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APPELLATE PRACTICE: ORAL ARGUMENTS

Lessons Learned From Affordable Care Act Oral Arguments



By Lawrence T. Gresser



And Elizabeth F. Bernhardt

NEWSPAPERS after the oral arguments on the Affordable Care Act (ACA)¹ predicted that the U.S. Supreme Court was likely to invalidate the statute.² Commentators blamed the performance of the government's chief attorney, Solicitor General Donald Verrilli Jr. A television analyst labeled Verrilli's argument "a train wreck."³ A blogger headlined: "Donald Verrilli makes the worst Supreme Court arguments of all time."⁴ It was widely predicted that the "individual mandate" aspect of the ACA would fall by a 5 to 4 vote.⁵

As we all know today, the opposite happened: The individual mandate was upheld 5 to 4.⁶ We decided to study the oral arguments, with the benefit of perfect hindsight, to try to see why many commentators erred in their predictions about the outcome of the case and what lessons can be drawn.

The Individual Mandate

Though the court decided several questions, the individual mandate in the ACA §5000A was the most hotly-contested issue in the case and was central to the court's decision.⁷ The individual mandate "requires most Americans to maintain 'minimum essential' health care coverage" or pay a financial penalty for noncompliance.⁸

Paul Clement, who represented the 26 states that challenged the constitutionality of this provision,⁹ argued that the individual mandate was unconstitutional because rather than merely regulate commerce, it compelled people "to enter commerce, to create commerce."¹⁰ Thus, Clement argued, the mandate went far beyond what the court had sanctioned in the past and exceeded Congress' powers under the Commerce Clause.¹¹ Clement's argument succeeded on this point: The court majority held that the individual mandate could not be justified under the Commerce Clause.¹²

In his brief, Clement also argued that the mandate should not be upheld as a tax under Article I of the Constitution because (1) the mandate was a legal

command, separate from a distinct financial penalty, and applied even to very needy individuals, who were exempt from the financial penalty but not from the mandate; (2) Congress used the word penalty, not tax, in the statute, showing that its purpose was to punish noncompliance; and (3) even viewed as a tax, the mandate was unconstitutional because it was a "direct tax," the proceeds of which had to be apportioned according to states' populations.¹³

In defense of the individual mandate, the government advanced two main arguments: (1) that Congress could require uninsured persons to purchase health insurance or pay a penalty under the Commerce Clause because the health care market has a substantial effect on interstate commerce, virtually everyone is or will be a participant in the health care market at some point, and, without an individual mandate, Congress' method for regulating health care insurance would not work;¹⁴ and (2) that under the Constitution's Taxing Power, Congress could require a tax to be paid by uninsured persons.

The government argued that the financial penalty in §5000A had all the indicia of a tax: It was to be self-declared and paid to the Internal Revenue Service on April 15; it would raise revenue; it was calculated in proportion to income; and it was not punitive (the penalty might be less than the cost of buying insurance).

Significantly, Verrilli argued in the government briefs and at oral argument, noncompliance with the individual mandate to maintain health care insurance would not be "wrongful"; the financial penalty was the only consequence of noncompliance. That the primary purpose of the penalty was to affect individual behavior, rather than to raise revenue, was irrelevant, because the tax code accommodates many such provisions, such as the mortgage interest deduction, the tax on cigarettes, etc.¹⁵ Justice Antonin Scalia sarcastically paraphrased Verrilli's argument as follows:

You're saying that all the discussion we had earlier about how this is one big uniform scheme and the Commerce Clause, blah, blah, blah, it really doesn't matter. This is a tax and the Federal Government could simply have said... everybody who doesn't buy health insurance at a certain age will be taxed.¹⁶

Oral Arguments, March 26-28, 2012

The Supreme Court devoted six hours of oral argument over three days to the ACA.¹⁷ Though only two hours were specifically allotted to discussion of the individual mandate, the parties referenced the mandate issue throughout.

