

RELEASE IN FULL

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**From:** Koh, Harold Hongju <KohHH@state.gov>  
**Sent:** Thursday, June 28, 2012 10:38 AM  
**To:** H  
**Cc:** Sullivan, Jacob J; Mills, Cheryl D  
**Subject:** FW: Health care outcome

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**From:** Koh, Harold Hongju  
**Sent:** Thursday, June 28, 2012 10:38 AM  
**To:** Koh, Harold Hongju; Nides, Thomas R; Boswell, Eric J; Sherman, Wendy R; Adams, David S; Mull, Stephen D; Crocker, Bathsheba N; Sullivan, Jacob J; Mills, Cheryl D; Nuland, Victoria J; Smith, Dana S (PA)  
**Subject:** RE: Health care outcome

They are still reading it out.

But the bottom line, from the blogs is that

The Affordable Care Act, including its individual mandate that virtually all Americans buy health insurance, is constitutional. There were not/not five votes to uphold it on the ground that Congress could use its commerce clause power, to regulate commerce between the state, to require everyone to buy health insurance. But five Justices led by CJ Roberts agreed that the penalty that someone must pay if he refuses to buy insurance is a kind of tax that Congress can impose using its taxing power under the taxing clause

Because the mandate survives, the Court did not need to decide what other parts of the statute were constitutional, except for a provision that required states to comply with new eligibility requirements for Medicaid or risk losing their funding. On that question, the Court held that the provision is also constitutional as long as states would only lose new funds if they didn't comply with the new requirements, rather than all of their funding.

So a big, if narrow win

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**From:** Koh, Harold Hongju  
**Sent:** Thursday, June 28, 2012 10:25 AM  
**To:** Nides, Thomas R; Boswell, Eric J; Sherman, Wendy R; Adams, David S; Mull, Stephen D; Crocker, Bathsheba N; Sullivan, Jacob J; Mills, Cheryl D; Nuland, Victoria J; Smith, Dana S (PA)  
**Subject:** Health care outcome  
**Importance:** High

As predicted. Ct. narrowly upholds. Still reading. L will send an info memo before the end of the day

But as we are seeing it right now, the money quote from the section on the mandate: "Our precedent demonstrates that Congress had the power to impose the exaction in Section 5000A under the taxing power, and that Section 5000A need not be read to do more than impose a tax. This is sufficient to sustain it."

CJ Roberts, as predicted places himself as the swing vote and controls the outcome. J. Kennedy not the "decider" This is the narrowest ground to uphold, allows Congress to say the Administration has imposed a hidden tax (now open). This allows CJ Roberts to reserve the wisdom of doing this to "the People", and will allow him to be described in post-term commentary as "deft" in his management of both this case and Arizona immigration.

More to come

Harold