

YANKEE DOODLING **Douglas Kamerow**

# How will the US Supreme Court rule on health reform?

Fearless (foolhardy?) predictions based on the oral arguments

The Patient Protection and Affordable Care Act, now two years old, is 1200 pages long and has countless provisions. Many of them have already taken effect, but much more change is to come over the next two years, most famously the so called individual mandate. In 2014, almost every US citizen will be required to buy health insurance, and companies of 50 or more employees will be required to offer it to their workers. In both cases, non-compliance results in a fine.

For three days in late March, the US Supreme Court listened to arguments on four issues that had been raised in lower court rulings on the law. In a circus atmosphere (demonstrators, presidential candidates, paid queue sitters) in the plaza outside the Greek temple that houses the court, and before an audience of luminaries inside, standing room only, the nine justices grilled (some would say filleted) the lawyers for both sides of the issues.

Four of the court's justices, appointed by Republican presidents, are reliably conservative, and four, appointed by Democrats, are unwaveringly liberal. In the middle sits Justice Anthony Kennedy, who is often the swing vote in 5-4 decisions. Many observers thought that the arguments in this case boiled down to convincing Kennedy or one of the conservatives to vote to uphold it.

Two of the four questions were thought to be easily dispensed with. First up was whether the courts even have jurisdiction to rule yet. An obscure 1876 law bars lawsuits to block a tax until the tax is actually levied. If the new law's penalties are regarded as taxes then the court could not rule on the law until 2015, when the fines begin. Lower courts split on this issue.

Although the justices disagree on almost everything else, none of them advocated postponing ruling on this landmark case. The consensus of observers is that there is very little chance that a majority of the justices

will uphold a lower court ruling that they have no current jurisdiction in this case. I agree.

A second issue is whether the law's mandatory expansion of the federal-state Medicaid insurance programme for the poor is constitutional. Before the hearing, most observers thought that there was little or no chance that the court would reverse this provision of the law. It is arguably only a quantitative expansion of existing federal regulation of the programme, and no lower courts had found this provision unconstitutional. Surprisingly, though, there were strong arguments from the conservative justices that the law did indeed coerce the states to participate. Despite these concerns, my guess is that there will be enough votes to prevent reversal of this provision.

Which brings us to the big questions: will the court overturn the individual coverage mandate and, if so, will that invalidate the entire law or just the mandate and its related provisions? The conservative justices gave the law's defenders a very difficult time with the mandate, seemingly ignoring precedents they usually depend on. In this case, it is the Constitution's so called "commerce clause," which gives Congress the right to regulate activities related to interstate commerce. Many legal scholars thought that since healthcare is a big, interstate business and all people need healthcare, Congress had the right to compel participation in insurance to pay for that care.

But the conservative justices and Justice Kennedy expressed strong doubts about the mandate, questioning whether the Congress could force people to buy anything, including health insurance. If that was constitutional, they asked, what prohibited Congress from mandating anything and everything else? They insisted Congress has never required people to buy a particular product



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and should not be allowed to.

Next up for debate was whether the entire law had to be withdrawn if the mandate was ruled unconstitutional. Most laws have “severability” clauses for just this eventuality, but the Affordable Care Act does not. Thus the justices debated which, if any, parts of the law could or should stand if they overturned the mandate. Logically, if the mandate is eliminated, then it would be unfair to forbid insurance companies to turn away patients with pre-existing conditions, because healthy people could then sign up for insurance only when they became sick, thus bankrupting insurers. Other than that, and some rate-setting requirements, the rest of the law could plausibly stand alone.

The conservative justices did not seem to see it that way. The mandate is the centerpiece and if it goes down the whole law should go with it, said one. Another questioned whether it was the court's role to redesign legislation. Better to return it to Congress and let them do their job again. Observers said they could see the whole law slipping away as they listened, a victim of plain conservative politics, not jurisprudence.

I don't agree with those who say that the mandate is unquestionably constitutional, and that anyone against it is just playing politics. It is a sweeping change and arguments against it are plausible. But my fearless (and given my track record (*BMJ* 2010;340:c500), likely unreliable) prediction is that the Supreme Court will vote 6-3 to uphold the individual mandate, with Justice Kennedy and Chief Justice John Roberts joining the liberals to form the majority. They will express misgivings about the mandate but in the end will agree that it is allowable under the Constitution.

Douglas Kamerow is chief scientist at RTI International and associate editor, *BMJ* dkamerow@rti.org

Douglas Kamerow's new book is *Dissecting American Health Care*, [www.kamerow.com/Dissecting\\_American\\_Health\\_Care.html](http://www.kamerow.com/Dissecting_American_Health_Care.html).

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