Tuesday's arguments made a question to be addressed today in the third and final day all the more important: If the individual mandate requiring most Americans to obtain health care insurance or pay a penalty were to fall, what other parts of the law would fall along with it?

Justice Anthony Kennedy, the court's perennial swing justice, asked a host of questions indicating discomfort with the law during the court's second day of arguments on the constitutionality of the president's signature domestic achievement.

"Can you create commerce in order to regulate it?" Kennedy asked the administration's lawyer, Solicitor General Donald Verrilli, minutes into the argument. Kennedy later told Verrilli that the federal government faced "a heavy burden of justification" and pressed him to articulate "some limits on the commerce clause."

Kennedy's questioning is famously hard to read, and near the end of the argument he noted that "most questions in life are matters of degree." But the weight of his questioning was skeptical.

Justices Antonin Scalia's and Samuel Alito's questions seemed consistently hostile to the law, while Chief Justice John Roberts sounded a little less so.

The conventional view is that the administration will need one of those four justices' support to win, and it was unclear whether it had captured one.

The court's four more liberal members — Justices Ruth Bader

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Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan — indicated that they supported the law, as expected. Justice Clarence Thomas, who asked no questions, is thought likely to vote to strike down the law.

The central legal question for the justices Tuesday was whether Congress had exceeded its constitutional authority to regulate interstate commerce in enacting the insurance mandate.

Verrilli argued that the law was a valid response to a crisis in health care. The individual mandate, he said, merely regulates how people pay for services they are virtually certain to use at some point in their lives and is well within the authority granted to the federal government by the Constitution.

Ginsburg seemed to agree, saying the mandate was a response to the fact that uninsured people receive free health care that ends up being paid for by others. "The problem is that they are making the rest of us pay," she said.

But several of the more conservative justices did not seem convinced. Alito said the market for burial services had features similar to the one for health care. Roberts asked why the government couldn't also require people to buy cellphones to use to call emergency service providers.

Scalia discussed the universal need to eat.

"Everybody has to buy food sooner or later, so you define the market as food," he said. "Therefore, everybody is in the market; therefore, you can make people buy broccoli."

The Supreme Court has read the commerce clause broadly, saying it allows Congress to limit how much wheat may be grown on a family farm and to punish the cultivation of home-grown marijuana.

Breyer said precedents demonstrated that Congress was free to address problems in the delivery of health care.

"I look back into history," he said, "and I see it seems pretty clear that if there are substantial effects on interstate commerce, Congress can act." An example, he said, was "the national bank, which was created out of nothing to create other commerce out of nothing."

Paul Clement, representing Texas and the 25 other states challenging the law, said it is one thing to establish a bank and another "to force the citizenry to put all of their money in the bank."

The second sort of law, Clement suggested, would be analogous to the individual mandate.

Can the federal government force Americans to buy health insurance?

[?]

The Obama administration argues:

■ Mandating that nearly everyone has insurance or pays a penalty falls under the federal government's powers to regulate interstate commerce and collect taxes.

■ The law fixes a crisis in the health care system, which makes up nearly 18 percent of the national economy.

■ Without additional money from healthy people that the insurance mandate would bring in, insurers couldn't reasonably be required to cover everyone, including those who are already sick, at affordable rates.

The law's challengers argue:

■ The health care law is an unconstitutional, unprecedented federal power grab that intrudes on people's liberty.

■ The law doesn't regulate commerce but instead compels people to buy something – health insurance – whether they use it or not.

■ The penalty for not buying insurance isn't what was envisioned for the Constitution in permitting federal taxes.

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