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11th Circuit Decision Update — Severability Issue

Tue, 08/16/2011 - 4:41pm | posted by George Scoville

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News broke late last week that the 11th Circuit Court had ruled against the government in *Florida v. United States Department of Health and Human Services*, one of the many legal challenges to President Obama's new health care law. In my reporting, I noted that

The Court disappointed in its treatment of the non-severability issue. In
fact, it overturned the lower court's ruling, which held that, because the law lacked a
severability clause, overturning any of the law's provisions means necessarily an
overturning of the entire law.

The Court's opinion is over 300 pages long—so it'll take me time I'm not even sure I have to sort out their reasoning on this last part. For now, I'll simply note that **this is a deeply troubling development**, and certainly a little rain on the liberty parade.

I also noted Megan McArdle's prognosis for the health care market (and the federal budget deficit) if we wound up with a mandate-less Obamacare:

Presumably, the insurance market across the United States ends up looking a lot like New York's market, where during the debate over health care reform it was reported that the cost of the average family policy in the individual market was over \$4,000 a month. That's because New York has the other features of ObamaCare—community rating and guaranteed issue—without the mandate. The result was that all the healthy people dropped out of the pool, leaving a few very sick people to buy insurance.

There's a slight difference though: the government is going to subsidize individuals in the private market. If the subsidies keep pace with the cost, Obamacare's nominal deficit reduction is going to turn into a gaping hole in the federal budget.

In truth, I haven't had moment one since the decision came down to really wade through the court's opinion — and I'm not a legal expert to boot, so I'm not sure my analysis would encapsulate everything important there is to say about this particular part of the ruling.

Trevor Burrus, legal associate at the Cato Institute's Center for Constitutional Studies, has been spending some time with the decision, and he offers some excellent thoughts and observations about the court's nuanced reasoning for ruling against the government in this case on the issue of the individual mandate.

When I asked him about the severability issue and the 11th Circuit's treatment of it, he offered the following response in an email (emphasis mine):

Severability is kinda a grab bag. Ironically, the two district court opinions that struck [the individual mandate] down either severed or didn't sever for the same reason: that the mandate was too intertwined with the law to sever. On one hand, severing would mean legislating from the bench, in a sense; that is, carving up the law into pieces. On the other hand, not severing would avoid doing that, and take the government at their word.

Similar, but more exacting, reasoning is employed in the 11th Cir. opinion...they ruled the mandate severable because a lot of things in the law (tanning taxes, etc.) can certainly stand without the mandate. Only difference is, they didn't have a problem sitting as a "super legislature" and carving up the law.

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Burrus also adds, thankfully, that the Supreme Court will do what it wants when it hears the case — so at this stage of the proceedings, this particular part of the ruling is practically irrelevant.

Many thanks to Trevor for his help with my understanding of this issue.

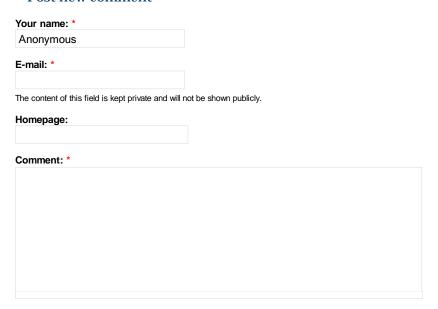
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3 of 3 8/17/2011 8:41 AM