ESSAY

IS CALIFORNIA V. TEXAS TAXING FOR OBAMACARE?[1]

By **Andrew Oringer**[2]

Since the initial publication of the article, there have been two judicial developments of the utmost importance to the ultimate fate of this dispute. First, the U.S. Court of Appeals for the Fifth Circuit, in a 2-1 opinion, affirmed the District Court's holding that the ACA's individual mandate is unconstitutional, but remanded to the District Court to determine whether the mandate is severable and, if not, whether the entirety of the ACA must fall.3 Then, on March 2, 2020, after the states that are challenging the constitutionality of the ACA filed with the Supreme Court a cross petition for review of the Fifth Circuit's decision, the Supreme Court, in what is now fashioned California v. Texas, consolidated and granted the cross petitions for certiorari and review of the Fifth Circuit's opinion (Case Nos. 19-840, 19-1019). The Supreme Court is to decide (i) whether the individual mandate provision is severable from the rest of the ACA, and (ii) whether the reduction of the shared responsibility payment to zero renders the ACA's minimum coverage provision unconstitutional. The Supreme Court's granting of certiorari has occurred even before the lower courts have reached a decision on the merits, and sets the stage for an utterly historic and sweepingly consequential decision.

To paraphrase Ronald Reagan (or maybe Dolly Parton):here we go again. Earlier in the year [2019] the U.S. Court of Appeals for the Fifth Circuit dispensed with arguably one of the two or three most significant initiatives of the Obama administration when it vacated the U.S. Department of Labor's amended fiduciary rule.[4]

We now return to the land of the Fifth Circuit for a ruling by a Texas district court in Texas v. United States that the entirety of the Patient Protection and Affordable Care Act, probably the consensus number one legislative initiative of the Obama era, was rendered unconstitutional in its entirety by the Tax Cuts and Jobs Act of 2017 (tax reform).[5] The ACA has survived two trips to the U.S. Supreme Court, first with National Federation of Independent Business v. Sebelius and later (in a manner of speaking) with King v. Burwell.[6] Will it survive what looks to be a third?

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[3] Texas v. United States, 945 F.3d 355 (5th Cir. 2019).

[4] *See generally* Andrew Oringer, *DOL's Fiduciary Rule:Death By a Thousand Cuts?*, LAW360 (Sept. 11, 2017), https://www.law360.com/articles/961160.

[5] No. 4:18-cv-00167-O, 2018 U.S. Dist. LEXIS 222345 (N.D. Tex. Dec. 14, 2018, Dec. 30, 2018). Section and other references to the ACA herein take into account Title X of the ACA, which, among other things, amends various earlier provisions of the ACA. It is noted that, while a number of Obama-era initiatives have been struck down by the courts, Texas is different. *See generally* Oringer & Scarritt-Selman, *The Courts' Take on Obama-Era Regs: You are Erased*, LAW360 (Sept. 7, 2018), https://www.law360.com/articles/1078589/the-courts-take-on-obama-era-regs-you-are-erased. In other cases the courts undid regulatory activity seen as unauthorized or otherwise invalid; in contrast, in Texas the court viewed a statute as being beyond Congress's constitutional authority in light of later amendments to the statute.

[6] Nat'l Fed'n of Indep. Bus. v. Sebelius, U.S. 519 (2012); King v. Burwell, 567 135 S. Ct. 2480 (2015).

With apologies now to Dr. Seuss, how can that be?[7] Let's go through some of the history, and then turn to the Texas decision itself for an exploration of how the issues possibly should be analyzed.

The Statutory Scheme

A brief review of the statutory scheme is provided as initial background. The ACA comprehensively overhauled the U.S. health care system. The ACA contains rules protecting those with preexisting conditions, expands coverage in certain cases, eliminates certain coverage limitations and provides a number of other new protections.

On the other side of the ledger, as a counterbalance to the new protections, the ACA contains rules that, to one extent or another, generally were intended to expand the pool of insured individuals within the system. In this regard, Section 5000A(a) of the Internal Revenue Code of 1986 (the code) after the enactment of the ACA sets forth a requirement (the individual mandate) that individuals maintain insurance that confers "minimum essential coverage." Section 5000A(b) of the code then provides for a required payment (the shared-responsibility payment) by those who do not procure the insurance required by the individual mandate.

