DC Appeals Court Finds ACA Individual Mandate Constitutional

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On November 8, 2011, the Court of Appeals for the District of Columbia issued a 2-1 decision upholding the shared responsibility payment (a/k/a the "individual mandate") imposed by the federal Patient Protection and Affordable Care Act (the ACA) in 2014 upon taxpayers who can afford to purchase health insurance, but who choose not to do so. *Seven-sky v. Holder*, No. 1:10-cv-00950 (D.C. Cir., Nov. 8, 2011); see, 26 U.S.C. §§ 5000A(a) and (c). We anticipate an eventual petition for certiorari, bringing to four the number of appellate decisions before the U.S. Supreme Court.

**Majority Decision:** The majority decision in *Seven-sky*, written by arguably one of the court’s most conservative members (Judge Silberman) and concurred in by arguably one of its most liberal (Judge Edwards), rejected appellants’ argument that the individual mandate exceeded Congress’ enumerated powers. Appellants (four individual taxpayers) principally argued that Congress cannot require individuals with no connection to interstate commerce to purchase a product (health insurance) that they did not wish to purchase, and that they might never need.

Respecting prior precedent, the majority observed that the Supreme Court had previously upheld Congress’ power under the Commerce Clause of the Federal Constitution (U.S. Const. art. I, § 8, cl. 3) to regulate purely local, intrastate economic behavior so long as that behavior, in the aggregate, substantially affected interstate commerce. The majority noted that the uninsured in America consume health care services that they cannot afford, typically through emergency services at hospitals provided "by virtue of federal law and professional obligation." As a result, $43 billion in annual costs are shifted to the insured through higher premiums. Higher premiums make health care even less affordable and increase the number of uninsured. Because of that ever-spiraling cycle, the Government argued, Congress had concluded that “decisions about how to pay for health care, in the aggregate, substantially affect interstate commerce.”

The majority found the “closest” Supreme Court precedent in the case of a wheat farmer who challenged Congress’ authority to regulate the amount of wheat he grew on his private farm, not for sale, but for consumption by his own livestock and his family. In *Wickard v. Filburn*, 317 U.S. 111, 128 (1942), the Supreme Court unanimously rejected a claim that the Agricultural Adjustment Act of 1938 was unconstitutional as applied to Filburn because he did not use his excess wheat for any activity in the interstate market, finding that growing wheat for personal consumption could affect the national price, because "it supplied a need of the man who grew it which would otherwise be reflected by
purchases in the open market,” and because “the stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions” on commerce.

For the majority, the encroachment on individual liberty imposed by the individual mandate “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 prescribed as the only effective palliative for excruciating pain, or that a farmer cannot grow enough wheat to support his own family.” The majority balanced individual liberty and perceived national need: “The right to be free from federal regulation is not absolute, and yields to the imperative that Congress be free to forge national solutions to national problems, no matter how local – or seemingly passive – their individual origins.”

Concurrence: Judge Edwards also wrote a cogent concurrence to explain that “means scrutiny” provided an appropriate limitation to Congress’ authority under the “Necessary and Proper Clause” of the federal Commerce Clause (see U.S. Const. art. I, § 8, cl. 18). Under that test, a court would test whether the means chosen by Congress are “reasonably adapted” to the attainment of a legitimate end under the commerce power.

Dissent: As had the Fourth Circuit, the dissent found that the Anti-Injunction Act precluded pre-enforcement challenges to the shared responsibility payment.

Development to watch: Today, the U.S. Supreme Court is expected to consider the petition for review of the 11th Circuit’s decision finding the individual mandate unconstitutional. The Government has asked the Court to grant review in the 11th Circuit case and to hold the others in abeyance.