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Monograph

Perspective on healthcare reform: Is an individual mandate constitutional?

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INTRODUCTION

Within hours of President Obama's signing the Patient Protection and Affordable Care Act (PPACA)[1] on March 23, 2010, a lawsuit was filed in the U.S. District Court for the Northern District of Florida, in Pensacola.[2] The lawsuit was prepared by the Attorneys General of several states, with Bill McCollum, Attorney General of the State of Florida, identified as the lead plaintiff.

The principal focus of the lawsuit is a constitutional challenge to the so-called "individual mandate," which requires every U.S. resident to obtain and maintain health insurance coverage or face a financial penalty. Section 1501, the "Requirement to maintain minimum essential coverage," acknowledges constitutional concerns in its initial paragraph[3] by specifically asserting an effect on interstate commerce.

Proponents of the PPACA immediately denounced the Florida lawsuit as a petty, partisan attack by disgruntled opponents of the Obama Administration. Politicians who supported the adoption of PPACA—while admitting insufficient time to read its nearly 2,700 pages—insisted that the new law must easily "stand constitutional muster." Challengers charged that PPACA represented an expansion of federal power that was both unwise and unprecedented. The Florida lawsuit alleged that Congressional power under Article I, section 8 of the U.S. Constitution[4] does not extend to requiring U.S. residents to purchase and maintain insurance coverage.

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On Oct. 14, 2010, Senior U.S. District Judge Roger Vinson issued an order and memorandum opinion[5] that largely agreed with the challenge from 20 states.[6] In a 65-page opinion, Judge Vinson allowed a number of key claims to proceed. He wrote that both the individual mandate and Medicaid expansion, another feature of the PPACA, must pass constitutional tests at trial. While it is virtually certain this trial court ruling will be appealed by the Obama Administration to the federal Circuit Court of Appeals, Judge Vinson stated forcefully that the Florida lawsuit raised serious and legitimate challenges, requiring judicial review.

THE ISSUES

Deciding whether a new law is constitutional is a task uniquely assigned to courts and judges. For readers without a background in the law, there are several fundamental concepts and terms to be understood.

The "separation of powers" doctrine is one concept. Generally, the legislative branch debates and adopts new laws and directs that the executive branch carry out new laws, but only if the judicial branch determines that they are constitutional.[7] Another is the so-called "limited jurisdiction" of the federal government. Under the 10th Amendment, federal powers are limited, while those of the states are broader and far more general.[8] Federal powers are limited by the U.S. Constitution and referred to as the "enumerated powers" since all such powers are specified in the Constitution.[9]

Congress' powers include levying taxes and regulating interstate commerce. The taxing authority is broad and not readily susceptible to judicial review. Other than a prohibition on "bills of attainder" and ex post facto laws, few taxes passed by Congress have been declared unconstitutional. The Commerce Clause (i.e., the power "to regulate Commerce ... among the several states") has been interpreted by U.S. Supreme Court over the years. In the context of healthcare reform, one 1942 Supreme Court decision[10] has received extraordinary attention and perhaps presents the strongest argument in support of the PPACA's constitutionality.

In *Wickard v. Filburn,* the U.S. Supreme Court held that Congress had the power under the Commerce Clause to limit the amount of wheat grown for personal consumption on a private farm to control supply and to avoid surpluses or shortages of wheat that could result in abnormally low or high wheat prices. An Ohio farmer (Filburn) grew some wheat to feed his livestock. He was fined by Claude R. Wickard, U.S. Secretary of Agriculture, for violating the Agricultural Adjustment Act of 1938 even though none of his wheat was sold in interstate commerce. The Supreme Court reasoned that growing and feeding wheat to Filburn's farm animals allowed him to avoid purchasing wheat on the market and

such an indirect effect was sufficient to invoke Congress' power to regulate interstate commerce under the Commerce Clause.[11]

The 1942 Supreme Court decision has always been controversial. Those favoring broad and expansive federal regulatory powers cite the case as authority for regulation whenever an activity can be shown to have a "substantial effect" on interstate commerce (whether or not goods and services are actually purchased or sold across state lines).

Critics point out that the Court's 1942 "rule" practically has no limits, since all human activities arguably have some effect on interstate commerce. Determining what is "substantial" is both subjective and lacking in meaningful criteria. In other words, those who favor a more limited federal regulatory power view the 1942 Supreme Court decision as poorly reasoned and unwise in terms of policymaking, since it gives Congress regulatory power over a virtually-unlimited array of activities. If the *Wickard* rule is to be liberally applied, it is difficult to imagine any human activity that could not be regulated by Congress under the Commerce Clause. And such an interpretation would appear to render the "enumerated powers" unnecessary and surplusage.

"The Florida lawsuit contends that the PPACA imposes a penalty for inactivity."

DISCUSSION

Judge Vinson spent a good deal of his 65-page opinion analyzing whether PPACA was a penalty imposed under the Commerce Clause power or a tax (authorized under Congress' broad taxing power).[12] He concluded that PPACA was not a tax, although the attorneys for the Obama Administration argued to the contrary. Vinson expressed exasperation, noting that the administration assured Congress and the public, prior to passage, that PPACA was definitely not a tax[13] but then reversed course by arguing that the financial penalty for failure to obtain and maintain health insurance really is a tax, after all, and one authorized under Congress' broad taxing authority.