While the four Democrat-appointed justices expressed support for an expansive view of Congress' powers, the five Republican-appointed justices pressed Verrilli to articulate a principled view of the limits of the Commerce Clause. Chief Justice John Roberts asked whether, in Verrilli's view, the government could require everyone to buy a cell phone to use in case of a police or fire emergency.¹⁸ Scalia raised the specter of compulsory purchase of broccoli—or, perhaps worse, compulsory gym club membership.¹⁹ More pointedly, Justice Samuel Alito asked whether the government could require individuals to purchase burial insurance, since everyone is going to die at some point and failure to buy burial insurance could mean that someone else—perhaps the government—would have to pay for your interment.²⁰

Perhaps constrained by his institutional position as spokesperson for the government, Verrilli declined to agree that such hypothetical mandates would be justified under his interpretation of the Commerce Clause; he insisted, rather, that the hypotheticals were unlike the mandate in §5000A. Alito disagreed, stating, "I don't see the difference," and the skepticism of the other conservative justices, including the presumed "swing" vote, Justice Anthony Kennedy, was manifest.²¹ It was left to the sympathetic Justice Stephen Breyer to interject on the government's behalf:

I'm somewhat uncertain about your answers to—for example, Justice Kennedy asked, can you, under the Commerce Clause, Congress create commerce where previously none existed. Well, yes.... I would have thought that your answer—can the government, in fact, require you to buy cell phones or buy burials—if we have, for example, a uniform United States system of paying for every burial such as Medicare Burial, Medicaid Burial, Ship Burial, ERISA Burial and Emergency Burial beside the side of the road, and Congress wanted to rationalize that

LAWRENCE T. GRESSER is the co-founder and managing partner of Cohen & Gresser, where he focuses on complex commercial matters and private equity transactions. ELIZABETH F. BERNHARDT is counsel at the firm and has served on the New York State Bar Association Committee for Courts of Appellate Jurisdiction.

system, wouldn't the answer be, yes, of course, they could.²²

But Verrilli appeared to view Breyer's question as a trap, not a life-line. He responded, "[If] Congress were to enact laws like that... it would be my responsibility to then defend them, and I would defend them on a rationale like that, but I do think that we are advancing a narrower rationale."²³

Verrilli eventually moved to his second argument, that the mandate should be viewed as a tax. In making this argument, he had to contend with the fact that Congress and President Barack Obama were on record telling the public that the ACA would *not* raise taxes, and the individual mandate was *not* a tax.²⁴ Verrilli also had to contend with simultaneously making the argument that the mandate was *not* a tax for purposes of the Anti-Injunction Act.²⁵ At one point, Scalia asked: "The President said it wasn't a tax, didn't he? ... Is it a tax or not a tax? The President didn't think it was."²⁶ Verrilli responded, first, "what matters is what power Congress was exercising," and second, "The President said it wasn't a tax increase because it ought to be understood as an incentive to get people to have insurance. I don't think it's fair to infer from that anything about whether that is an exercise of the tax power or not."²⁷

In his final words to the court, Verrilli passionately urged that if viewing the individual mandate as a tax allowed the law to be upheld, "it is the Court's duty to do so."²⁸ Though Scalia and three other justices ultimately rejected this argument, the court majority adopted it, using the same reasoning and precedents that Verrilli used. As the Chief Justice wrote in his majority opinion, "The question is not whether [a tax] is the most natural interpretation of the mandate, but only whether it is a 'fairly possible' one."²⁹

By contrast, while as careful and disciplined in his language as Verrilli, Clement faced no institutional constraints on his responses. Nor did Clement face sharp questioning. The Democrat-appointed justices, who agreed with the government's Commerce Clause arguments and voted to uphold the law on this as well as the alternative tax ground, were not inquisitorial toward Clement.³⁰ Rather, these justices asked questions in the style of speeches, including defenses of the ACA and lessons on history.³¹ This allowed Clement to comment, agree and disagree as he chose. Perhaps confident that a court majority was with him, Clement attempted to refute the government's tax arguments only briefly, during the last few moments of his argument.³² He received no questions on this issue.