The statute itself (i.e., not just the legislative history), in Section 1501(a)(2)(H), states that under the ACA (and the Employee Retirement Income Security Act of 1974 and the Public Health Service Act) "the Federal Government has a significant role in regulating health insurance." Section 1501(a)(2)(H) then goes on to say that the individual mandate is a requirement that "is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market." Section 1501(a)(2)(I) recites that the individual mandate "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." These points are arguably bolstered, or at least complemented by, somewhat similar points made by Congress in paragraphs (A), (C) and (J) of Section 1501(a)(2) of the ACA.

National Federation of Independent Business v. Sebelius

In 2012, the Supreme Court in NFIB v. Sebelius held that the ACA was constitutional. The inquiry went down two principal paths.

First came the question of whether the individual mandate was a valid exercise of congressional power under clause 3 of Section 8 of Article I of the U.S. Constitution (the commerce clause). The court focused on the notion of Congress' prohibiting inaction, rather than regulating affirmative conduct. The court held that Congress did not have the power under the Constitution's commerce clause to compel people to act — in this case, to buy insurance — but rather could only regulate existing commercial activity. As a result, without more, the individual mandate, and indeed possibly the entirety of the ACA, would be unconstitutional.

But then, courtesy of Chief Justice John Roberts, the court looked to whether Congress's power to tax (the tax power) under clause 1 of Section 8 of Article I of the U.S. Constitution supported the individual mandate. The idea, in effect, was that the individual mandate was not really a mandate at all. Rather, individuals were left with a clear and stark choice: (1) procure insurance that satisfied the ACA's requirements, or (2) make the shared-responsibility payment to the U.S. treasury. Viewed in

[7] *See* DR. SEUSS, HOP ON POP 21 (1963) ("Fish in a tree? How can that be?").

that way, the ACA (including the individual mandate) required nothing; rather, it simply provided that if an individual chose not to get certain insurance the individual was required to make a payment to the treasury. And that payment, in turn, was viewed by the court as a permissible — constitutional — tax. Through the tax prism, the individual mandate was in effect viewed not as a mandate at all; it rather was nothing more than a condition that, if unsatisfied, gave rise to a tax in the guise of the shared-responsibility payment.

Tax Reform

Next up was tax reform. In 2017, culminating the year's tax-reconciliation process, tax reform amended the ACA to reduce the shared-responsibility payment to $0, thus effectively repealing an individual's obligation to make a payment to the U.S. treasury for choosing not to comply with the individual mandate. Nothing else was changed in the ACA, and it's not clear, given the tax-reconciliation posture of the 2017 legislation, what more in the ACA could have been changed.

Texas v. United States

Commencement of the Case

It was not immediately obvious to everyone that tax reform's elimination of the shared-responsibility payment somehow could have invalidated the individual mandate and, beyond that, the entirety of the ACA. Eventually, though, the visceral appeal of the following logical conundrum began to emerge: if (1) (A) the individual mandate is invalid under the commerce clause and (B) the only reason that the individual mandate is constitutional is that, when viewed together with the shared-responsibility payment, Congress has validly exercised the tax power; then (2) once the shared-responsibility payment is repealed, doesn't it follow like night follows day that the individual mandate (A) is now left without a tax-based foundation and (B) is therefore unconstitutional?

And so the Texas case was commenced. Initially, some took a tilting-at-windmills approach to the case. After all, the Supreme Court already upheld the ACA.[8] Don't these plaintiffs know how to lose?

But the cleverness of the plaintiffs' argument started to emerge. In fact, there really was a potentially relevant intervening event — the enactment of tax reform. And now maybe the game was changed.

And then on June 7, 2018, the U.S. attorney general wrote a letter to the speaker of the U.S. House of Representatives stating, "I have determined that the plaintiffs in Texas v. United States are correct that Section 5000A(a) [of the Code] will be unconstitutional when the Jobs Act's amendment becomes effective in 2019 ... [T]he Department [of Justice] will decline to defend the constitutionality of 26 U.S.C. 5000A." Some saw this letter (and its reasoning) as a major development that was dangerous to the survival of at least some of the ACA and it did get some attention, but one can wonder whether it got the attention it really deserved. Maybe after the attorney general's letter the writing was indeed on the wall (and not just in his letter) that real fireworks could lie ahead.

