

In the district court's consideration of the health care case, there were seven different questions that the court had to address at one stage or another of the case.

Six of those seven questions were what I would call "binary," i.e., there was a yes or no answer. The seventh question was the nature of the remedy in the case.

Today, I'm going to focus on the remedy question, but first I'll address the first six questions - the binary questions.

The Binary Questions

The first four binary questions had to be addressed in the first round of the case - the motion to dismiss stage.

To prevail in defeating the federal government's motion to dismiss Virginia's case, Virginia had to prevail on all four questions. The reason for this is that the feds only needed one basis to dismiss our case, while Virginia needed to demonstrate that there were no reasons to dismiss the case.

The first three arguments/questions from the federal government were: 1) Virginia is not injured by the individual mandate; 2) If Virginia is injured, it isn't injured yet (i.e., the case isn't "ripe"), because the mandate does not go into effect until 2014; and 3) Regardless of 1 and 2, the case should be dismissed under the Anti-Injunction Act because until the penalty is due for failure to buy the government-approved health insurance, the case can't go forward.

These are all yes or no issues. The court found that Virginia is injured, the case is ripe, and the Anti-Injunction Act does not apply to this case.

The last binary question at the Motion to Dismiss was whether Virginia had even stated a claim-- that is, was Virginia's constitutional challenge even plausible. This was the first time the court was asked to address the merits of our constitutional arguments. The court found them plausible, meaning we advanced to the summary judgment stage, where the court would decide whether those arguments were right.

That took care of the motion to dismiss, now on to the motion for summary judgment (MSJ)...

In the MSJ, there were three questions, two constitutional questions that were binary questions, plus the remedy.

The two constitutional questions were whether the individual mandate (btw, don't you love how the Attorney General of the United States and Secretary Sebelius now call the individual mandate the 'personal responsibility provision'? Fodder for a later Compass...) was permissible under Congress' commerce clause power, and whether the monetary penalty for not buying the government-mandated health insurance was a 'tax' for purposes of bringing it under Congress' power under the taxing and spending for the general welfare clause of the constitution.

Obviously, the court found that Congress does not have the power under either the commerce clause or the general welfare clause to order the individual mandate and/or the penalty. Again, either Congress has this power or it doesn't, thus my term 'binary questions.'

I would note that Virginia had to win all six of these binary questions to win the case and we did. So far, we are the only case in the country not to lose a substantive argument in either our motion to dismiss or our summary judgment.

This will be a serious challenge to maintain through the fourth circuit court of appeals, but we'll see how we do!

The Remedy - Severability?

Regarding remedy, the most important part of the Court's decision is its declaration that the individual mandate is unconstitutional. The Court held that the individual mandate and penalty

are "neither within the letter nor spirit of the Constitution."

This was by far the most important finding by the Court. It establishes that Congress exceeded its powers in seeking to force citizens to buy a private product or service from a private company. In short, Congress does not have the power to force citizens into commerce so that it can regulate them.

In addition to asking the Court to declare the individual mandate and penalty unconstitutional, we also asked the Court to enjoin the government from further implementation of the health care law and to strike the entire law as unconstitutional. The Court addressed both requests.

Regarding the injunction, the Court did not grant the injunction, but that should not be viewed as a victory for the federal government. The Court did not grant the injunction because it felt that the declaration of unconstitutionality was sufficient, writing that "the award of declaratory judgment is sufficient to stay the hand of the [federal government] pending appellate review." This means that the Court does not believe that the federal government will seek to impose the penalty on Virginians unless an appellate court reverses the declaratory judgment at some point in the future.

Regarding finding the entire law unconstitutional, the Court engaged in what is known as a severance analysis. In doing so, it tried to determine if the unconstitutional individual mandate and penalty could properly be "severed" from the rest of the act.

Ultimately, because the Court found that there were portions of the law that could operate without the individual mandate and penalty, it did not find the entire law unconstitutional. When the case is heard by a higher court, we will again ask that court to review the severance decision and find that the entire law must be stricken.

Of course, the issue of severance will not be the only issue that an appellate court will review. The federal government has indicated it will appeal the Court's finding that the individual mandate and penalty are unconstitutional. We will continue to make the argument that, based on the letter and spirit of the Constitution, Congress simply does not have the power to do what it has tried to do.

From the very beginning of this fight, I have said that the matter can only be resolved in the Supreme Court of the United States. We have taken but one step towards that end, and the fight is far from over. However, while the ultimate fight will not be resolved for some time, we certainly take heart in the fact that we have won the first round.

Sincerely,

A handwritten signature in black ink, appearing to read "Ken". The signature is written in a cursive, flowing style.

Ken Cuccinelli, II

Attorney General of Virginia