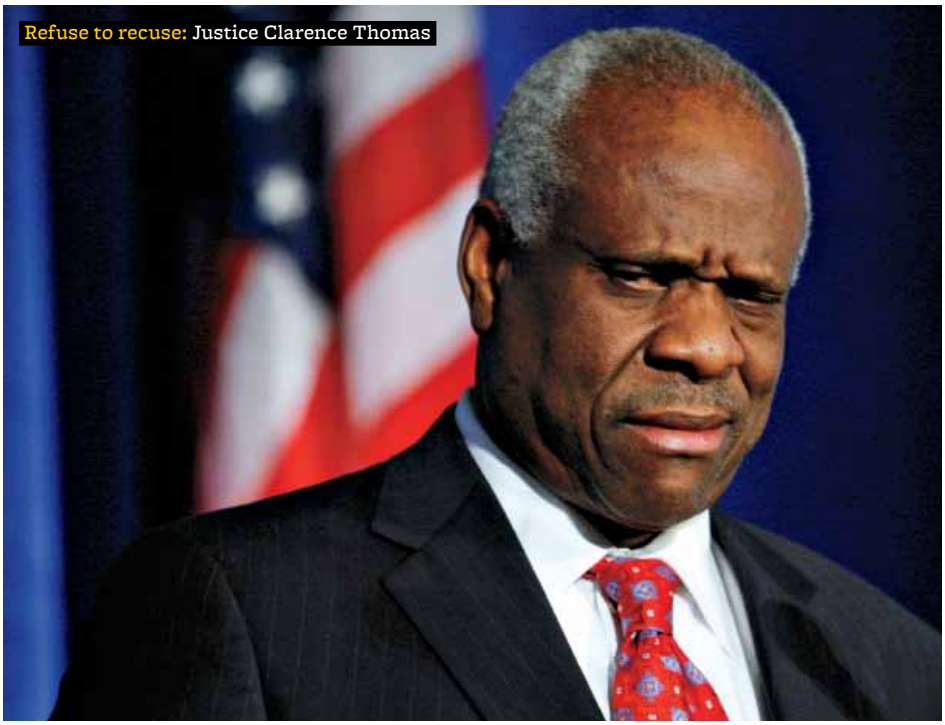
# Twilight Zone

The landmark health care case before the Supreme Court isn't just important. It's also deeply weird. By Margot Sanger-Katz



Refuse to recuse: Justice Clarence Thomas

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Nine people will settle the biggest questions in health care. When the Supreme Court justices hear arguments next year about the Affordable Care Act, President Obama's signature health law, they will debate titanic questions like whether the federal government can require people to buy health care. They could uphold the law, strike down key provisions, or opt to postpone the big decisions for a future year. But the significance of the case overshadows its deep weirdness: Neither the justices nor the players have treated the health care challenges like any other lawsuit. The result is a hugely important case being handled very differently than the way the tradition-bound Supreme Court usually does business.

Strange feature No. 1: Since 1970, the Court generally gives attorneys one hour per case. Every few years, the justices extend the discussion when they ask lawyers to brief them on several complex topics. But here, they have set aside five and a half hours for oral argument, the longest in the current era for a single case—longer than *Roe v. Wade* (two hours) or *Bush v. Gore* (90 minutes). The only recent hearing to come close was a 2003 argument about the campaign finance law authored by Sens. John McCain and Russell Feingold (four hours). That case included 13 separate legal issues, while the justices have focused on just four questions in the health care law. Presumably, the Court recognizes the case's potential political impact and wants to ensure that all the stakeholders have their say before its ruling creates a firestorm.

Of the four issues they say are at stake, the justices have identified two where the parties actually agree: that the Court has jurisdiction to decide the case now, and that the individual mandate to buy insurance can't be separated from the law's many other provisions. Because the litigants concur, the Court was forced to hire its own lawyers, known as amici, to argue the other side of these questions. This happens in most years, but two lawyers for one case is extremely rare. A survey by University of Minnesota law professor Timothy Johnson suggests that two lawyers have not been invited to argue in the same case for at least 40 years.

The Court made a bold choice by agreeing to discuss the third issue at all. Attorneys general from 26 states argue that the health care law's expansion of Medicaid inappropriately coerces state governments. But none of the lower courts that have ruled on the law agreed with them. In fact, as one Appellate judge pointed out, no federal court has ever struck down a law using the legal theory advanced by the attorneys general. The Supreme Court rarely takes questions where the lower courts are in agreement, but it will spend an hour on the issue.

What's more, outside groups—on both the right and the left—are fighting unusually hard for justices to recuse themselves. The law's critics say that Elena Kagan should sit this one out because she worked in Obama's Justice Department when the Affordable Care Act was passed. (She did not work on the legislation but expressed satisfaction in a work e-mail that it was likely to pass.) The law's defenders say that Clarence Thomas should bow out because his wife works for a tea party advocacy group that opposes the law. No one expects the justices to accede, but by hounding them, advocates have laid the groundwork to paint the decision as illegitimate. "Both sides are trying to soften up their supporters for saying, once the decision comes down, it's a political decision," said Tim Jost, a law professor at Washington and Lee University.

Outsiders also plan to speak out through legal filings. According to Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute who is coordinating with many parties, more than 100 amicus briefs are likely to be filed. "I think it's going to set a record," he said, pointing to the dozens of amicus briefs that have accompanied the cases in the lower courts already. Several justices have said they rarely read such briefs, but the writings sometimes supplement legal arguments made by the litigants, allowing various lobbies to show their members that they are engaged in a case of national significance.

There's one final, very unusual problem: One of the plaintiffs may no longer have standing to challenge the law, throwing parts of the lawsuit into question. Mary Brown, a Florida auto-body-shop owner, was the only plaintiff in the Supreme Court case who the lower courts said had the right to challenge the individual mandate. She argued that the mandate harmed her by forcing her to change her business practices. But since bringing the suit, Brown lost her business and filed for bankruptcy. The Court may decide that her changed circumstances don't matter or that another plaintiff has standing, but it could also throw out much of the case, despite the hours of debate, the contracts with special lawyers, the stack of amicus briefs, and the many oddities that make this one for the record books. A technical knockout would be a fittingly strange end to a very strange case. ■