



Weekly Checkup

Reports of Obamacare's Death Are Greatly Exaggerated

CHRISTOPHER HOLT | OCTOBER 16, 2020

Much of official Washington—and probably at least one or two other people somewhere in the rest of the country—was glued to the TV this week watching the confirmation hearings of Judge Amy Coney Barrett, President Trump's most recent nominee to the Supreme Court. Opponents of her nomination have focused much of their attention on how Judge Barrett might shift the Court's alignment for the upcoming *California v. Texas* (formerly *Texas v. Azar*) case challenging the constitutionality of the Affordable Care Act (ACA)—yes, another one; no, you aren't experiencing déjà vu—and how that would impact Americans with pre-existing health conditions. **But how much danger is the ACA really in?** Let's consider.

To briefly review, in 2017, Congress passed the Tax Cuts and Jobs Act, which included a provision setting the ACA's individual mandate penalty for not purchasing health insurance to zero, in effect eliminating the mandate. The mandate was also the crux of a 2012 lawsuit seeking to overturn the law. At that time, however, Chief Justice Roberts allowed that a mandate to purchase insurance would be unconstitutional, but a tax for not purchasing insurance was within Congress' constitutional prerogative. Fast forward to 2018, when a number of state attorneys general opposed to the ACA sued on the grounds that a tax of \$0 is not a tax, so the mandate cannot be classified as a tax and is unconstitutional. Further, they argued that because the ACA's authors believed that the mandate was crucial to making the other insurance reforms work, the entire law must be struck down if the mandate is struck down.

The case against the mandate itself seems relatively strong (though I'm not a lawyer) and I would not be surprised if there is a majority on the Court, with or without Barrett, to throw out the mandate. It does not necessarily follow, however, that the rest of the law must fall or that a majority of the Court—particularly with increased politicization of the Court and calls for changes to its institutional structure—is eager to throw out a 10-year old law, massively disrupting health insurance for millions of Americans. Note that the Roberts' Court with a 5-4 conservative majority has twice had the opportunity to strike down the ACA but has gone out of its way not to leave the law intact.

Additionally, the argument that if the mandate goes the whole law must follow presumes that the mandate is, in fact, crucial to the law. The Obama Administration, however, provided broad waivers to the mandate and did not actively enforce it. Neither then, nor since the penalty was reset, have we seen notable negative effects. **Arguably, the law has been functioning just fine without the mandate since the beginning.** This brings us back to Judge Barrett, who [noted](#) this week that it was Congress that acted to zero-out the mandate without making any other changes to the law. Additionally, Barrett emphasized the importance of presuming individual provisions of law are severable.

Of course, this assumes the Court doesn't simply throw the case out on standing grounds, which appears to be a possibility. And it should be noted that **Congress, particularly if Democrats take control of the Senate, can easily resolve the situation by either fully repealing the ACA, setting the penalty to a nominal amount, say \$1, or passing a technical corrections package that explicitly states Congress' intent for the provisions of the law to be severable.** There is certainly the possibility that large pieces or even all of the ACA could be

struck down, but there is also a possibility that I'll let my kids eat ice cream for breakfast tomorrow. **At a minimum, we can say that reports of the ACA's demise have been greatly exaggerated.**

Video: Addressing Surprise Medical Bills

States appear to have coalesced around a few general approaches to surprise medical bills, but is this enough to solve the problem? Holt explains why Congress needs to act.