[8] *See generally* MIGUEL DE CERVANTES SAAVEDRA, EL INGENIOSO HIDALGO DON QUIXOTE DE LA MANCHA (1605).

Two extensive opinions have been issued in the Texas case. The court's initial Dec. 14, 2018, opinion has been followed by a Dec. 30, 2018 opinion.[9] Unless otherwise indicated, the discussion herein relates to the first (Dec. 14) opinion.[10]

The Court's Initial Decision

The presentation, analysis and discussion in Texas seem clearly to be thoughtful and detailed. But is the case correct?

1. Role of the Courts

The court began its analysis of the substantive constitutional question by examining the individual mandate. The court reviewed the portion of NFIB that discussed how judicial deference to Congress regarding policy cannot diminish the judiciary's role in determining constitutionality.

2. The Tax Power

The court then looked to the tax power. It pointed out that the individual mandate and the shared-responsibility payment are distinct from each other, focusing sharply on the relationship between the individual mandate and the shared-responsibility payment.

Essentially, the shared-responsibility payment was viewed as a tax payable by an individual in the event that the individual mandate were not satisfied by the individual. The court emphasized that, to the extent that the Supreme Court held that the individual mandate could be fairly read as a tax, "it reasoned only that the Individual Mandate could be viewed as part and parcel of a provision supported by the Tax Power — not that the Individual Mandate *itself* was a tax. [emphasis in original]" In concluding that the individual mandate could no longer be upheld under a tax-based analysis, the court said, "So long as the shared-responsibility payment is zero, the saving construction articulated in NFIB is inapplicable and the Individual Mandate cannot be upheld under Congress's Tax Power. *[citation omitted]"*

3. The Commerce Clause

Next, the court turned to the commerce clause. Here, the question became whether the individual mandate, previously held in NFIB not to be a constitutional exercise of power under the commerce clause, continues to be unconstitutional under the commerce clause.

In this context, the court shifted its approach to the individual mandate, pivoting from (1) a characterization of the individual mandate as merely leading to a payment (a tax, so to speak) in the event the individual mandate is not satisfied, to (2) a characterization of the individual mandate as itself constituting a requirement of some sort. The court seems to have concluded that, without the companion shared-responsibility payment, the individual mandate must still be something and, since it rings in the language of being a requirement, then a requirement is what it is.

There are several statements in Texas along these lines. Examples include:

[9] Texas v. United States, No. 4:18-cv-00167-O (N.D. Tex. Dec. 14, 2018).
[10] Texas v. United States, 340 F. Supp. 3d 579 (N.D. Tex. Dec. 14, 2018).

- "Accepting Intervenor Defendants' theory that the Individual Mandate does nothing ... requires finding that it is not an exercise of Congress's Interstate Commerce Power. [citation omitted]"

- "the undisputed evidence in this case suggests the Individual Mandate fixes an obligation."

- "the fact that many individuals will no longer feel bound by the Individual Mandate does not change either that some individuals feel so bound - such as the Individual Plaintiffs here — or that the Individual Mandate is still law."[11]

- "To accept the Intervenor Defendants' argument that the Individual Mandate does nothing would be doubly sinful under the canon against surplusage — it would require ignoring both the mandatory words of the provision and the function of the provision itself."

- "logic demands that the Individual Mandate was never — pardon the oxymoron — a nonbinding law."

The court ultimately concluded as to the commerce clause: "Given that the Individual Mandate no longer 'triggers a tax,' the Court finds the Individual Mandate now serves as a standalone command that continues to be unconstitutional under the Interstate Commerce Clause."

4. Severability

The court then addressed the utterly crucial question of whether all or a portion of the rest of the ACA must fall as a result of the court's determination that the individual mandate is unconstitutional. As the court said, "[T]he next question is whether [the individual mandate] is severable from the rest of the ACA."

