



SCOTUS Questions Constitutionality of PPACA; House Passes FY 2013 Budget Resolution

House Passes FY 2013 Budget Committee Resolution

Before recessing for two weeks until April 16, the House voted along party lines 228 to 191 to pass H. Con. Res. 112, a resolution to limit FY 2013 appropriations to \$1.028 trillion and to cut about \$4 trillion in spending over fiscal years 2014 through 2022. The cap is \$19 billion below the \$1.047 trillion spending cap agreed to under the Budget Control Act (BCA) and insisted on by the Senate. The resolution directs six House committees to cut mandatory spending by \$261 billion.

As to health-related matters, the House plan would:

- ◆ repeal the PPACA;
- ◆ raise the Medicare eligibility age from 65 to 67 between 2023 and 2034;
- ◆ provide for a voluntary Medicare voucher system to begin in 2023;
- ◆ provide for the repeal of the current Medicare physician payment SGR system and use a deficit-neutral reserve fund as an offset for its replacement;
- ◆ block grant the Medicaid and food stamp programs; and
- ◆ increase funding for anti-fraud programs.

The House voted down six alternative proposals,

including a Democrat amendment that would, among other things, cap discretionary spending at \$1.043 trillion (as under the BCA), keep the current Medicare and Medicaid structure and fund the implementation of the PPACA.

Of note, the House also killed, 38-382, a bipartisan substitute authored by **Reps. Jim Cooper and Steven LaTourette** which mirrors, to a degree, the President's Deficit Reduction Commission proposal (Simpson/Bowles). Inasmuch as the House resolution was declared dead in the Senate, the passage of all FY 2013 appropriations bills before the end of this fiscal year remains in doubt. It appears that a continuing resolution will push at least some FY 2013

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Does the AIA Preclude Ruling on the PPACA's Constitutionality Before 2014?

Last Monday the Supreme Court began its deliberations on the PPACA health reform law by hearing arguments on whether the Anti-Injunction Act (AIA) precludes any decision on the constitutionality of the individual mandate until the mandate and related penalties for non-compliance become effective in 2014. In 90 minutes of argument, a majority of the justices appeared skeptical that the penalties rise to the level of a “tax” which would invoke the AIA and preclude the court’s jurisdiction

to render a decision this year. For example, **Justice Stephen Breyer** questioned whether the AIA should apply since it is intended to prevent interference with a federal revenue source, which in this case, it is not. Of note, **Justice Samuel Alito** questioned why the DOJ argued on Monday that the penalty for not purchasing coverage is not a tax, while the government is expected to argue on Tuesday that for constitutional purposes it is a tax and, thus, allowed under the Constitution’s commerce clause.

Is the PPACA's Individual Mandate Constitutional under the Commerce Clause?

On Tuesday, the Court heard two hours of argument on whether the commerce clause is broad enough to validate the individual mandate. The plaintiffs (including Florida and 26 states) stated their case that the mandate is unprecedented and exceeds congressional authority. The questions posed by **Chief Justice Roberts and Justices Alito, Kennedy and Scalia** appeared skeptical of the DOJ Solicitor General’s arguments that the mandate does not exceed congressional authority under the commerce clause or should otherwise be upheld because the penalty for non-compliance is a “tax”. For example, **Justice Scalia** asked, “The President said it wasn’t a tax, didn’t he?” Even **Justice Elena Kagan** observed that Congress made a “determined effort” not to label the penalty as a tax. **Justice Scalia** appeared to take on the commerce clause argument in the most direct fashion when he said “The federal

government is not supposed to be a government that has all powers.... It’s supposed to be a government of limited powers.”

