

Feeling Poorly: The Ailing Health Care Law

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On December 13, 2010, a federal district court judge in Virginia became the first to rule that a provision in the new federal health-care reform law, the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), Section 1501, exceeded the constitutional power of Congress. Section 1501, known as the individual coverage mandate or the minimum essential coverage provision, requires, starting in 2014, that almost every U.S. citizen carry a minimum level of health insurance coverage. A failure to comply would result in a penalty included with the taxpayer's annual tax return and, as enacted, Section 1501 would be administered and enforced as a part of the Internal Revenue Code.

In *Virginia v. Sebelius*, 728 F. Supp.2d 768 (E.D. Va. 2010), the Commonwealth of Virginia sought both declaratory and injunctive relief to bar the federal government from enforcing the individual coverage mandate, on the basis that Congress lacked the power to regulate (and tax) a citizen's decision not to participate in interstate commerce. Specifically, it argued that Section 1501 and the affiliated penalty were beyond the outer limits of the Commerce Clause and the associated Necessary and Proper Clause, and that requiring an otherwise unwilling individual to purchase a good or service from a private vendor was beyond the boundaries of congressional Commerce Clause power. The failure, or refusal, of citizens to elect to purchase health insurance was not an economic activity historically subject to federal regulation under the Commerce Clause. Alternatively, the Commonwealth contended that the provision could not be sustained as a legitimate exercise of the congressional power of taxation under the General Welfare Clause because, in essence, it was a penalty untethered to an enumerated power. Congress could not exercise such power to impose a penalty for what amounted to passive inactivity. Lastly, the Commonwealth argued that Section 1501 was in direct conflict with the Virginia Health Care Freedom Act, and that Section 1501 was an unlawful exercise of police power that encroached on the sovereignty of the Commonwealth, and offended the Tenth Amendment to the U.S. Constitution.

The argument of the Secretary of the federal Department of Health and Human Services, the nominal defendant, in defense of the Section 1501 and the apparent underlying rationale of Congress, was premised on the "facially logical assumption that every individual at some point in life will need some form of health care," and that this form of economic activity was inevitable despite an individual's decision not to purchase health insurance. Congress had "rationally found that a failure to regulate the decision to delay or forego insurance — i.e., the decision to shift one's costs on to the larger health care system— would undermine the 'comprehensive regulatory regime.'" Since Congress had the power under the Commerce Clause to reform the interstate health insurance market, it also possessed, under the Necessary and Proper Clause, the power to make the regulation effective by enacting Section 1501. Accordingly, Congress had properly exercised its powers under the Commerce Clause, or alternatively, the Necessary and Proper Clause, to adopt a regulatory mechanism to effectuate necessary health-care market reform measures. In brief, the constitutional viability of the Section turned on whether or not a person's decision to refuse to purchase health care insurance was an economic activity.

Focusing on Section 1501 as "the vital kinetic link that animate[d] Congress's overall regulatory reform of interstate health care and insurance markets," the court found that the Section "appears to forge new ground and extends the Commerce Clause powers beyond its current high water mark." It held that "[n]either the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market." This was true even for the "collective effect of an aggregate of such inactivity." Thus, the enactment of the individual coverage mandate exceeded the Commerce Clause powers vested in Congress under Article I. Further, because the Necessary and Proper Clause only extended to give Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers, it could not apply with respect to an unlawful exercise of an enumerated power. The court was also unpersuaded that the placement of the provision in the Internal Revenue Code under "miscellaneous excise taxes" had the effect of making it a bona fide revenue-raising measure enacted under the taxing power of Congress. It was, in form and substance, a penalty as opposed to a tax, and had to be linked to an enumerated power other than the General Welfare Clause. The court severed only Section 1501 and any directly-dependent provisions which made specific reference to Section 1501, but held there was no need for the "extraordinary remedy" of injunctive relief against federal officers.