The court concluded that both the 2010 Congress and the 2017 Congress "manifested the same intent: The Individual Mandate is inseverable from the entire ACA." The court homed in on the congressional findings incorporated into the actual statutory text of Section 1501(a)(2) of the ACA, and on the fact that Section 1501(a)(2) was left undisturbed by Congress in 2017 when it passed tax reform. In a sense, the court takes an approach that at first blush may be seen as harkening back to the apocryphal quip by Justice Felix Frankfurter, "This is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute."12

But there is a potentially critical distinction here between legislative history in general and the congressional statements of intent in the ACA that, to the Texas court, raises the significance of stated intent to a higher level. The congressional findings cited by the court here are indeed

[11] The court appears to have felt that it is relevant that "[t]he individual Plaintiffs assert they feel compelled to comply with the law" *Id.* at 602.

[12] Greenwood v. US, 350 U.S. 366, 374 (1956); see also Easterbrook, *Challenges in Reading Statutes*, (Sept. 26, 2007) http://lawyersclubchicago.org/docs/Challenges.pdf. "The canonical way to [look for legislative intent] was to look at what legislators said — at legislative history. One wag — who happened to serve on the Supreme Court — quipped that the judge would turn to the statute only when the legislative history was unclear"; SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 31 (Amy Gutmann ed. 1997) (joking that "one should consult the text of the statute only when the legislative history is ambiguous").

emblazoned in the statute itself, with language contained in a statute passed by both houses of Congress and signed by the president. Thus, the Texas court stated, "On the unambiguous enacted text alone, the Court finds the Individual Mandate is inseverable from the Act to which it is essential. [footnote omitted]"

The court also parsed the language of the various opinions rendered in NFIB, as well as the Supreme Court's subsequent opinion in King, asserting (after piecing together the various opinions in NFIB and King) that "all nine" justices "understood what Congress understood: Without the Individual Mandate, the guaranteed-issue and community-rating provisions [of the ACA] 'could not work.'" The court continued on that the Supreme Court's "reasoning ... also confirms that the Individual Mandate is inseverable from the *entirety* of the ACA. [emphasis in original] [citation omitted]" The Texas court went on to conclude, "The ACA's text and the Supreme Court's decisions in NFIB and King thus make clear the Individual Mandate is inseverable from the ACA."

5. Validity of the ACA as a Whole

As a result, the entire ACA was held to be invalid. The court concluded: "For the reasons stated above,
the Court grants Plaintiffs partial summary judgment and declares the Individual Mandate … *UNCONSTITUTIONAL*. Further, the Court declares the remaining provisions of the ACA …. are *INSEVERABLE* and therefore *INVALID*. [emphasis in original] [citations omitted]"

The Court's Later Decision

In its later (Dec. 30) opinion, the court (1) confirms that its Dec. 14 opinion is a final opinion; (2) stands by its earlier analysis and, indeed, expressly states that it is "unlikely" that the Fifth Circuit will reverse; and (3) notwithstanding its view that the Fifth Circuit is unlikely to reverse, agrees to stay its earlier decision to the effect that the individual mandate is unconstitutional and inseverable because the equities favor a stay. In the later opinion, the court goes through various challenges to its initial reasoning and, while acknowledge the "narrative" of certain defendants to be "compelling," it goes on to say that the narrative "falls apart."

Certain Possible Analyses

Some of the Possible Forks in the Road

So what will the appellate courts do with all of this? As Yogi Berra said, when you come to a fork in the road, take it. Proposed below are several alternative possibilities for the analysis that may ensue:

- (1) the individual mandate is invalid under the commerce clause; (2) the repeal of the shared-responsibility payment leaves the individual mandate without a tax-based foundation to support it; (3) the individual mandate is therefore unconstitutional; (4) the ACA is an integrated initiative such that the individual mandate is not severable from the rest of the ACA; and (5) the ACA is therefore unconstitutional

This path would seem essentially to be the one that the Texas court took.