It is generally believed that the fewer questions you are asked at oral argument, the better you are doing.³³ Clement was interrupted by questions only 33 times, while Verrilli was interrupted 103 times—on average, every 22 seconds.³⁴ At the end of his third day of such treatment, when Roberts told him, "You have another 15 minutes," Verrilli responded, "Lucky me. Lucky me." The courtroom laughed.³⁵

Perhaps as a result of the rough—some said "brutal"³⁶—treatment of Verrilli, many observers believed that he performed badly and that the court would invalidate the individual mandate and the entire ACA. However, not all observers drew this con-

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clusion. James A. Feldman, writing in *The Washington Post* shortly afterward, pointed out that both Roberts and Kennedy used Verrilli's language to question opposing attorneys. This demonstrated that Verrilli's arguments affected the justices.³⁷ Moreover, Feldman wrote, evaluating a performance by the intensity of the questioning can be misleading.³⁸ Jonathan Cohn saw that the taxing argument was a "sleeper argument." Cohn noted, "It would take just one of the conservatives to break ranks and endorse this theory" for the ACA to survive.³⁹ This, of course, is exactly what happened.

Lessons Learned

• **It's not easy to represent the government.** Lost amid the recriminations after the oral argument was the reality that Verrilli may have faced institutional constraints in responding to the court's questions and in advancing his arguments. Affirmative answers to the court's hypotheticals about broccoli and cell phones could easily have been taken out of context, and enthusiastic advocacy of the proposition that the mandate was a tax in every sense of the word could have led to embarrassing headlines, especially in an election year.

• **The Supreme Court may increasingly look to the Taxing Power in deciding whether to uphold federal statutes.** Supreme Court case law on the Taxing Power is relatively sparse. If, as the *Sebelius* decision suggests, the court intends to limit further expansion of the Commerce Clause—or even roll it back—then the Taxing Power may become increasingly important in evaluating the constitutionality of federal statutes. This may have implications for how federal statutes are drafted and how constitutional issues are litigated.

• **Make only your strong arguments, but be sure to make all of them—even if you think you're winning.** The conventional wisdom is that attorneys should present only their best arguments in oral argument, and the conventional wisdom is correct. But *Sebelius* shows that forcefully presenting a strong secondary argument—here, that the individual mandate should be upheld under Congress' Taxing Power—can mean the difference between victory and defeat. It is impossible to know whether Verrilli's oral advocacy made the difference on this point, or if Clement could have changed the outcome by spending more time refuting the government's position. But appellate advocates should, and will, take note.

• **Don't celebrate, or despair, until you get the decision.** Questioning, even aggressive questioning, from the bench may not indicate disagreement. Judges often ask questions to confirm their understanding of an advocate's argument and the limits of the position being advocated. And, contrary to the conventional wisdom, silence from the court during oral argument may not denote agreement. Simply put, it is not fruitful to try to guess what a court will do based on the tenor of the oral argu-

ment, and during the argument, it is critical to stand your ground and make all of your points—whether the court appears to be in agreement with your position or against it.

1. Pub. L. No. 111-148, 124 Stat. 119, amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

2. Before the oral arguments, the online prediction market Intrade set the odds that the Supreme Court would invalidate key provisions of the statute at 20 percent. After the oral arguments, the odds jumped to 60 percent. "Betting on the Future," *The Economist*, July 18, 2012.

3. Jeffrey Toobin, "Gut check for March 27, 2012," CNN.

4. Kevin Drum, "Donald Verrilli Makes the Worst Supreme Court Argument of All Time," Mother Jones, March 27, 2012; see also Adam Sewer, "Obamacare's Supreme Court Disaster," Mother Jones, March 27, 2012; Chris Cillizza, "Who had the worst week in Washington? Solicitor General Donald B. Verrilli Jr.," *The Washington Post*, March 30, 2012.

