

March 29, 2012

ANA ANALYSIS OF THE SUPREME COURT OF THE UNITED STATES - ORAL ARGUMENTS ON THE ACA TOPICS:

- (1) Is the Affordable Care Act's (ACA) expansion of Medicaid coercive, where overall federal support for a state's Medicaid program is conditional on the state covering everyone up to 133% of the federal poverty level (starting in 2014)?**
- (2) Should the entire ACA be struck down if the Court finds the Individual Mandate unconstitutional, or can the parts of the law that haven't been challenged be separated from – or "severed"-- from the full ACA and therefore preserved?**

On March 28, 2012, in the final day of Supreme Court oral arguments, challenging the ACA proved as contentious and difficult a day for the federal government as Day #2 [March 27, 2012], in which the ACA "individual mandate" was argued.

Medicaid: Registered nurses have reason to be concerned about the disposition of the Medicaid challenge before the Court. The ACA's expansion of the Medicaid program is scheduled to begin in 2014, and the federal government would pay 100% of increased costs to states up front, gradually reducing that to 90% by 2020. States refusing to comply with the expansion would lose 100% of their Medicaid funding.

The Court's decision on whether this constitutes impermissible federal "coercion" has the potential to fundamentally redefine federal power. States could be placed in the position of having to decide whether to accept federal conditions or forego all federal Medicaid monies. Or the issue could be sent back to Congress, which could decide on unfettered, no-strings-attached block grants to the states. In that scenario, each state would be a battleground for increasingly scarce resources in healthcare, breeding uncertainty for patients and healthcare providers alike. If the Court rejects the concept that federal conditions may be placed on money given the states, decades of precedent would be upended and it would spark chaos and untold years of litigation and legislative battles over not only health funding, but education, transportation, and energy grants, among others.

The more "liberal" justices pressed the question of why this provision would be "coercive," suggesting that the extra federal money to cover those people currently uninsured was a gift to the states. Counsel for the 26 state attorneys general challenging the Medicaid provision welcomed Justice Scalia's characterization of the deal as an "offer they can't refuse." Justice Kennedy, again considered a swing vote requiring persuasion, added that he felt the states had "no real choice" if all their federal Medicaid money could be taken away. The fact remains, though, that the Court would have tremendous difficulty articulating a "bright line" between federal assistance and federal "coercion."

Severability: Although it seems to be mired in highly technical legal arguments, the issue of "severability" also has direct consequences for registered nurses. The Court reviewed the issue of "severability," that is, whether a part of the statute can be struck down as unconstitutional, while

preserving the portions of the law that are not challenged. Justice Ginsberg wondered whether her colleagues were on a “wrecking operation” or a “salvage job.”

For registered nurses, this is a particularly important question. Large portions of the ACA have nothing to do with coverage and Medicaid expansion. It includes many ANA-supported provision that seek to improve quality of care, in some encouraging steps to move the system from an acute care focus to one that better integrates primary and preventive care, as well as chronic disease management. It creates mechanisms such as the Accountable Care Organization (ACO) for paying for improved patient quality of care and using resources more thoughtfully and effectively, rather than paying for care based on the number of services and tests ordered. It also provides grants to encourage innovative models of delivery using bundled payments, new contractual arrangements to coordinate care, and other needed changes. Another section that ANA worked hard to have included addresses strengthening the healthcare workforce, especially nursing and primary care.

What if the entire law is struck down? If the entire ACA is struck down, many gains in consumer protections that have *already* been implemented would be lost, including the requirement for plans to offer coverage to children up to age 26 under a parent’s plan, the prohibition on lifetime insurance limits, the prohibition on pre-existing conditions exclusion for children, tax breaks for small employers, and the discount on prescription drugs for Medicare seniors. During a bitterly partisan election season, political theatre threatens to completely overwhelm any rational efforts to address the problems that the ACA was intended to resolve or mitigate.

All may not be lost, though, as the state and private markets might step in to pursue a targeted few of the ACA’s quality and cost-savings elements. First, the states may take up many of the provisions, such as creating high-risk pools for those with pre-existing conditions who cannot obtain health insurance. In fact, some states have already passed laws that would implement several of the consumer protections contained in the ACA. And the private insurance market would almost certainly continue to seek ways to improve quality and efficiencies in care delivery. These could show up as increased attention to coordination of care, improved health information technology and communication, and paying for good care outcomes or episodes of care, rather than simply the number of services and procedures that can be billed. All of these are good for patients and good for registered nurses. So regardless of the outcome of the Supreme Court’s deliberations – expected toward the end of June – it is clear that health care delivery must change to remediate the problems of a fragmented and perversely incentivized system.

March 28, 2012

**ANA ANALYSIS OF THE SUPREME COURT OF THE UNITED STATES – ORAL ARGUMENTS ON THE ACA
TOPIC: the “INDIVIDUAL MANDATE”**

On March 27, 2012, the Supreme Court heard oral on the “mandatory coverage” (or “individual mandate”) provisions – the requirement that individuals purchase health insurance or pay a penalty - of the Affordable Care Act (ACA) came under heavy fire yesterday in two hours of oral argument before the U.S. Supreme Court. Before oral arguments, many knowledgeable Court-watchers shared the view that the ACA requirement for insurance coverage had a fairly good chance of surviving constitutional scrutiny. By noon yesterday, that view had changed.

Questioning from Justices Kagan, Breyer, Sotomayor and Ginsberg appeared to support the government’s argument that everyone is part of the nation’s healthcare market and that requiring insurance coverage is a legitimate federal regulation of that market. Justices Alito and Thomas have been presumed to be opposed to the mandate from the start, and questioning from Justice Alito confirmed that viewpoint. Surprisingly, based on previous judicial opinions Chief Justice Roberts and Justice Scalia had been discussed as potential swing votes; their questions yesterday suggested that view might have been too optimistic. Justice Anthony Kennedy, as predicted, appears to be the swing vote that may decide the fate of the “individual mandate.”

There were some interesting exchanges that demonstrated why it was so important for registered nurses and other healthcare advocates to share their frontline perspective with the Court. Counsel for the National Federation of Independent Businesses (NFIB) claimed that young people only have need for “catastrophic coverage” and are part of the mandate only to subsidize older people with health problems. This argument is problematic for at least two reasons. As Justice Ginsberg pointed out, the entire premise underlying insurance is that a pool of individuals subsidizes whoever in that pool has need. The second and more challenging assumption of the NFIB’s argument is that young people don’t have health needs addressed by insurance. This ignores the importance of prevention, primary care, and chronic disease management ... *especially* for young people, before poor health can manifest or deteriorate further. This connection, and the economic arguments supporting its value, was argued powerfully in the ANA’s *amicus* brief to the Supreme Court in the case.

Outside the Court, the scene was emblematic of democracy itself. ANA, other registered nurses and healthcare providers, and patient groups showed up in vocal support of the law. Counter-demonstrators opposing the law brought their signs and stories, as well. Many people, those in the crowd as well as tourists and others passing by the scene, approached nurses to thank them for their work and caring. It made the effort that much richer an experience for nurses on the steps of the U.S. Supreme Court, voicing their support for patients.