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"Kennedy's 'coercion' concern in focus"

By Glenn C. Smith

If you're any kind of Court Watcher, it didn't escape your notice that last week, the U.S. Supreme Court heard oral argument on one of the most consequential cases on this term's docket: *King v. Burwell*. The case directly affects the health insurance of millions of Americans in 34 states. In deciding the case, the court will go a long way toward determining the economic viability (and maybe even the survival) of the Patient Protection and Affordable Care Act, aka Obamacare.

You also likely read that a line of questioning by Justice Anthony Kennedy at Wednesday's argument buoyed hopes that the Affordable Care Act would survive this second round of Supreme Court jeopardy. The possibility that Kennedy would join the four "liberal" justices as the critical fifth vote to uphold an expansive Internal Revenue Service regulation assuring government subsidies to lower-income Americans purchasing insurance on the federal healthcare exchange was welcome news in many quarters. (Before Kennedy's questions, it seemed that Chief Justice John Roberts would need to be the white knight with the fifth vote.) Hospital stock prices even soared on news of the possible Kennedy save.

But if you don't make a profession out of following the court, you may not be fully clear about the legal context of Kennedy's questions — or what this oral argument vignette reveals about the dynamics of Supreme Court litigation.

The Law Behind the Kennedy Concern

Kennedy's oral argument inquiries go back to 2012's *NFIB v Sibelius* decision. In *NFIB*, even though five justices led by the chief justice famously found the Affordable Care Act's individual mandate to buy healthcare (and, by implication, the entire act) constitutional, seven justices went on to invalidate an important Medicaid-expansion feature. This provision offered states a choice between dramatically expanding health coverage for their low-income residents or losing all federal funding for all existing Medicaid programs.

No state, the majority reasoned, could abandon several decades' worth of participation in the basic Medicaid program — or the large numbers of poor residents and health care providers who had come to rely on it. The provision was a gun to the head triggering a limit the court had only speculated about in a 1987 case: Any condition accompanying offers of increased federal spending must be an authentic "choice" states can freely decline; "coercion" is unconstitutional.

Fast forward to last week's argument: The issue wasn't whether the IRS regulation at issue (or the statutory language it sought to implement) was *unconstitutional*. Instead, the *NFIB* unconstitutional-coercion specter hovered over *King* as a reason for invoking the long-standing canon that statutory interpreters should choose among potential statutory readings the one avoiding serious constitutional questions.

This "avoidance canon" took center stage in *King* because its disputants contest the meaning of an Affordable Care Act phrase affording federal subsidies to Americans with incomes between 100 percent and 400 percent of the federal poverty line who purchase insurance on an exchange "established by the State."

The *King* challengers assert this language's plain meaning (the way "any English speaker" would read it, to quote their brief) is to only subsidize insurance purchases in 16 states (including California) and the District of Columbia, which established their own insurance exchanges. Buttressing their plain-meaning argument with many typical statutory-construction arguments (reading the statutory language in its broader context, explaining how their reading is not absurd, considering congressional intent, and the like), the challengers ask the justices to invalidate an IRS ruling that "established by the State" is a "term of art" including exchanges set up by the federal government, under other Affordable Care Act authority, when states fail to do so.

As with other seemingly arcane statutory interpretation/administrative law dustups, the one in *King* has huge real world consequences. Upwards of 8 million low-income Americans in 34 states not setting up their own exchanges could only afford health insurance because they qualified for subsidies under the disputed IRS regulation. Along with their own complex statutory construction and administrative-agency-deference arguments, the U.S. government and numerous friends of the court emphasized to the justices that taking away subsidies would throw these millions out of the ranks of the newly insured. Experts hypothesized that health insurance markets in many states would enter "death spirals." Insurance pools would become dominated by relatively sick insureds, leading to premium spikes; insurers would eventually abandon state markets.

Kennedy's "Coercion" Concern

With so much at stake, it's no wonder that court watchers paid so much attention to Kennedy's dramatic suggestion, early in the argument by challengers' counsel, Michael Carvin, that "there is something very powerful to the point that if [challengers'] argument is accepted, the states are being told either create your own exchange, or we'll send your insurance market into a death spiral." Doggedly pursuing the concern that the challengers' interpretation "raises a serious constitutional question" — in two more questions to Carvin and three to U.S. Solicitor General Donald Verrilli, Kennedy emerged as an unexpected potential ally of Obamacare.

In contrast to his across-the-board negative verdict on the Affordable Care Act in 2012, Kennedy seemed to be at least considering how to avoid disastrous practical consequences (something he often tries to do) while at the same time advancing his

long-standing states' rights concern by expanding protection against state coercion. This moved seemed vaguely reminiscent of an otherwise unrelated 1992 case. In *Lee v. Weisman,* Kennedy's concern that prayers at high school graduations "coerced" nonbelievers to participate led him to contribute a crucial fifth vote, to other justices more enamored with another theory, to rule against the school district.

What This Says about Oral Argument and Decision

The Kennedy coercion inquiries prompt two points about Supreme Court oral argument and decision-making.

First, it is dangerous to generalize from oral argument. Lines of thought may not even endure for several days when the justices meet to render a preliminary decision — much less for months, as competing opinion drafts circulate and positions shift.

Specifically, Kennedy may ultimately worry that his coercion theory would raise doubts about the other important federal spending programs. Indeed, challengers' counsel argued just this point.

Besides, the avoidance canon is only supposed to fire when statutory words are ambiguous. This makes troubling a less-noticed Kennedy remark that "It may well be that [challengers] are correct as to these words, and there's nothing we can do."

A second point is that, if the coercion theory does emerge as what ultimately saves Obamacare in 2015, the contrast with 2012 provides a vivid example of the varied ways Supreme Court arguments can evolve. The alternative theory that the act's individual mandate was a constitutional exercise of Congress' taxing authority — the rationale the chief justice used to uphold the act — was a central argument initiated by the U.S. government in briefs and argument.

By contrast, this year's coercion concern was not a major facet of the government's brief. And, at oral argument, the solicitor general could only muster a tepid endorsement of it. Apparently worried about the theory's wider implications, Verrilli was content to call it "novel" and something to be pursued "to the extent the court believes that this is a serious constitutional question."

This illustrates the reality that, although the contending parties substantially shape the issues considered by the court, oral arguments are free form and significantly subject to the influences and interests of the justices.

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