Supreme Court arguments on Obama health care law set stage for legal assault on social programs

Tom Carter
2 April 2012

Beginning Monday of last week, the US Supreme Court held three consecutive days of oral arguments on a number of issues related to the constitutionality of the Obama administration's 2010 health care legislation (the Patient Protection and Affordable Care Act), including the "individual mandate" provision requiring citizens to purchase heath insurance from private corporations.

To the apparent surprise of many legal commentators and the nominally liberal justices on the court, the right-wing faction used the opportunity to launch a political offensive not just against the Obama health care legislation, but also against federal social programs in general.

The four-justice right-wing bloc on the Supreme Court, consisting of Chief Justice Roberts and Associate Justices Antonin Scalia, Clarence Thomas and Samuel Alito, represents the most reactionary sections of the ruling elite. Wednesday's arguments, in particular, revealed that this bloc is seeking to exploit the regressive and unpopular Obama health care "reform" to lay a pseudo-legal basis for far-reaching attacks on all federal entitlement programs, beginning with Medicaid.

The Patient Protection and Affordable Care Act has been the subject of intense litigation involving more than two dozen federal lawsuits since it was passed in March 2010. The principal challengers have been 26 of 50 state governments and the National Federation of Independent Business, as well as numerous private individuals. Over the past two years, judges in the lower federal courts around the country have issued conflicting and contradictory decisions, which the Supreme Court is tasked with resolving in the present case, *Florida v. Department of Health and Human Services*.

It now seems clear that Chief Justice John Roberts made the decision to schedule three days of arguments, an extraordinary step, precisely to create an opportunity to lay out the case for going back to the days before the Great Depression and Roosevelt's New Deal when the Court routinely blocked social legislation. In this case as in all others, the right-wing bloc on the court proceeds from a political goal, not legal precedent or principle, and improvises its legalistic arguments to achieve that goal. In the three days of arguments last week, the justices, particularly Scalia, barely sought to conceal their political motives.

The court focused the first day of arguments on preliminary considerations of whether the court could even consider challenges raised to portions of the Patient Protection and Affordable Care Act that had not yet gone into effect. The second day was dedicated to the constitutionality of the individual mandate, which the right wing attacked as an unconstitutional imposition of the federal government on individual Americans.

It was not until the third day that the political dynamic emerged in full force. On Wednesday, the court invited arguments on two issues: first, whether, if the individual mandate is struck down, the entire law should be thrown out; and second, whether the provisions in the law expanding the scope of Medicaid, the federal health insurance program for the poor, violate states' rights.

The first day's arguments were largely technical. They for the most part turned on whether the fine associated with failure to comply with the individual mandate, which is slated to go into effect in 2015, is a "penalty" or a "tax" for the purposes of a statute prohibiting challenges to taxes before they are actually imposed. The Obama administration maintained that the fine was not a tax, in order to insure that the Supreme Court took its decision this year rather than waiting until 2015. Its right-wing opponents adopted the same position on the jurisdictional question, so the Supreme Court appointed an independent counsel, Robert Long, to argue that the penalty was in fact a tax.

The legal arguments over the constitutionality of the individual mandate itself on the second day took a fairly predictable form. In general, the court's ostensibly liberal justices defended the provision, while the court's right-wing bloc criticized it (with the exception of Thomas, who, in accord with his bizarre custom, said absolutely nothing throughout the three days of proceedings). The so-called "swing" justice, Anthony Kennedy, asked critical questions of both sides.

The Obama administration and the Democratic Party, in the closest collaboration with insurance and health industry

lobbyists, constructed their health care "reform" around the individual mandate provision for the purpose of ensuring that corporate and government health care costs could be cut without impinging on the profit interests of the insurance companies.

Obama and the Democrats rejected out of hand any form of universal health care under a government-run program. Instead, they sought, through the individual mandate, to place the onus for their "reform" of the health care system on individual working people, while expanding the market for private insurers and underwriting their profits by guaranteeing tens of millions of new policyholders.

At the same time, the plan entails hundreds of billions of dollars in cuts in the federal Medicare program for the elderly and reductions in benefits for millions of working class families. A recent Congressional Budget Office report estimated that up to 20 million workers could lose their employer-sponsored health insurance in the first few years of the program.

The posturing by the Supreme Court's right-wing bloc as defenders of individual rights against overreaching government was utterly cynical. When it comes to torture, military commissions, indefinite detention, state secrets, domestic spying, warrantless searches, police abuse and attacks on free speech, these figures are more than happy to tear the Constitution to shreds.

On the third day, the court gave Republican attorney Paul D. Clement, representing 26 states, a lengthy opportunity to present arguments that the Obama health care legislation violated states' rights. Clement's remarks rapidly assumed the character of an attack not just on the health care overhaul, but also on Medicaid.

Medicaid, launched in 1965, is funded largely by the federal government but is administered by the states. The Patient Protection and Affordable Care Act expands Medicaid and requires the states to make it available to a larger section of the population. This helps to cut costs by pushing millions more working class families into bare-bones health care coverage.

In his arguments before the Court, Clement declared that in 1984 "federal spending to the states was a shade over $21 billion. Right now it's $250 billion, and that's before the expansion under this statute." Clement argued that these sums of money amount to "coercion" and are a violation of states' rights.

Justice Elena Kagan asked, "Well, if you are right, Mr. Clement, doesn't that mean that Medicaid is unconstitutional now?" "Not necessarily, Justice Kagan," Clement replied evasively.

However, Clement went on later to argue openly that the court "should go back and reconsider your cases that say that Congress can spend money on things that it can't do directly"—in other words, the court should reconsider whether federal programs such as Medicaid are constitutional.

Clement's argument that the court should "go back" to legal doctrines that prevailed a century ago evidently shocked the liberal justices. Arch-reactionary Justice Antonin Scalia, on the other hand, went out of his way to praise Clement's arguments.

In an article Wednesday in the *Wall Street Journal*, legal commentator Jess Bravin called the doctrines advanced by Clement and welcomed by the court's right-wing bloc "a tectonic shift in constitutional doctrine that has dominated since the New Deal."

In a subsequent article on Thursday, Bravin elaborated on this point, writing: "In the run-up to the court argument, the Medicaid expansion received less attention. But the issue emerged as perhaps the most revelatory of the Roberts court's view of American federalism, with conservative justices suggesting a deep unease over the dominant role in domestic policy Washington has played since the New Deal."

The powers of the federal government to enact and maintain social programs such as Medicaid, long thought to be a settled constitutional issue, are now subject to challenge along the lines of legal doctrines that were rejected in the 1930s.

The court's decision on the health care law, due in June, is not a foregone conclusion. During the arguments, Justices Anthony Kennedy and Samuel Alito expressed concern that striking down the individual mandate could be "unfair" to insurance companies. None of the other justices pointed out that whether or not the insurance companies would be able to continue raking in massive profits had nothing to do with the constitutionality of the law.

Chief Justice Roberts on the third day hinted in the direction of caution in openly attacking Medicaid, suggesting that the states had compromised their case for states' rights in relation to federal social programs by accepting large amounts of federal funding over the past 75 years.

The ultimate decision will be made far more on the basis of political considerations than on legal or constitutional ones.

Regardless of the Court's ultimate decision in the case, the arguments presented last week represent the opening shots in a legal challenge to the entire framework of basic entitlement programs. Workplace safety laws, food stamps, the Civil Rights Act, the Voting Rights Act, the Social Security Act, Medicaid, Medicare, and anti-discrimination statutes—the Supreme Court has placed a question mark over virtually the entire system of social legislation developed in the United States in the 20th century.