Many prior Supreme Court cases fleshed out the critical distinction between a penalty and a tax. Paraphrasing, the court grants wide latitude to Congress if a new law imposed a tax, since Congress' taxing power is so broad. On the other hand, imposition of a financial penalty must be authorized under the narrower Commerce Clause authority, since penalties are a form of federal regulation.

Judge Vinson concluded that the constitutional challenge brought by the 20 states must be allowed to go to trial because the states had made a plausible argument that PPACA goes beyond all former precedents in expanding federal regulatory power. Briefly stated, the Florida lawsuit contends that the PPACA imposes a penalty for "inactivity," in the form of failing to obtain or maintain health insurance. The lawsuit complains that requiring U.S. residents to purchase and maintain a health insurance policy sold by a private insurance company does not regulate commerce but only penalizes inactivity. One need not engage in an activity with substantial effect on interstate commerce to be penalized for merely refusing to purchase insurance.

PPACA's proponents deny this effect and instead argue that all U.S. residents consume healthcare at one time or another. The proponents reason that refusal to purchase health insurance is not mere inactivity but rather a choice regarding how healthcare is purchased. In other words, some individuals may decide to forgo receiving any healthcare services for a while, but eventually such a choice will cause them to become patients, even if only when they become sick and die.

Proponents also argue forcefully that health insurance clearly is commercial activity. Decisions to purchase or to forgo coverage would appear to have both a direct and substantial effect on interstate commerce. Congress must have the power to regulate how healthcare is purchased, it is argued, since healthcare expenditures represent such a growing percentage of the national economy. Without the individual mandate, the entire scheme of healthcare reform cannot succeed, it is argued, since healthy individuals must contribute to the healthcare insurance market, and may not be allowed to opt-out if costs are to be controlled.

CONCLUSIONS

The Florida lawsuit and others[14] raise the question whether an individual mandate is constitutional. Proponents of PPACA observe that health insurance clearly is commercial activity, representing a huge and growing percentage of the national economy. Proponents argue that Congress has the power to regulate all activities that are shown to have a substantial effect on interstate commerce, under the Commerce Clause. During court argument, attorneys for the Obama Administration also argued that PPACA may be considered a tax, authorized under Congress' broad taxing authority. Finally, proponents urge that the Florida lawsuit lacks standing or ripeness (readiness for adjudication) and should be dismissed.

Opponents of PPACA convinced Judge Vinson that triable issues existed regarding PPACA's constitutionality. While the Supreme Court probably will ultimately decide the question, there seems to be more than an outside chance that a majority of justices will view PPACA in the same way Judge Vinson did. As broad as the rule of *Wickard v. Filburn* may be, even that 1942 decision did not go as far as PPACA. Growing wheat to feed to livestock is, at a minimum, an activity with some arguable commercial effect. The PPACA, on the other hand, requires every U.S. resident to purchase a health insurance policy, subject to paying a fine for failing to do so. No one can refuse or opt-out of PPACA, as a farmer can decide not to grow and feed his own wheat to farm animals.

In other words, the PPACA affects every living, breathing human being who resides in the U.S., merely based on existence. Such an unprecedented expansion of Congress' regulatory power is opposed by many as an unconstitutional infringement on States' and individual rights.

The Supreme Court is bound by the rule of precedent to follow *Wickard v. Filburn* unless it finds reasons to reverse it. PPACA's opponents, who complain about its unprecedented and

unconstitutional expansion of federal regulatory power, hope that the court does just that. In the meantime, our healthcare delivery industry is expected to invest enormous amounts of time, effort and expense to implement PPACA, now the law of the land. But is there a Plan B if PPACA's individual mandate ends up being ruled unconstitutional?

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REFERENCES

1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).
2. *State of Florida, et al. v. United States Department of Health and Human Services, etc.*, Case No: 3:10-cv-91-RV/EMT (U.S. District Court for the Northern District of Florida, Pensacola Division March 23, 2010).
3. PPACA Section 1501(a)(1): "In General. — The individual responsibility requirement provided for in this section (in this subsection referred to as the "requirement") is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2)."
4. Article 1, Section 8 reads: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . [and] To regulate Commerce with foreign Nations, and among the several States."
5. *State of Florida, etc. supra,* Document 79, filed Oct. 14, 2010 (available at: http://www.scribd.com/doc/39344827/State-of-Florida-v-United-States-Dept-of-HHS)
6. The states involved in the lawsuit are Florida, South Carolina, Nebraska, Texas, Utah, Louisiana, Alabama, Michigan, Colorado, Pennsylvania, Washington, Idaho, South Dakota, Indiana, North Dakota, Mississippi, Arizona, Nevada, Georgia, and Alaska.
7. U.S. Constitution, Articles 1-3.
8. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
9. Article 1, Section 8, is entitled "Powers of Congress"; Section 9 is entitled "Limits on Congress."
10. *Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942)
11. *Id.*, 317 U.S. at 130-131.
12. Justice Vinson quickly disposed of constitutional challenges to PPACA based on "standing" and "ripeness." The Florida decision holds that the States have standing to challenge PPACA, and that the lawsuit is timely (even though the individual mandate does not go into effect until 2014). The Obama Administration argued that the lawsuit must be dismissed since the States lacked standing (i.e., were not harmed) and because the lawsuit was premature.
13. On Sept. 29, 2009, CNN reported that President Obama, responding to a direct question, said it was "absolutely not a tax: and, in fact, "[n]obody considers [it] a tax increase."
14. A separate constitutional challenge by the State of Virginia, is pending before the federal court. Several other separate lawsuits have been filed, and some dismissed at an early stage, based on lack of standing or ripeness.