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The U.S. Supreme Court's ObamaCare Ruling

On 28 June 2012, the U.S. Supreme Court issued a ruling in the politically controversial ObamaCare litigation (National Federation of Independent Business v. Sebelius). The ruling upholds the constitutionality of the provisions of the omnibus health care law (Patient Protection and Affordable Care Act- ACA) requiring individuals – excluding certain vulnerable categories and those covered by state or employer-administered programs – to buy health insurance (the so-called "individual mandate") under the threat of penalty or, as labeled by the Chief Justice John Roberts – tax. Roberts' qualification of the penalty as a tax saved the most controversial element of Obama's health care reform. This aspect of the judgment has caused the most comment and overshadowed the part of the judgment that declared the attempt by Congress to oblige the states to extend the state-administered program Medicaid to cover additional categories of citizens as unconstitutional.

This post explains what has been in dispute and how the U.S. Supreme Court has resolved it. The post is largely addressed to the domestic audience, as in Serbia there has been almost no mention of the U.S. reform or the interesting constitutional dispute attached to it.

Health insurance system in the U.S.

To understand the judgment, it is useful to note that, unlike in most of the world, the U.S. does not feature a national health insurance system. The federal government, through the Medicare program, directly finances and administers health insurance for senior citizens over the age of 65 and the disabled. In addition, Congress established the Medicaid program, which covers certain categories of vulnerable citizens. States are free to accept or to not accept the federal Medicaidprogram. If they do accept the program, as all States have done so far, they are in charge of its administration and are entitled to receive partial funding from the federal government while being obliged to cover the remaining expenses. According to the data quoted in Justice Ginsburg's partly concurring and partly dissenting opinion, the federal

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government covered on average of 57% of the total Medicaid costs in the period from 2005-2008. Citizens who do not qualify forMedicaid or Medicare either buy private health insurance or remain uninsured. The latter are expected to pay for medical services directly to healthcare institutions on a pay as you go basis. However, healthcare institutions have a legal obligation to provide a certain amount of emergency care to all individuals, including those unable to pay. According to the

data quoted in Justice Ginsburg's opinion, in 2009 approximately 170 million Americans were covered by private health insurance, about 50 million Americans were in the same year uninsured, while about 15% of the total amount of medical services are being administered outside any insurance system.

ACA and healthcare reform

Obama's health care reform features two main tracks. The first one aims at increasing the number of Americans covered by private health insurance. The second one strives to expand the categories of persons qualifying for Medicaid.

The plan to expand the pool of people covered by private insurance stands on three pillars. The first is reflected in the provisions on guaranteed-issue, which oblige insurance companies to insure anyone who applies. With this intervention into the freedom to contract or abstain from contracting, Congress primarily wanted to help people with pre-existing medical conditions. Because of the increased risk of the occurrence of an insured event (illness), insurance companies have been refusing to sell insurance to people with pre-existing conditions, demanding very high premiums or offering only limited coverage which excludes the pre-existing condition. In direct relation to this aspect of the reform are the community-rating provisions, which limit the factors that may be taken into account when determining insurance premiums (such factors may not include the medical history of the insured). The third, most controversial, pillar of the reform imposes an obligation on all Americans, with the exception of specific vulnerable groups as well as those covered by Medicare, Medicaid or their employers' programs, to buy health insurance with a certain minimum coverage. These provisions, which constitute the so-called "individual mandate" (an order to the individual to behave in a certain manner), are intended to secure additional revenues to insurance companies to compensate them for the losses they will inevitably suffer due to the newly created requirement to provide insurance to everyone, including those who are sick, at affordable prices. Additional revenues are expected to flow from the premiums to be paid mostly by the young who have not been insured so far and who, because of good health, are not expected to create expenditures for insurance companies on a

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short-term horizon. The three mentioned pillars of the reform were seen by Congress as a system of "communicating vessels".

Federalism in the U.S.A.

To understand why this reform is controversial, it should be recalled that in the U.S. version of federalism, sovereignty belongs to the citizens and the several States. A State has full capacity to regulate the behavior of its citizens (police power), limited by the obligation to respect human rights guaranteed by the constitution of the relevant state, as well as by the U.S. Constitution. Unlike the several States, the federal government only possesses those powers expressly granted to it by the federal Constitution (enumerated powers). The U.S: Supreme Court was thus not faced with the issue of

whether, as a matter of principle, a government may or should interfere with commercial relationships on the healthcare and health insurance markets, but whether the federal government (Congress) is competent to do so.

