D.C. Federal Appeals Court Upholds Ruling Declaring Key Reform Law Provision Valid

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Just days before the U.S. Supreme Court is expected to decide whether to grant review of issues surrounding the Patient Protection and Affordable Care Act (PPACA), an influential federal appeals court Nov. 8 declared constitutional a key provision of the federal health reform law (*Seven-Sky v. Holder*, D.C. Cir., No. 11-5047, 11/8/11).

The U.S. Court of Appeals for the District of Columbia Circuit affirmed a ruling by the U.S. District Court for the District of Columbia holding that Congress had authority, under the U.S. Constitution's commerce clause, to enact the individual mandate—a provision that would require virtually all citizens to purchase health insurance or pay a penalty.

In an opinion by Judge Laurence H. Silberman, the court said neither the text of the Constitution nor Supreme Court precedent supported the challengers' position that Congress acted outside the bounds of its constitutional power. It became the second federal appeals court to hold the mandate constitutional.

Silberman, joined by Judge Harry T. Edwards, also rejected an argument that the tax anti-injunction act (AIA), 26 U.S.C. §7421(a), deprived the court of jurisdiction to decide the merits of the case. However, the third member of the panel, Judge Brett M. Kavanaugh, dissented on this point and did not reach the merits.

The AIA, which precludes pre-enforcement lawsuits challenging the collection or assessment of a tax, had been considered unimportant until the U.S. Court of Appeals for the Fourth Circuit dismissed a PPACA challenge on that ground (175 HCDR, 9/9/11).

Challenges Pending in Supreme Court

The individual mandate, or minimum coverage, provision is not scheduled to go into effect until 2014, but it has been the focus of much of the litigation over the federal health reform law. Federal appeals courts have split on the question of the mandate's constitutionality, with the U.S. Court of Appeals for the Sixth Circuit holding it valid and the U.S. Court of Appeals for the Eleventh Circuit declaring it unconstitutional. (The Fourth Circuit declined to reach the merits.)

Parties in all of those cases have asked the Supreme Court to review the constitutional question, along with several side issues, and the petitions are scheduled to be considered at the court's Nov. 10 conference (209 HCDR, 10/28/11).

Simon Lazarus, public policy counsel at the National Senior Citizens Law Center in Washington, said the timing of the D.C. Circuit's decision was not necessarily coincidental. He said he thinks the appeals court was “very intent” on getting its opinion out before the Supreme Court conference.

However, Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute in Washington, told BNA the D.C. Circuit opinion should have no effect on the justices' consideration of the review petitions or the issues on which they might choose to grant review. The case does not raise any issues not previously raised in the petitions under consideration, he said.

Stuart M. Gerson, with Epstein Becker & Green in Washington, disagreed. He told BNA the D.C. Circuit decision keys up the debate over the applicability of the AIA better than the Fourth Circuit decision or any other case currently before the high court. Kavanaugh's 65-page dissent, along with Silberman's reasoning as to why the AIA did not bar consideration of the merits, make a full debate on the issue in the Supreme Court more likely.

Gerson added that the AIA issue could delay a decision on the pending review petitions, but only time would tell. Also, he said, it still was an open question as to whether the high court would appoint special counsel to argue for the application of the AIA, as the government has joined the challengers in arguing that the statute has no application in the PPACA cases.

Influence on Justices?

The D.C. Circuit's opinion might have more of an influence on the Supreme Court's ultimate determination of the constitutional issue, several experts said. Lazarus, for example, said that, given that Silberman shares the conservative viewpoint of several Supreme Court justices, it is “inconceivable” that Chief Justice John G. Roberts Jr. and Justices Antonin Scalia, Samuel A. Alito Jr., and Anthony M. Kennedy “won't take his opinion seriously.” These justices are likely to be influenced by Silberman's reasoning, he said.

Other experts, however, cautioned against predicting an early victory for the reform law. Gerson told BNA “the justices are still the justices.” While Silberman is a “very conservative, very good judge,” the justices “will decide on their own” and will not necessarily be influenced by his opinion.

Still, Gerson said, the D.C. Circuit's decision certainly gives the government optimism that the high court could rule in its favor, because the opinion is as important for who said it as it is for what was said.