Chief Justice Roberts suggested that the court would be hard pressed to come up with a limit on the extent of the commerce clause if the individual mandate is upheld. In particular, **Justice Kennedy** asked the Solicitor General, without receiving a satisfactory response, how the court could present a rationale for upholding the commerce clause and distinguish it from future federal actions. **Justice Kennedy** suggested that the government faces a “very heavy burden of justification” for the mandate and that the provision “changes the relationship of the government to the individual in a fundamental way.” However, **Justices Breyer, Ginsburg and Kagan** came to the defense of the solicitor general several times. For example, **Justice Ginsburg** referred to

an amicus brief showing that uncompensated care in Maryland increased consumer costs by 7% in arguing that, because the uninsured are passing on their health care costs to the insured, the federal government can regulate them. Also, **Justice Sotomayor** suggested that the government can force citizens to purchase insurance prior to needing it “because you can’t buy it at the moment you need it.”

During the arguments presented by the plaintiffs, **Chief Justice Roberts** observed that the key to the DOJ’s argument is that everyone is in the health care market, which differentiates health care from other products, and that the government is attempting to regulate how health care is paid for. However, the plaintiff’s representative objected to this observation when he argued that some U.S. residents do not consume health care or purchase insurance.

What Portion of the PPACA Should Survive if the Individual Mandate Falls?

On Wednesday the court first considered the issue of severability, that is, what portions, if any, of the law should survive if the individual mandate or Medicaid expansion is held to be unconstitutional. The plaintiff's attorney argued that keeping portions of the law without the individual mandate would leave a "hollow shell" and that "Whatever you do, Congress is going to have options." However, it appeared that most justices were willing to consider retaining at least some of the PPACA's provisions even if the individual

mandate is upheld. For example, **Justice Sotomayor** said "The bottom line is, why don't we let Congress fix it" instead of striking down the entire law. Also, **Chief Justice Roberts** noted that the PPACA includes provisions, such as one related to Native American health care, that are unrelated to the individual mandate. **Justice Scalia** questioned the plaintiff's argument, saying "You're telling us that the whole statute would fall" if the court struck down even one provision and "That can't be right." On the other hand, Justice Scalia also said it was totally unrealistic

for the court to comb through every line of the 2700 page bill to determine what should go and what should stay. In addition, **Justice Kennedy** said it would be "more extreme" for the court to attempt to piece together the remaining parts of the law and to do so "we would have a new regime that Congress did not order." Perhaps of significance, the court noted that the PPACA provisions that have already become effective might be viewed as already having been severed from the individual mandate and related provisions that become effective later in 2014.

Does the PPACA Unlawfully Coerce States to Accept Medicaid?

In the court's concluding session on Wednesday, the justices considered whether the PPACA's Medicaid expansion, requiring new state funding, represents an unlawful coercion of the states by the federal government. The attorney for the 26 state plaintiffs reminded the court that it previously ruled that there are limits to what the federal government can require states to do to receive funds and that the condition cannot be "so coercive as to pass the point at which pressure turns into compulsion."

However, **Justice Kagan** questioned "Why is a big gift from the federal government a matter of coercion? It's just a boatload of federal money. It doesn't sound coercive to me." **Chief Justice Roberts** noted that states have been receiving Medicaid money with federal requirements attached for years, so they shouldn't be surprised that the federal government has decided to expand them. **Justice Breyer** noted that it is up to the Secretary of HHS to determine whether a state will be forced out of Medicaid and

that administrative law requires the Secretary to act reasonably. He said such an action has never been taken, although the plaintiffs offered a letter from HHS to a state which noted the Secretary's authority to withdraw funding if the state did not conform its law to the federal requirements. Taking a tougher line of questioning, **Justice Alito** noted that it would be nearly impossible for states to turn down the large percentage of federal funding for the law's Medicaid expansion. He asked, "How could that not be coercion?"

The Aftermath

The court was expected to take private, tentative votes last Friday on the several issues summarized above. Justices could always change their votes as deciding arguments are fashioned and majority opinion duties are assigned by the Chief Justice. It would be unusual if the court did not release their decision by the end of June when the court's term ends. If all or parts of the PPACA are struck down by the court, it is unlikely that Congress will attempt to remedy the ruling or replace the law

before the November elections. What the Congress does decide to do during the lame-duck session will likely be determined by the new composition of the Congress and whether or not the President remains in office next year. Republicans on the House Ways and Means Health Subcommittee used hearings to further showcase their position to "repeal and replace" the health reform law and called eight witnesses to put on the record additional arguments as to why the law and individual mandate are unconstitutional.