- (1) the individual mandate is invalid under the commerce clause; (2) the repeal of the shared-responsibility payment leaves the individual mandate without a tax-based foundation to support it; (3) the individual mandate is therefore unconstitutional; (4) (A) the significance

of the characterization of the individual mandate as "essential" is not enough to establish congressional intent that the individual mandate is inseverable from the rest of the ACA or (B) the expression of intent in the statute regarding the significance of the individual mandate needs to be read in light of the neutering of the individual mandate resulting from the repeal of the shared-responsibility payment; and (5) the ACA, other than the individual mandate, remains constitutional

This path would respect the NFIB reasoning and analysis, which led to the Supreme Court's conclusions that the commerce clause does not support the individual mandate, but that the tax power supports the combination of the individual mandate and the shared-responsibility payment. The individual mandate would thereby now be viewed as unconstitutional, without the corresponding revenue. However, this path would also acknowledge that the individual mandate is not essential to the amended ACA, thereby resulting in the severing of the individual mandate such that the remainder of the ACA is not rendered unconstitutional.

Arguably, to get to that result, an appellate court would need (1) to conclude that, as a general matter, notwithstanding provisions such as Section 1501(a)(2)(H) of the ACA, the individual mandate is not so integral to the ACA that it cannot be severed (i.e., "essential" does not inexorably lead to "inseverable"); or (2) to view the expression of congressional intent in Section 1501(a)(2)(H) as a vestigial expression of intent linked specifically to the ACA as it stood in 2010, which no longer applies with the same force to the 2017 construct, even though Congress did not repeal or otherwise amend Section 1501(a)(2)(H) in 2017. The Texas court in its Dec, 30 opinion seems to acknowledge the potential validity of arguments that minimize the significance of the individual mandate after tax reform, but rejects those arguments, particularly in light of the fact that the individual mandate is textually still there and the fact that Section 1502(a)(2) expressions of intent have not been repealed.

- (1) the individual mandate has been rendered precatory at best and irrelevant at worst by the repeal of the shared-responsibility payment and therefore doesn't any longer actually have the force of law; and (2) the question of whether the provision is constitutional should be avoided altogether, because the question is of no moment.

This path would arguably be consistent with the structure of the affected ACA provisions both before and after tax reform. Before tax reform, the ACA essentially provided that individuals need either (1) to get health insurance (under the individual mandate) or (2) to pay $X (i.e., whatever the shared-responsibility payment would be). The statutory structure hasn't been changed by tax reform. Now, therefore, the ACA provides that individuals need either (1) to get health insurance or (2) to pay $0.

Putting aside for the moment the moral imperative surmised by the Texas court, it can be argued that the net result of the choice set forth in the amended ACA is that the ACA simply and without more does not require an individual to procure health insurance.[13] It also may be argued that, if there was no moral imperative to comply with the individual mandate when there was a shared-responsibility payment, there is likewise no (and maybe even less so after tax reform) moral

[13] In theory it could be argued that the deletion of the payment requirement converts the individual mandate into a specifically enforceable provision of substantive law, although the result that after tax reform individuals now have to purchase health insurance, period, would presumably come as a great surprise to the Congress that repealed the shared-responsibility payment.

imperative when the shared-responsibility payment is $0. So under this construct the mandate is not only not a mandate, but furthermore is not a condition to the payment of a tax — it rather is ... nothing.

This approach calls into question what if anything is left of NFIB after tax reform. The approach would also require the appellate court to minimize the significance of a provision (the individual mandate) that unquestionably still exists in the statute and would again require the appellate court to deal with the expression of congressional intent in Section 1501(a)(2)(H) as essentially being a legacy provision that has not been conformed to the repeal of the shared-responsibility payment, or as otherwise being insufficient to support inseverablity.

As to Section 1501(a)(2)(H), one possible approach could be to view the Section 1501(a)(2)(H) language as rendered moot by tax reform's total vitiation of the underlying provision (the individual mandate) to which the language relates. In any event, at a minimum it would seem that the continued existence of the individual mandate and Section 1502(a)(2)(H) stands as a tricky hurdle over which to jump for anyone trying to minimize the meaning or significance of the individual mandate — although one can wonder whether the hurdle would be insurmountable. Again, the Texas court in its Dec. 30 opinion was unwilling both to view the individual mandate as a nullity and to look past Congress's unrepealed statements in Section 1501(a)(2).