5. See, e.g., David Leonhardt, "When the Crowd Isn't Wise," *The New York Times*, April 8, 2012 (Sunday Review at 4) (reporting that Intrade showed "about a 75 percent chance" that the mandate would be ruled unconstitutional "right up until the morning it was ruled constitutional").

6. See *National Federation of Independent Business v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566 (2012).

7. In addition to hearing argument on the individual mandate, the court heard argument on whether the lawsuit was barred by the Anti-Injunction Act, whether the Medicaid expansion was coercive, and whether the individual mandate was separable from other provisions of the ACA.

8. Chief Justice John Roberts' majority opinion, 132 S. Ct. at 2571.

9. The other advocate who argued against the individual mandate was Michael Carvin, representing the National Federation of Independent Business (NFIB).

10. March 27 Tr. 54:7-11.

11. March 27 Tr. 64:8-22.

12. Roberts' majority opinion, 132 S. Ct. at 2591.

13. Brief for State Respondents on Minimum Coverage Provision at 62; see also March 27 Tr. 79:12-80:9.

14. Brief for Petitioner on Minimum Coverage Provision at 23-24; March 27 Tr. 9:11-22.

15. Brief for Petitioner, id. at 52-53; March 27 Tr. 47:17-23.

16. March 27 Tr. 52:23-53:6.

17. The court allotted its time as follows: Anti-Injunction Act (one hour, March 26); Individual Mandate (two hours, March 27); and Severability and Medicaid Expansion (one hour each, March 28).

18. March 27 Tr. 6:2-8.

19. Id. 13:8-12, 41:7-12.

20. Id. 7:13-7:16.

21. Id. 9:9 to 9:25.

22. Id. 15:10-23.

23. Id. 16:11-17.

24. Kevin Sack, "Arguing That the Health Mandate Is Not a Tax, Except When It Is," *The New York Times*, March 26, 2012, available at <http://www.nytimes.com/2012/03/27/health/policy/arguing-that-health-mandate-is-not-a-tax-except-when-it-is.html>.

25. March 26 Tr. 32:13-17.

26. March 27 Tr. 47:8-9, 22-23.

27. Id. 47:24-48:3.

28. Id. 80:15-25.

29. Roberts' majority opinion, 132 S. Ct. at 2594.

30. One observer commented, citing Thomas Goldstein, that "the liberal justices don't make their targets sweat." Tony Mauro, "For the Lawyers, a Contrast in Styles During Tuesday's Arguments," *National Law Journal*, March 27, 2012.

31. See, e.g., March 27 Tr. 11:14-25, 16:10-23.

32. Id. 79:11-80:9.

33. Lee Epstein, William M. Landes, Richard A. Posner, "Inferring the Winning Party in the Supreme Court From the Pattern of Questioning at Oral Argument," 39 *J. Legal Stud.* 433, 436 (2010).

34. Ryan A. Malphurs and L. Hailey Dresser, "That's Enough Frivolity. A Not So Funny Countdown of the Supreme Court's Affordable Care Act Oral Arguments," at 18, 21-24, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079136.

35. March 28 Tr. 71:13-16.

36. See John M. Broder, "Vindication for Maligned Lawyer in Justices' Decision," *The New York Times*, June 29, 2012.

37. James A. Feldman, "The flawed case against Donald Verrilli," *The Washington Post*, April 2, 2012, http://www.washingtonpost.com/opinions/verrilli-successfully-made-his-points-on-health-care-before-supreme-court/2012/04/02/gIQAQjUrS_story.html.

38. Id.

39. Jonathan Cohn, "Another Lifeline for Justice Kennedy (If He Wants It)," *The New Republic*, May 7, 2012, <http://www.tnr.com/blog/jonathan-cohn/103155/obamacare-mandate-tax-revenue-balkin-kennedy>.

COHEN & GRESSER LLP

800 Third Avenue
New York, NY 10022
Ph +1 212 957 7600
Fax +1 212 957 4514
www.cohengresser.com