Commerce Clause and Necessary and Proper Clause of the U.S. Constitution

Among the exhaustively enumerated powers of Congress as a branch of the federal government is the power provided under Article 1, Section 8, Clause 3 of the U.S. Constitution (the so-called Commerce Clause), authorizing Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

Considering that the activities of health insurance providers are not limited to individual State markets, but rather produce economic effects at the national level, the power of Congress to regulate those activities, inter alia by prescribing guaranteed-issue and community rating, is contained within the Commerce Clause. For this reason, those provisions ofACA have not been constitutionally challenged, although the appropriateness of the regulation does not cease to be in the center of a heated debate in Washington DC.

However, one of the two issues before the Supreme Court was whether the provisions compelling an individual to purchase health insurance are in accordance with the U.S. Constitution.

The federal government as the defendant, as well as four of the nine justices of the Supreme Court, maintained that the Commerce Clause covers the individual mandate. Their main argument was that the decision not to buy health insurance,

in conjunction with the legal, professional and moral obligations of healthcare institutions to provide a certain level of emergency care to all patients, has as a result that those institutions end up providing a certain amount of services free of charge. Health-care providers compensate the ensuing losses by raising the prices of their services, and as the costs of those services are primarily taken up by insurance companies, the rising cost of healthcare ultimately results in increased insurance premiums. In other words, the decision not to buy insurance represents an economic behavior that produces effects on the national healthcare market, by causing a hike in prices of medical services, as well as on the national insurance market, through increased insurance premiums. As a consequence, citizens who buy private insurance end up subsidizing those who choose to remain uninsured. Given that this consequence has a national dimension, the federal government and the judges who remained in the minority considered that Congress has the power under the Commerce Clause to regulate the behavior causing such consequence, inter alia by imposing on individuals an obligation to purchase health insurance.

Five of the nine Supreme Court justices, concerned with the preservation of the original structure of American federalism, as well as personal freedom, held that Congress exceeded its constitutional powers by prescribing the individual mandate. Without disputing that the decision not to buy health insurance affects the healthcare and insurance markets, these justices have, in a somewhat formalistic interpretation of the Commerce Clause, concluded that Congress can regulate only economic relationships that exist prior to the regulation. The majority concluded that the decision not to buy individual insurance is a decision to refrain from entering into the relevant commercial relationship and that Congress cannot, under the label of economic regulation, force individuals into the commerce it wishes to regulate.

The group of four justices which on this issue remained in the minority argued that the contested provisions of ACA regulate the health care market, which is specific in that literally all citizens will inevitably participate in it, since everyone will sooner or later require medical attention. Accordingly, they argued, a commercial relationship (purchase of healthcare) exists, even though its materialization is deferred in time, and the regulation of the manner of payment for the services (in advance through insurance, rather than out of pocket at the point of sale) is a legitimate exercise of Congress' constitutional authority granted under the Commerce Clause. Chief Justice Roberts, as well as four justice who issued a joint dissenting opinion, were, however, of the opinion that the insurance purchase and the future purchase of medical care are two separate transactions and that because of a temporal gap between the insurance purchase transaction (today) and the medical care purchase transaction (who knows when), one cannot consider that an individual participates in the healthcare market prior to actually purchasing some care.

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The same five justices, including Chief Justice Roberts, who rejected the Commerce Clause argument, held that the challenged provisions do not pass the muster of the Necessary and Proper Clause of the U.S. Constitution (Article, Section 8, Clause 18), which authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States…" The other four justices argued that individual mandate is constitutional because it is in the function of and essential to the implementation of the constitutionally uncontestable power of Congress to enact guaranteed-issue and community rating provisions. Chief Justice Roberts, however, concluded in his opinion that this clause of the federal Constitution cannot represent a legal basis for creating a new power of Congress which undermines the separation of powers, in this case between the federal government and the several States, and that individual mandate, while perhaps "necessary", is not a "proper" tool for implementation of the reform..