Silberman served in the Nixon, Ford, and Reagan administrations and was awarded the Medal of Freedom by President George W. Bush, according to Ian Millhiser, a policy analyst and editor of ThinkProgress Justice in Washington. He also is a personal friend of Scalia and Justice Clarence Thomas, Millhiser said.

Millhiser said it is significant that this “leading light” of conservatism could find nothing in the text of the constitution to support the challenge to the mandate's constitutionality.

‘Tentative' Decision?

Shapiro disagreed as to the influence the opinion is likely to have on the justices. He told BNA that the opinion—like other lower court opinions upholding the mandate—was “tentative.”

“After acknowledging the novelty of the power Congress is asserting, the court expressed concern at ‘the Government's failure to advance any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce,'” Shapiro said. “In other words,” he said, “the majority saw itself bound by the Supreme Court's broad reading of federal power under the commerce clause but felt ‘discomfort' at reaching a result that seemingly had no bounds.”

In this way, Silberman's opinion was similar to that of Judge Jeffrey S. Sutton of the Sixth Circuit, Shapiro said. Also known for his conservative views, Sutton, too, found no textual or precedential limits on Congress's commerce clause power. He called on the Supreme Court to define those limits.

More liberal experts found no such tentativeness in Silberman's opinion. Lazarus called the issuance of the opinion “the best day the Affordable Care Act has had in court so far.” Constitutional Accountability Center chief counsel Elizabeth Wydra said in a press release that the D.C. Circuit “has dealt a devastating blow to the challengers” of the mandate.

No Textual or Precedential Limitations

Silberman's opinion acknowledged the uniqueness of the health care market and the novelty of the individual mandate. However, the challengers' argument that Congress could not compel currently inactive individuals to enter into interstate commerce also was novel, the court wrote.

“No Supreme Court case has ever held or implied that Congress's Commerce Clause authority is limited to individuals who are presently engaging in an activity involving, or substantially affecting, interstate commerce,” it said.

This led the court to examine the text of the Constitution to determine whether it supported the challengers' contention that there are limits on Congress's commerce clause power.

Article I, §8 of the Constitution states: “The Congress shall have Power … To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

“Regulate,” at the time of the Constitution's adoption and now, “can mean to require action,” the court said, adding that nothing in the text appeared to limit Congress's power to regulate people already active in an interstate market. Nor does “commerce” refer to only “existing commerce,” it said.

Having found no support for the challengers' argument in the text, the court turned to the Supreme Court's prior decisions. It determined that the only “recognized limitations” on Congress's power today are that “(1) Congress may not regulate non-economic behavior based solely on an attenuated link to interstate commerce, and (2) Congress may not regulate interstate economic behavior if its aggregate impact on interstate commerce is negligible.”

“Those limitations,” the court wrote, “are quite inapposite to the constitutionality of the individual mandate, which certainly is focused on economic behavior—if only decisions whether or not to purchase health care insurance or to seek medical care—that does substantially affect interstate commerce.”

The court found that the closest precedent was Wickard v. Filburn, 317 U.S. 111 (1942), in which the Supreme Court upheld federal regulations that precluded farmers from growing wheat for personal consumption. By preventing farmers from growing their own wheat, and forcing them to buy it on the open market to feed their families, the Wickard decision came “very close to authorizing a mandate similar to ours, at least indirectly,” the court said.

Lack of Limits Argument Rejected

The court also rejected the challengers' concern that, if Congress could force individuals to buy insurance, it could force them to do anything.

This argument “expresses a concern for individual liberty that seems more redolent of Due Process Clause arguments,” the court wrote. “But it has no foundation in the Commerce Clause.”

The mandate “seems an intrusive exercise of legislative power,” the court said. It added, however, that “that seems to us a political judgment rather than a recognition of constitutional limitations.”

“It certainly is an encroachment on individual liberty, but it is no more so than a command that restaurants or hotels are obliged to serve all customers regardless of race, that gravely ill individuals cannot use a substance their doctors described as the only effective palliative for excruciating pain, or that a farmer cannot grow enough wheat to support his family,” the court said.

Edward L. White III, of the American Center for Law & Justice, Ann Arbor, Mich., argued for the plaintiffs. Beth S. Brinkmann, of the Department of Justice, Washington, argued for the government.

The court's opinion is available at http://op.bna.com/hl.nsf/r?Open=mapi-8nen7b.

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