

University of Michigan Journal of Law Reform Caveat

Volume 45 | Issue 1

2012

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Recommended Citation

Gene Magidenko, Comment, *The Tangled Thicket of Health Care Reform: The Judicial System in Action*, 45 U. MICH. J. L. REFORM CAVEAT 1 (2012).

Available at: https://repository.law.umich.edu/mjlr_caveat/vol45/iss1/1

This Comment was originally cited as Volume 1 of the University of Michigan Journal of Law Reform Online. Volumes 1, 2, and 3 of MJLR Online have been renumbered 45, 46, and 47 respectively. These updated Volume numbers correspond to their companion print Volumes. Additionally, the University of Michigan Journal of Law Reform Online was renamed Caveat in 2015.

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JOURNAL *of* LAW REFORM ONLINE

COMMENT

THE TANGLED THICKET OF HEALTH CARE REFORM: THE JUDICIAL SYSTEM IN ACTION

Gene Magidenko*

On March 23, 2010, after a lengthy political debate on health care reform, President Barack Obama signed the Patient Protection and Affordable Care Act (PPACA) into law. A week later, he signed the Health Care and Education Reconciliation Act of 2010, which amended certain provisions of PPACA. But far from ending the intense national debate on the issue, these enactments opened a new front of battle in the federal courts that will almost certainly make its way to the United States Supreme Court. Much of this litigation focuses on § 1501 of PPACA, which contains the controversial individual mandate¹ requiring every individual to maintain minimum “essential coverage” (with certain exceptions).

This is an interesting time to be a student of the law. Courts are issuing a steady stream of rulings on the individual mandate. For those following the debate in the courts, the challenges to the mandate present an opportunity to see constitutional jurisprudence in action. What is perhaps most remarkable is how quickly these cases have moved through the courts. As of this writing, five federal Courts of Appeals have already reviewed challenges to the mandate in one form or another. Two have ruled substantively on the underlying merits of the cases. A number of federal District Courts have also issued opinions.

* I would like to thank Professor Douglas A. Kahn, University of Michigan Law School, for his valuable suggestions and comments on this post. Any errors or omissions are exclusively my own.

1. Codified under 26 U.S.C.A. § 5000A.

THE CASES

So what is the current state of the individual mandate? The short answer is that it is quite unclear. The longer answer calls for a romp through the thickets of judicial decision-making on the topic.

The decisions tending to occupy the news and pundits alike are those of the federal circuits:

- *Thomas More Law Center v. Obama* from the Sixth Circuit.² This was the first and perhaps the most fascinating from a legal standpoint. In the fractured decision, Judge Boyce F. Martin, Jr. wrote most of the opinion of the court, where he determined that imminent injury established standing and the Anti-Injunction Act did not bar the claim. Having decided the procedural issues, Judge Martin concluded that the individual mandate is facially constitutional under the Commerce Clause. Judge Jeffrey Sutton delivered the rest of the opinion of the court, where he concluded that the mandate could not be sustained under the Taxing and Spending Clause. Examining the text of the statute, congressional intent, context, the central function of the mandate, and case law, he determined that the penalty for violating the individual mandate is a regulatory sanction – not a tax – and so he would look beyond its bare inclusion in the Internal Revenue Code to its substance. In an opinion concurring in the judgment, Judge Sutton wrote that he cannot overturn the mandate as facially unconstitutional under the Commerce Clause (citing *United States v. Salerno*), admittedly leaving open an as-applied challenge. Judge James L. Graham, a District Court judge sitting by designation, concurred that the mandate cannot be sustained under the taxing power. However, he dissented from the Commerce Clause holding on federalism grounds.

- *New Jersey Physicians, Inc. v. President of the U.S.* from the Third Circuit.³ The appellate panel consisting of Judges Michael Chagares, Kent A. Jordan, and Joseph A. Greenaway unanimously found that the plaintiffs could not show injury in fact, denying them standing to sue.

2. 651 F.3d 529 (6th Cir. 2011).

3. 653 F.3d 234 (3d Cir. 2011).

- *Florida ex rel. Attorney General v. U.S. Department of Health and Human Services* from the Eleventh Circuit.⁴ Judge Joel Fredrick Dubina, joined by Judge Frank M. Hull, determined that the individual mandate exceeded the congressional Commerce Clause power. Just like Judge Graham did in *Thomas More Law Center*, the court did not consider the activity/inactivity distinction dispositive. Instead, it too focused on federalism principles. Citing *United States v. Lopez* and *United States v. Morrison*, the judges noted the government's lack of limiting principles on a Commerce Clause jurisprudence allowing Congress to reach non-market participants and mandating their entry into commerce. The judges were concerned with preserving the balance between the federal and state governments, as well as withholding from Congress general police powers usually reserved to the states. The court further held that the mandate is a civil regulatory penalty – not a tax – and therefore cannot be sustained under the Taxing and Spending Clause. Interestingly the court held the mandate severable from the rest of the Act. Judge Stanley Marcus concurred in part and dissented in part, stating that he would uphold the individual mandate under the Commerce Clause.