Big Data Research and Development Initiative

The Administration announced the \$200 million “Big Data Research and Development Initiative” designed to amass large amounts of data, including health care data, for research purposes. The six federal agencies involved include: the Defense Advanced Research Projects Agency; the

Department of Defense; the Department of Energy; the National Institutes of Health; the National Science Foundation; and the U.S. Geological Survey. Under the initiative, the NIH and the NSF plan to collaborate on a project to find new technologies and methods for data analysis, data management and machine learning.

FDA Issues

According to Senator Mike Enzi, the Senate HELP Committee will include in one bill all four FDA/manufacturer user fee agreements covering brand-name drugs, medical devices, generic drugs and biosimilars. The bills would reauthorize the Prescription Drug User Fee Act (PDUFA) and the Medical Device User Fee Act (MDUFA) and create new user fee programs for generic drugs and biosimilar (or follow-on biologic) drugs.

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spending decisions past the November elections. The low vote total of the Cooper/LaTourette attempt to push for a “big deficit reduction solution” concedes not bode well for a lame-duck compromise to reduce long-term deficits and to resolve the BCA mandate for \$1.2 trillion in ten-year spending cuts.

IPAB Repeal Needs Technical Restart in House

The House previously passed H.R. 5, the Help Efficient, Accessible, Low Cost, Timely Healthcare (HEALTH) Act of 2011, which would repeal the PPACA’s Independent Payment Advisory Board. Because of a technical glitch, the House was forced to approve a resolution, H.Res. 596, that requests the Senate to return the bill to the House for correction.

S. 2227 (TAXATION), to amend the Internal Revenue Code of 1986 to expand and simplify the credit for employee health insurance expenses of small employers; KERRY; to the Committee on Finance, March 22.

H.R. 4242 (HEALTH REFORM), to repeal the Patient Protection and Affordable Care Act, to amend the Public Health Service Act to provide individual and group market reforms to protect health insurance consumers, and for other purposes; HECK; jointly, to the committees on Energy and Commerce, Ways and Means, Education and the Workforce, the Judiciary, Natural Resources, Rules, House Administration, and Appropriations, March 22.

H.R. 4245 (VETERANS' HEALTH), to amend Title 38, United States Code, to require the secretary of veterans affairs to reimburse eligible veterans who are entitled to Medicare benefits for Medicare deductibles and other expenses that are owed by the veterans for emergency medical treatment provided in non-Department of Veterans Affairs facilities; DEFAZIO; to the Committee on Veterans' Affairs, March 22.

H.R. 4246 (VETERANS' HEALTH), to amend Title 38, U.S. Code, to provide for the expansion of eligibility for veteran reimbursement for emergency treatment provided in non-Department of Veterans Affairs facilities; DEFAZIO; to the Committee on Veterans' Affairs, March 22.

H.R. 4254 (MEDICARE), to amend Title XVIII of the Social Security Act to enhance Medicare Advantage program integrity; STARK; jointly, to the committees on Ways and Means and Energy and Commerce, March 22.

H. RES. 594 (DISEASE AWARENESS), commending the progress made by anti-tuberculosis programs; ENGEL; jointly, to the committees on Foreign Affairs and Energy and Commerce, March 22.

S. 2236 (DRUGS), to provide for the expedited development and evaluation of drugs designated as breakthrough drugs; BENNET; to the Committee on Health, Education, Labor, and Pensions, March 26.

H. CON. RES. 113 (FEDERAL BUDGET), establishing the budget for the U.S. government for fiscal year 2013 and setting forth appropriate budgetary levels for fiscal year 2012 and fiscal years 2014 through 2022; GARRETT; to the Committee on the Budget, March 26.

