Constitutional challenges to the Patient Protection and Affordable Care Act

By Michele Masucci

“May you live in interesting times” – ancient Chinese curse

Whether the Patient Protection and Affordable Care Act squares with the U.S. Constitution is a hotbed of federal court litigation, already involving over 20 lawsuits including challenges by dozens of state attorneys general and governors. The suits center on whether the “individual mandate” set forth in § 1501 of the Act violates the Commerce Clause in the Constitution. The “individual mandate,” effective in 2014, will require most American citizens and U.S. residents to buy health insurance that provides minimum essential coverage as defined in the Act or pay a monetary penalty.

The 16-word Commerce Clause states that Congress shall have the power: “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” (Emphasis added). Central issues in the litigation include whether “activity” is required before Congress can exercise its powers under the Commerce Clause and if so, whether the individual mandate seeks to regulate “activity” or “inactivity.” The parties seeking to invalidate the Act argue that the individual mandate regulates inactivity and thus is beyond Congress’s power under the Commerce Clause. In a nutshell, the argument runs, the individual mandate regulates persons who do not have the requisite insurance; not having insurance is inactivity; and if Congress has the power to force people to buy insurance, its power is essentially unlimited, contrary to the concept of a federal government with limited authority. Those seeking to uphold the Act argue that activity is not required before Congress can exercise its Commerce Clause power, but even if activity were required, not having insurance constitutes activity. In addition, they argue that the individual mandate is sustainable for falling within the Necessary and Proper Clause of the Commerce Clause authorizing Congress "to make all Laws necessary and proper" to regulate interstate commerce. The Necessary and Proper Clause, however, is generally not regarded as an independent source of federal power, but simply a provision for making effective the powers that the Constitution actually vests in Congress.

Another legal challenge asserts that the Act’s expansion of Medicaid violates the Spending Clause and principles of federalism protected by the Ninth and Tenth Amendments.

Lawsuits have argued that the Act as a whole must fall because the individual mandate is inextricably bound in purpose with the other statutory provisions. The Act contains no severability clause.
As of January 31, 2010, district courts have issued four decisions, two upholding the Act and two invalidating the individual mandate as unconstitutional. None of the decisions invalidates the Medicaid provisions as being coercive to the states, but one of the decisions strikes down the entire Act, including the Medicaid provisions, based on a ruling that the individual mandate is unconstitutional and not severable from the rest of the Act. This is the most recent decision, State of Florida v. United States Department of Health and Human Services, issued on January 31st and referenced below, which holds the entire Act unconstitutional. See, Liberty Univ., Inc. v. Geithner, __F.Supp.2d__ (W.D.Va. 2010), 2010 U.S. Dist. LEXIS 125922 (holding the individual mandate is a proper exercise of the commerce power); Thomas More Law Center v. Obama, 720 F.Supp.2d 882 (E.D. Mich. 2010) (same); Virginia v. Sebelius, 728 F.Supp.2d 768 (E.D.Va. 2010) (holding the individual mandate violates the Commerce Clause); State of Florida v. United States Department of Health and Human Services, __F.Supp.2d__ (N.D. Fla. 2011), 2011 U.S. Dist. LEXIS 8822 (striking down entire Act under the Commerce Clause).

Given the exceptional circumstances, the constitutionality of the Act should be reviewed by the courts of appeals on an expedited basis and swift intervention by the Supreme Court will be appropriate as well. On February 4, 2010, the State of Virginia announced its intention to seek expedited Supreme Court review of the district court’s decision, leap-frogging over the federal court of appeals. These are interesting times.

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