- *Baldwin v. Sebelius* from the Ninth Circuit.⁵ The appellate panel consisting of Judges Pamela Ann Rymer, Ferdinand F. Fernandez, and Richard C. Tallman unanimously found that the plaintiffs could not show injury in fact and so lacked standing.

- *Virginia ex rel. Cuccinelli v. Sebelius* from the Fourth Circuit.⁶ The appellate panel consisting of Judges Diana Gribbon Motz, Andre M. Davis, and James A. Wynn unanimously found that Virginia – as a state on whom no obligations are in fact imposed by the individual mandate – has no standing to sue, and therefore the court lacks subject-matter jurisdiction.

- *Liberty University, Inc. v. Geithner* from the Fourth Circuit.⁷ Decided on the same day by the same panel as *Virginia ex rel. Cuccinelli*, this is a more nuanced opinion. Judge Motz delivered the opinion of the court classifying the mandate's penalty as tax, with the Anti-Injunction Act stripping the court of

4. 648 F.3d 1235 (11th Cir. 2011).

5. 654 F.3d 877 (9th Cir. 2011).

6. __ F.3d __, 2011 WL 3925617 (4th Cir. Sept. 8, 2011).

7. __ F.3d __, 2011 WL 3962915 (4th Cir. Sept. 8, 2011).

jurisdiction. Judge Wynn concurred, but hypothesized that if there were no adjudicatory bar, he would uphold the law under the federal taxing power. Judge Davis dissented, finding that the Anti-Injunction Act does not apply and concluding that he would uphold the mandate under the Commerce Clause.

In addition, there are a number of cases from the federal district courts on the same subject. Disregarding those that have been reviewed in the appellate courts, they are:

- *Taitz v. Obama*,⁸ where Judge Royce C. Lamberth found that, among other claims, the plaintiff did not have standing to challenge the individual mandate.

- *Shreeve v. Obama*,⁹ where Judge Curtis L. Collier dismissed the complaint for lack of subject matter jurisdiction.

- *Mead v. Holder*,¹⁰ where Judge Gladys Kessler determined that taxpayers had standing and the action was ripe. In turn, Judge Kessler found that PPACA did not violate the Commerce Clause, Necessary and Proper Clause, General Welfare Clause, or the Religious Freedom Restoration Act.

- *Peterson v. United States*,¹¹ where Judge Joseph N. Laplante held that the Medicare-recipient plaintiff lacked standing to challenge PPACA and the manner in which it was passed. Judge Laplante found that PPACA's enactment did not violate the Presentment Clause, and that the plaintiff's claim that the President violated his oath of office in signing the bill is not cognizable.

- *Kinder v. Geithner*,¹² where Judge Rodney W. Sippel held that the court lacked subject matter jurisdiction.

- *Bryant v. Holder*,¹³ where Judge Keith Starrett, after dismissing the plaintiff's prior complaint without prejudice for

8. 707 F. Supp. 2d 1 (D.D.C. 2010).

9. 2010 WL 4628177 (E.D. Tenn. Nov. 4, 2010) (slip opinion).

10. 766 F. Supp. 2d 16 (D.D.C. 2011).

11. 774 F. Supp. 2d 418 (D.N.H. 2011).

12. 2011 WL 1576721 (E.D. Mo. April 26, 2011) (slip opinion).

13. __ F. Supp. 2d __, 2011 WL 4059243 (S.D. Miss. Aug. 29, 2011) (memorandum opinion and order).

certain deficiencies, found that the plaintiff does have standing to sue. The case is still ongoing.

- *Goudy-Bachman v. U.S. Department of Health and Human Services*,¹⁴ where Judge Christopher C. Conner held that the individual mandate is outside the scope of the Commerce Clause.
- *Butler v. Obama*,¹⁵ where Judge Joseph F. Bianco dismissed the case for a lack of standing, finding that the injuries alleged were neither actual nor imminent.

THE FOUR TRENDS

What trends can one divine from looking at these cases? The first and perhaps most obvious is that there is no clear legal consensus about the constitutionality of the individual mandate. This is especially telling where the Sixth and Eleventh Circuits have split on the merits of the objections to PPACA. It is almost axiomatic that the Supreme Court hears cases where circuits have split, and considering the potpourri of district court cases that could still potentially be decided by their respective circuits, the split may become even more pronounced. It is likely that even if a miraculous *en banc* review aligns the circuits (an unlikely event), the Supreme Court will have to resolve this disagreement. With quick appellate movement by both the government and the plaintiffs challenging the individual mandate, it is now appearing progressively more likely that the Supreme Court could take on PPACA during this present term. We may find out as early as November 10. Contrary to the perception that it takes cases years to work their way through the judicial system, individual mandate challenges have zipped through with surprising alacrity. The machinery of justice can be swift when the need calls for it.