S. 2243 (MEDICARE), to establish a program to provide incentive payments to participating Medicare beneficiaries who voluntarily establish and maintain better health; WYDEN; to the Committee on Finance, March 28.

H.R. 4274 (CHILDREN'S HEALTH), to amend Title IV of the Public Health Service Act and Title V of the Federal Food, Drug, and Cosmetic Act to permanently extend the provisions of the Best Pharmaceuticals for Children Act and the Pediatric Research

Equity Act of 2003; ROGERS of Michigan; to the Committee on Energy and Commerce, March 28.

H.R. 4292 (PRESCRIPTION DRUGS), to direct the attorney general to establish uniform standards for the exchange of controlled substance and prescription information for the purpose of preventing diversion, fraud, and abuse of controlled substances and other prescription drugs; ROGERS of Kentucky; to the Committee on Energy and Commerce, March 28.

S. 2254 (PRESCRIPTION DRUGS), to direct the attorney general to establish uniform standards for the exchange of controlled substance and prescription information for the purpose of preventing diversion, fraud, and abuse of controlled substances and other prescription drugs; PORTMAN; to the Committee on Health, Education, Labor, and Pensions, March 29.

S. 2256 (MENTAL HEALTH), to amend the Public Health Service Act to provide grants for community-based mental health infrastructure improvement; REED; to the Committee on Health, Education, Labor, and Pensions, March 29.

S. 2257 (MEDICAID), to increase access to community behavioral health services for all Americans and to improve Medicaid reimbursement for community behavioral health services; STABENOW; to the Committee on Health, Education, Labor, and Pensions, March 29.

S. 2262 (CHILDREN'S HEALTH), to amend the Public Health Service Act to reauthorize and extend the Fetal Alcohol Syndrome prevention and services program, and for other purposes; JOHNSON of South Dakota; to the Committee on Health, Education, Labor, and Pensions, March 29.

S. 2265 (MEDICARE), to amend Title XVIII of the Social Security Act to cover screening computed tomography colonography as a colorectal cancer screening test under Medicare; INHOFE; to the Committee on Finance, March 29.

S. 2281 (RARE DISEASES), to amend the Federal Food, Drug, and Cosmetic Act to strengthen the ability of the Food and Drug Administration to seek advice from external experts regarding rare diseases, the burden of rare diseases, and the unmet medical needs of individuals with rare diseases; WHITEHOUSE; to the Committee on Health, Education, Labor, and Pensions, March 29.

H.R. 4315 (VETERANS' HEALTH), to amend Title 38, United States Code, to provide for unlimited eligibility for health care for mental illnesses for veterans of combat service during certain

periods of hostilities and war; RYAN of Ohio; to the Committee on Veterans' Affairs, March 29.

H.R. 4324 (TAXATION), to amend the Internal Revenue Code of 1986 to expand the credit for employee health insurance expenses of small employers; KIND; to the Committee on Ways and Means, March 29.

H.R. 4332 (DRUGS), to amend Section 505(j) of the Federal Food, Drug, and Cosmetic Act to extend the period for a first applicant, with respect to a generic drug, to obtain tentative approval without forfeiting the 180-day exclusivity period, and for other purposes; PALLONE; to the Committee on Energy and Commerce, March 29.

H.R. 4341 (MILITARY HEALTH), to direct the secretary of defense to establish a working group to review TRICARE policy with respect to providing health care to children and determine how to improve such policy, and for other purposes; STIVERS; to the Committee on Armed Services, March 29.

H. RES. 603 (DISEASE AWARENESS), expressing support for designation of Oct.

2, 2012, as World MRSA Day; BIGGERT; to the Committee on Oversight and Government Reform, March 29.

H. RES. 605 (PUBLIC HEALTH), supporting the goals and ideals of National Public Health Week; ROYBAL-ALLARD; to the Committee on Energy and Commerce, March 29.