Certain Other Possibilities

Other possible bases exist for the upholding of the ACA, including possible standing issues for one or more of the plaintiffs; the fact that revenue may still flow into the U.S. treasury under the ACA (thus supporting the tax argument), albeit in respect of prior periods; the statute's continuing structure that still includes the shared-responsibility payment, which in theory could in the future be changed again so that it's more than $0; and the argument that the repeal itself, while not constitutionally infirm in and of itself, is nevertheless unconstitutional if it causes the ACA to be unconstitutional. These possibilities were addressed and dispensed with by the Texas court, although it is possible that an appellate court might see the issues differently.

Analysis

If the Texas court is right that the individual mandate without the shared-responsibility payment is now an unconstitutional provision, the analysis would arguably turn, as the Texas court suggests, to the question of whether the individual mandate is severable from all or part of the rest of the ACA. A threshold question there would seem to be whether Congress ever intended, starting in 2010, that the individual mandate be considered inseverable. If there was never any inseverability intent, then maybe, if the individual mandate is unconstitutional, that's the end of the inquiry, such that the rest of the ACA is safe and remains intact.

But assume for the moment that in 2010 the individual mandate was inseverable. Now, in 2017, there emerges an arguably odd relationship between policy and constitutional analysis.

In 2017, Congress did seem to regard the individual mandate as being a (the?) key to the ACA's overall workability — thus Congress's inclusion of Section 1501(a)(2) statutory language cited by the Texas court. But in 2017 Congress left the ACA in place while maybe totally declawing the individual mandate (by repealing the shared-responsibility payment). Paradoxically, the analysis that could possibly support the continuing constitutionality of the ACA is that in 2017 it was Congress's judgment to leave in place the ACA generally while at the same time minimizing

or eliminating the significance of the very provision (the individual mandate) that Congress in 2010 itself regarded as a principal foundation on which the ACA rested. But that's what Congress in 2017 may well have done, without amending its 2010 express statutory statements about the individual mandate's "essential" role with respect to the ACA.

Asked another way, did Congress in 2017 leave a statute in place (the ACA without a meaningful individual mandate) that in 2010 it would have regarded as making no sense? And if it did, and if the remaining portions of the ACA are constitutionally supportable when viewed alone, is it the judiciary's job, maybe in part based on expressions of 2010 intent that continue to be memorialized in the statute, to negate Congress's 2017 decision to leave the ACA in place without a meaningful individual mandate?

Will Congress Act?

With a legal gauntlet like this, it should not be surprising that the politics of the situation are varied and unclear. Some thoughts on how this gauntlet might be run follow here.

— If the ACA is finally ruled unconstitutional, will that cause the Democrats to try to find common ground, in order to mitigate perceived pain that would result for large segments of the electorate? Would Democrats be willing to allow that perceived pain, in order to avoid allowing the Republicans to assert victoriously that under Republican leadership a better way has been found? Will Republicans be willing to risk hurting large segments of the electorate in order to let Obamacare disappear without a replacement, if that is the price of failing to find common ground with the Democrats? Or would Republicans be willing to move closer to what the Democrats might want, thereby risking claims that the Republicans did not adequately dispense with Obamacare, in order to mitigate the problems that might ensue as a result of an invalidation of Obamacare in the absence of a replacement?

— If at the end of the day the ACA is left in place, there will be no actual need to figure out a replacement, because, by hypothesis, the ACA will still be there. But the question remains — will uncertainty surrounding the ACA's survival push both sides toward trying to agree on an alternative prior to a final disposition in Texas, in order to avoid the dislocation (to say the least) that would almost surely arise out of a bare scuttling of the statute, notwithstanding the political complexities that may surround who may be the perceived winners and losers in the event of such an agreement?

Those are just some initial thoughts as this new chapter in the story unfolds, with no attempt to be comprehensive or otherwise complete. There would seem to be so many other conceivable twists and turns, with no feasible way to figure out all the possibilities. Clear as mud? Mud is arguably much clearer.

Conclusion

The ACA now goes down a new road that would seem to belong in a theme park somewhere on Mr. Toad's Wild Ride. If in this game of Hold ‘Em the Texas court's invalidation of the ACA holds, it's anyone's guess as to where this whole thing lands. And even if Texas is reversed, the decision may invigorate serious political discussion regarding how best to go forward, particularly while the case is still winding its way through the courts. Onward ...