Subsequent to the Virginia ruling, the House of Representatives voted in January to repeal the health care law, but a new decision on January 31 may make the U.S. Supreme Court the ultimate arbiter. Senior U.S. District Judge Roger Vinson of Pensacola struck the entire health care law, all 2,700 pages, on the basis that the individual mandate was invalid and not severable, rendering the ACA, as whole, unconstitutional. The case, *Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services*, No. 3:10-cv-91-RV/EMT, 2011

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(2010). A copy is available online at http://tinyurl.com/4omg5ch.
3. [1972] 2 All E.R. 353 (C.A.); *aff'd on other grounds*, [1973] 2 All E.R. 1169 (H.L.).
4. *Id.* at 376. (Quoted with approval in *R v. Campbell and Shirose* [1999] 1 S.C.R. 565, at para. 50).
5. For example, those called to the Bar in Alberta swear the following oath: "That I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, her heirs and successors according to the law. That I will as a Barrister and Solicitor conduct all causes and matters faithfully and to the best of my ability. I will not seek to destroy anyone's property. I will not promote suits upon frivolous pretences. I will not pervert the law to favor or prejudice anyone, but in all things will conduct myself truly and with integrity. I will uphold and maintain the Sovereign's interest and that of my fellow citizens according to the law in force in Alberta." The oath in Ontario is: "I accept the honour and privilege, duty and responsibility of practising law as a barrister and solicitor in the Province of Ontario. I shall protect and defend the rights and interests of such persons as may employ me. I shall conduct all cases faithfully and to the best of my ability. I shall neglect no one's interest and shall faithfully serve and diligently represent the best interests of my client. I shall not refuse causes of complaint reasonably founded, nor shall I promote suits upon frivolous pretences. I shall not pervert the law to favour or prejudice any one, but in all things I shall conduct myself honestly and with integrity and civility. I shall seek to ensure access to justice and access to legal services. I shall seek to improve the administration of justice. I shall champion the rule of law and safeguard the rights and freedoms of all persons. I shall strictly observe and uphold the ethical standards that govern my profession. All this I do swear or affirm to observe and perform to the best of my knowledge and ability." There is an optional oath of allegiance to the Sovereign. Law Society of Upper Canada, By-Law 4, Sections 22, 23(1) and 24 (optional), respectively.
6. Melissa Dunne, *In-house counsel must act as the company moral compass*, In-house Counsel (Spring 2009) at 6.
7. Andrew C. Varga, On Being Human 138 (Paulist Press 1978). ML

Federal

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WL 285683 (N.D. Fla. Jan. 31, 2011), was filed minutes after the President signed the bill into law, and included, as parties, 26 States' Attorney Generals or Governors.

Judge Vinson agreed that a person's private decision not to buy health insurance was economic "inactivity," and the reach of the Commerce Clause was limited to individuals and entities engaged in "activity." In every Supreme Court case decided thus far, he said, "Congress was not seeking to regulate under its commerce power something that could even arguably be said to be 'passive inactivity,'" and it was a "radical departure" to accept that it could. Further, because the Necessary and Proper Clause could not be utilized to "pass laws for the accomplishment of objects" that were not within Congress' enumerated powers, the individual mandate could not be otherwise authorized by an assertion of power under that clause. Severability "ultimately turn[ed] on the nature of the statute at issue," and, while a severability clause was included in an earlier version of the Act, it had not been carried forward. The court concluded that "the individual mandate was an essential and indispensable part of the health reform efforts, and that Congress did not believe other parts of the Act could (or it would want them to) survive independently. I must conclude that the individual mandate and the remaining provisions are all inextricably bound together in purpose and must stand or fall as a single unit."

On February 03, Virginia's Attorney General announced that he would seek an expedited review of the health care ruling by the U.S. Supreme Court, bypassing the Circuit Court of Appeals; the U.S. Department of Justice has likewise announced its intention to appeal Judge Vinson's decision to the Eleventh Circuit Court of Appeals. ML

Supreme Court

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addicts, outer space, and the Due Process Clause have in common. He began with an outright rejection of any federal constitutional right to informational privacy. Pointing out that the employees' brief did not once identify the portion of the Constitution that gave rise to such right, he added that this approach "was refreshingly honest. One who asks us to invent a constitutional right out of whole cloth should spare himself and us the pretense of tying it to some words of the Constitution." In any event, the Due Process Clause, the likely choice, was inapposite as it protected those fundamental rights and liberties which were "deeply rooted in this Nation's history and tradition." The employees, he said, did not even attempt to argue that the claim at issue passed that test, "perhaps recognizing the farcical nature of a contention that a right deeply rooted in our history and tradition bars the Government from ensuring that the Hubble Telescope is not used by recovering drug addicts." ML

Inside Canada

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of the SPP and pay the benefits until the dispute was decided. Because it was previously decided that the City could not do both things, "it would be an abuse of process to revisit that issue, and it [was] equally an abuse of process to attack that substantive conclusion by challenging the process used to decide it.... it offend[ed] the integrity of the administration of justice to attempt to litigate the process by which a decision was made, after the decision itself ha[d] been fully litigated." It was time for