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Recommended Citation

Bagley, Nicholas. "Is Obamacare Really Unconstitutional?" *New Eng. J. Med.* 382, no. 5 (2020): 400-1.

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Is Obamacare Really Unconstitutional?

Nicholas Bagley, J.D.

On December 18, 2019, just 3 days after the close of open enrollment on the exchanges and on the same day the House of Representatives impeached President Donald Trump, a conservative appeals court handed the President a major victory in his crusade against the Affordable Care Act (ACA). Over a stern dissent, the U.S. Court of Appeals for the Fifth Circuit declared that the law's individual mandate is unconstitutional and that the entire rest of the law might therefore be invalid.

The full consequences of the ruling are not yet clear. Instead of deciding for itself how much or how little of the ACA could stand, the appeals court asked the Texas judge who originally decided the case to take a second look at the question. In the meantime, a consortium of Democrat-led states may ask the Supreme Court to intervene. But it's by no means assured that the Court will take up the invitation.

We're in for a long period of uncertainty, and it's unlikely that we'll know the fate of the ACA before the 2020 election. At risk are the law's protections for people with preexisting conditions, its prohibitions on abusive insurance practices, the Medicaid ex-

pansion, subsidies for private coverage, and much more. And whether the law survives this latest brush with death may depend on whether Trump secures a second term in office.

The lawsuit arose out of congressional Republicans' failure to repeal the ACA after Trump's election. They didn't have the votes for that, but they did have enough to eliminate the ACA's penalty for going without insurance. At the time, Trump crowed that "the very unfair and unpopular Individual Mandate has been terminated."¹

The Fifth Circuit, however, saw matters differently. For the court, it was constitutionally significant that Congress, when it repealed the penalty, hadn't actually repealed the part of the law that says that people "shall" buy insurance. The instruction was still on the books, though it was now completely unenforceable.

Why did that matter? Back in 2012, the Supreme Court held that the individual mandate would be unconstitutional if that "shall" were read as a command.² Congress didn't have the power to force people to buy insurance. But the Supreme Court reasoned that "shall" didn't have to be read as a command. To avoid consti-

tutional difficulties, the Court read the ACA as imposing a tax: either buy insurance or pay a penalty. You've got a choice. Since Congress undeniably has the power to levy taxes, the individual mandate — that "shall" language — was perfectly constitutional.

Once Congress wiped out the penalty, however, the law looked less like a tax: after all, it would no longer raise any revenue. And so the Fifth Circuit said that the only way to read "shall" is as a coercive command — the sort of law that, under the Supreme Court's 2012 decision, is unconstitutional.

Lawyers of all political stripes have derided the court's conclusion. When Congress eliminated the penalty for going without insurance, it made the individual mandate *less* coercive, not more so. And the Supreme Court, in 2012, already interpreted "shall" as affording people "a lawful choice." Congress didn't revisit that conclusion when it eliminated the penalty. The appeals court is bound by the Supreme Court's conclusion, whether it likes it or not.

On its face, too, the decision betrays just how partisan the litigation over the ACA has become. The opinion reports, for exam-

ple, that “some opponents” think “that the entire law was enacted as part of a fraud on the American people.” That kind of gratuitous jab may help to explain why the opinion is so difficult to defend in traditional legal terms. It reads, instead, as an exercise of raw political power.

What does the constitutional holding mean for the rest of the ACA? The judge who first heard the case held that the mandate’s unconstitutionality required the invalidation of the entire ACA — to use the legal jargon, that it could not be “severed” from the rest of the law. In his view, the same Congress that wiped out the tax penalty also believed that the mandate — even without a penalty — was an essential part of the entire law. No part could be saved.

On that, the appeals court disagreed. Severability analysis, it held, requires a court to use a “finer-toothed comb” when reviewing legislation. The court reasoned that parts of the ACA — including, for example, the part requiring chain restaurants to post calorie counts on their menus — don’t have much to do with the mandate at all. They could perhaps be salvaged, even if the mandate is struck down. So the Fifth Circuit sent the case back to the judge and told him to try again. Yet the court offered no guidance about “how fine-toothed that comb should be.” It was even open to the possibility that the judge could reach exactly the same conclusion: “it may still be that none of the ACA is severable from the individual mandate, even after this inquiry is concluded.”

Here, too, the Fifth Circuit’s

decision is difficult to defend. As the dissenting judge wrote, if Congress in 2017 had viewed the mandate “as so essential to the rest of the ACA that it intended the entire statute to rise and fall with the coverage requirement, it is inconceivable that Congress would have declared [it] as it did.” A hortatory instruction to buy insurance can’t be essential to anything.

With that in mind, the Fifth Circuit could simply have struck down the mandate and kept the rest of the ACA intact. Had it done so, the case, for all practical purposes, would be over: no one cares whether an unenforceable instruction to buy insurance remains on the books. Instead, the court sent the case back down to a judge with a partisan reputation who had previously invalidated the entire law. He is likely to make a similarly expansive decision the second time around.

But the process will take time — perhaps another 2 years for the Fifth Circuit to decide the inevitable appeal from the judge’s do-over, followed by another high-stakes Supreme Court case. It’s hard to resist the conclusion that the delay is strategic: declaring all or part of the ACA invalid would probably have been bad for Republicans in the 2020 election. Many parts of the ACA are quite popular, especially the protections for people with preexisting conditions and the Medicaid expansion. Invalidating those parts might have provoked a political backlash. Punting to the district court gives Republicans a little more breathing room.

Unless, of course, the Supreme Court chooses to intervene at this stage. And it might do so: the

validity of the ACA is an issue of national importance, and the Fifth Circuit’s decision is absurd. Plus, it takes only four votes for the Supreme Court to agree to hear a case, and the four liberal justices can probably count on Chief Justice John Roberts, who has twice turned back more substantial challenges to the law and is unlikely to embrace a lawsuit as weak as this one. The liberal justices might opt to hear the case now instead of running the risk that Trump will be reelected and will stack the Court with hard-liners.

That said, the justices generally dislike hearing cases before they’re final. They may be especially disinclined given that the ACA will remain intact during the additional proceedings on severability. Roberts may look like a safe bet, but you never know. And the Court may prefer to avoid such a politically salient case during an election year. Perhaps the more prudent course is to wait.

Regardless, the ACA will have a cloud over it for the foreseeable future. Republicans haven’t been able to repeal the ACA through Congress. But they’re still working hard to repeal it in the courts.

Disclosure forms provided by the author are available at NEJM.org.

From the University of Michigan Law School, Ann Arbor.

This article was published on January 1, 2020, at NEJM.org.

1. Trump DJ. Twitter entry. Dec. 26, 2017 (<https://twitter.com/realdonaldtrump/status/945624910898122752?lang=en>).
2. Nat’l Federation of Independent Businesses v. Sebelius, 132 S.Ct. 2566 (2012).

DOI: 10.1056/NEJMp1917063

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