The second trend is the remarkable number of legal challenges that have failed due to a lack of standing to challenge the mandate. Those that have been decided on the merits have overcome or bypassed standing issues. The most reasonable explanation of why some cases have not progressed far at all, whereas others have been adjudicated on their substance, is simply that the cases can be distinguished on their facts. Different

14. __ F. Supp. 2d __, 2011 WL 4072875 (M.D. Pa. Sept. 13, 2011).

15. __ F. Supp. 2d __, 2011 WL 4526079 (E.D.N.Y. Sept. 30, 2011).

plaintiffs are situated differently, allowing for such disparate determinations. However, standing issues should not be immediately discounted. Since the individual mandate does not go into effect until 2014, no individual has yet been penalized for not maintaining coverage. Of course this does not *per se* bar a plaintiff from having standing to sue, as a significant possibility of future harm may be sufficient, although courts do need to be eminently careful to not overreach.

The third trend is that, at least in those appellate courts where judges would strike down the individual mandate, the activity/inactivity distinction did not prove the lynchpin that many commentators supposed. The focus instead has been on broader federalism issues. In the United States' system of federalism, the states are generally charged with the general police power to regulate the "safety, health, morals, and general welfare" of their citizens. The federal government, as one of limited and enumerated powers, does not possess the same authority. The question then is whether mandating insurance coverage for all – a power that a state may exercise – is within the federal government's authority. The courts disagree in their responses to this question. Some judges contend that the Commerce Clause does grant such authority. Others find that it does not.

The fourth trend is – where cases have been decided on the merits – the partial breakdown of the "conservative/liberal" dichotomy often attributed to the judiciary. Judge Jeffrey Sutton, appointed to the Sixth Circuit by Republican President George W. Bush, was the deciding vote that upheld the individual mandate, if only facially, in that court. On the other hand, Judge Frank M. Hull, appointed by Democratic President Bill Clinton, was in the majority that overturned the mandate in the Eleventh Circuit. Although this observation is not necessarily profound, as the traditional political dichotomy has never quite fit the judiciary, it is an excellent reminder of the usefulness of independent judges with lifetime tenure.

CONCLUSION

Uncertainty over how the Supreme Court might rule remains the white elephant in the room. As more cases are decided in the lower courts, the legal situation of the individual mandate becomes more complex. Ultimately the disagreement is about the

constitutional interpretation and scope of the Commerce Clause, as well as broader federalism issues. These are concerns with immediate and immense consequences for the way the nation is governed. The debate over the scope of federal regulatory authority has animated the legal profession since the founding of the Republic, and never with such animation as since the New Deal. And where the dispute is legal, not factual, and the circuits are irreconcilable, the nation looks to nine jurists to resolve the matter. With the novel issues surrounding the individual mandate, any guess about how a decision will play out in the Supreme Court can only ever be just that – a guess. One thing is certain: whatever decision the Court ultimately reaches on the merits, it shall be one for the ages. Rarely does a man recognize that he is living in times of great import and change until after the fact. This may well be one of those rare times.

ADDENDUM

The past several weeks saw some important movement in the challenges to PPACA. Firstly, the United States Court of Appeals for the District of Columbia Circuit issued an opinion on November 8, 2011 upholding the individual mandate. In *Seven-Sky v. Holder*,¹⁶ Senior Judge Silberman, writing for the court, with Senior Judge Edwards concurring, held that the Anti-Injunction Act¹⁷ did not apply, as the penalty for not maintaining insurance was not a tax. He also held that the individual mandate was covered by congressional powers under the Commerce Clause, notwithstanding the court's discomfort with a lack of doctrinal limiting principles on Congress's power to mandate participation in commerce. Judge Kavanaugh dissented, arguing that the individual mandate penalty is a tax and that, therefore, the Anti-Injunction Act presently bars adjudication.

The Monday after the D.C. Circuit's opinion, however, held even bigger news. On November 14, 2011, the Supreme Court announced that it would hear five-and-a-half hours of oral arguments on PPACA's constitutionality in March. This means that there should be some sort of Court decision on the health care reform by June or so. Of course, it is possible that the Court will decide that the Anti-Injunction Act bars judicial review for the

16. __ F.3d __, 2011 WL 5378319 (D.C. Cir. Nov. 8, 2011).

17. 26 U.S.C. § 7421 (2006).

time being, punting the issue down the road to a later year. Such a decision would be important for future Internal Revenue Code interpretation, but it would not address the substance of the challenges. Or the Court could decide the case on the merits. Either way, the next half-year will be particularly tense.