



American Action Forum, Blue Dog Research Forum
Affordable Care Act before the Supreme Court: Legal Expert Survey
March 23, 2012

Survey Description

This survey was a bipartisan collaboration between the American Action Forum and the Blue Dog Research Forum. It was designed to gather expert insight into the probable outcomes of the upcoming case involving the Affordable Care Act.

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Methodology

The survey was administered by Purple Insights, the research division of Purple Strategies. The survey was fielded March 19th-22nd, 2012

The survey sample is comprised of 66 participants: 43 former clerks of current Supreme Court justices, and 23 attorneys who have argued before the Court.

The survey was distributed to 398 former Clerks and 239 attorneys who have argued before the Court. All of those in the sample were contacted first via e-mail, and were then reached by phone at least once to encourage participation. We provided two follow-up e-mails as additional encouragement to participate. The survey was administered online.

Of the Supreme Court clerks, 12 clerked for the "left" block of the Court (Justices Breyer, Ginsburg, Kagan, Sotomayor), 21 clerked for the "right" block of the Court (Justices Alito, Roberts, Scalia, Thomas), and 10 clerked for Justice Kennedy. Given the tenures of the various members of the Court blocks, this is a representative division of the populations of former clerks.

Survey Results

1. On a scale of zero to 100, what do you believe is the probability that the SCOTUS majority will decide the Anti-Injunction Act applies to the individual mandate?

27%

2. On a scale of zero to 100, what do you believe is the probability that the SCOTUS majority will find the individual mandate unconstitutional?

35%

3. If the Supreme Court rules that the individual mandate is unconstitutional, what do you believe is the probability of each of the following findings? Please enter a number between 0 and 100 for each outcome – the total of all three must equal 100.

1) The individual mandate is partially severable

38%

2) The individual mandate is completely severable

36%

3) The individual mandate is non-severable

27%

4. On a scale of zero to 100, what do you believe is the probability that the SCOTUS majority will find the Medicaid expansion unconstitutional?

19%

5. If the Supreme Court rules that the Medicaid expansion is unconstitutional, what do you believe is the probability of each of the following findings? Please enter a number between 0 and 100 for each outcome – the total of all three must equal 100.

1) The Medicaid Act is severable

65%

2) The Medicaid Act is non-severable

19%

3) This will be decided in the next term

16%

Open-Ended Comments

- “I don't think this will be nearly as close a case as conventional wisdom now has it. I think the Court will uphold the statute by a lopsided majority.”
- “If the case gets to the merits (i.e., the court finds the AIA does not apply), I am pretty confident there are 5 votes to strike the mandate (Scalia, Thomas, Roberts, Alito, and Kennedy). Based on his opinions in *Comstock* and *Bond*, I do not believe that Kennedy will allow this expansion of federal power to stand. I think the more difficult questions are the questions re severability and Medicaid and I cannot predict an outcome here. However, I would not be surprised if the Medicaid expansion is also struck down as failing the test outlined in *South Dakota v. Dole*.”
- “It seems that most people are expecting a politically polarized ruling. But I expect the Court to uphold the individual mandate and the whole Act, but either anywhere from 6-3 to 8-1, with 7-2 most likely.”
- “The only way to strike down the individual mandate would be to overrule decades of precedent going back to the New Deal. That'd be a welcome step, in my view, but it's one that the Court simply won't take. Justice Scalia gave *stare decisis* effect to these precedents in the medical-marijuana case (*Gonzales v. Raich*), and even Justice Thomas's concurrence in *U.S. v. Lopez* indicated reluctance to wipe the Commerce Clause slate completely clean.”
- “My personal view is that the law is actually well-settled in this area. The Act is clearly constitutional under prior Commerce Clause decisions. I appreciate the arguments being made against that view, but I think they have all long since been disposed of. I don't even think this is a close case, let alone a hard one.”