Tax clause of the U.S. Constitution

Regardless of the fact that the majority of justices held that the Commerce Clause gives Congress no right to prescribe the individual mandate, the individual mandate has survived thanks to the Judgment of Solomon to which Justice Roberts adhered.

Namely, ACA provides that an individual who fails to maintain health insurance, and thus fails to comply with the individual mandate, shall pay a fine in an amount to be determined based on his/her income and family status. ACA further provides

that the obligation to pay the penalty must be declared in the filing of an individual's annual tax return (low income individuals who are not subject to the requirement of filing annual tax returns are released from payment of penalty), while the penalty is to be assessed and collected by the Internal Revenues Service in the same manner as tax. Justice Roberts concluded that the provisions on individual mandate do not necessarily have to be understood as an order to individuals to purchase health insurance (which is not within the power of Congress) but may be interpreted as a regulation imposing a tax on those who choose to go without insurance. The power of Congress to collect taxes is explicitly granted in the Tax Clause of the federal Constitution (Article 1, Section 8, Clause), which states: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises ...". The fact that ACA calls the required payment a penalty and not a tax is a label that is, according to Justice Roberts, inconsequential for determination of the legal nature of the imposition. Four of

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Roberts' colleagues vehemently opposed this life supporting solution in their joint dissent, arguing that the prescribed penalty is not a tax and that the individual mandate is unconstitutional.

Spending Clause of the U.S. Constitution

In the second part of its ruling, the U.S. Supreme Court declared unconstitutional the provisions of ACA which authorize the federal government to withdraw entire Medicaid funding, and not only the additional funding, from those States that refuse to enlarge the program so as to cover new categories of citizenry as unconstitutional.

As stated above, the States have thus far had the right to opt into the federal Medicaid program as it is formulated by the federal law. If they accept the program, and all States have done so, they are entitled to the federal funding ear-marked for the program. As part of Obama's healthcare reform, Congress adopted amendments to the Medicaid legislation, enlarging its coverage (inter alia to all individuals under 65 with incomes not exceeding 133% of the federal poverty level). This enlargement naturally increases the total cost of the program. Even though the federal government undertook the lion's share of the additional costs, a certain amount of those costs would inevitably fall upon the States. However, Congress did not leave the States with the choice to stay in the program with its existing scope. Instead, the States were obliged, under the "all or nothing" principle, to accept the new version of the program at the threat of losing the total amount of federal Medicaid funding to which they were entitled prior to the enlargement.

The plaintiffs (including 26 States) were of the opinion that by such stipulations Congress exceeded its constitutional powers. They argued that through the contested provisions, Congress sought to impose on the States the will of the federal government, contrary to the foundations of American federalism in which sovereignty resides with the States.

The federal government invoked the provisions of Article 1, Section 8, Clause 1 of the federal Constitution, which grants Congress the power "to provide for ... general Welfare of the United States" (the so-called Spending Clause), that is to establish social security and welfare programs. The federal government may operate such programs alone or in cooperation with the States. As confirmed in the jurisprudence of the Supreme Court, if the federal government chooses the latter model, it is entitled to impose conditions on the participating States under which federal funds may be used. In the present case, the federal government as the defendant argued that Congress had the right to prescribe that the States may participate in the Medicaid program and thus use federal funds allocated to this program under the condition that they accept to extend the benefits of the program to all individuals designated in the new act of Congress. Moreover, in the

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original Medicaid legislation, Congress reserved the right to amend and supplement the provisions of the legislation. Accordingly, the federal government argued, each State was at the time of its accession to Medicaid put on notice that it was acceding to a program that may change over time.

However, the majority of Supreme Court justices invoked the rule established by earlier jurisprudence of that court, by which the conditions imposed by the federal government on the States for using federal funds may never exceed the red line that separates a legitimate incentive to the States to implement a federal policy from coercion. In this case, the justices concluded that the penalty for refusing the expansion of Medicaid is too harsh (loss of all federal Medicaid funding and not only the funding allocated for the enlargement) to leave the States with any genuine choice. After the ObamaCare Supreme Court judgment, the States will be free to refuse the Medicaid expansion to the so-far uncovered population, without risking loss of entire federal funding for Medicaid.

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