

Next Stop, SCOTUS? Conflict on PPACA's Individual Mandate Arises Among Federal Appeals Courts

August 14, 2011

On August 12, 2011, a three-justice panel of the 11th Circuit Court of Appeals in Atlanta [ruled](#) that the PPACA's individual mandate violated the Commerce Clause of the Constitution, which protects state commerce from federal regulation. In deeming the mandate to be unconstitutional, the 11th Circuit contradicted an earlier [ruling](#) in June by the 6th Circuit court in Cincinnati that upheld the measure. Now that two federal appeals courts have reached differing conclusions on the mandate, the issue may proceed to the Supreme Court, which begins a new term in October 2011.

Although the 11th Circuit court panel concluded that the individual mandate component violated the Commerce Clause, it did not deem the entirety of PPACA to be unconstitutional. In this regard it reversed the trial court, which had held that the individual mandate provision was so thoroughly interwoven into PPACA that its unconstitutionality tainted the entire law. I discussed that ruling in [an earlier post](#); although enforcement of the ruling was [stayed](#), it had been viewed as a significant victory by the plaintiffs in the underlying lawsuit, who included Republican attorneys general and governors from 26 different states. In addition the 11th Circuit court upheld PPACA's expansion of Medicare coverage – through increased state financial responsibility – on the grounds that this measure was within Congress's authority to pass spending bills.

One prominent pull quote from the more than 300-page ruling is consistent with that of earlier trial court rulings against the mandate, namely that Congress cannot dictate individual spending at the state level:

“what Congress cannot do under the Commerce Clause is mandate that individuals enter into contracts with private insurance companies for the purchase of an expensive product from the time they are born until the time they die.”

The countervailing argument is that, because our health system provides care to the uninsured, the resulting financial burden to the system has become a sizeable portion of total federal spending, and one that will only increase with time. In its June ruling the 6th Circuit court adopted this viewpoint, noting:

“ the practice of self-insuring substantially affects interstate commerce by driving up the cost of health care as well as by shifting costs to third parties. Self-insuring for the cost of health care directly affects the interstate market for health care delivery and health insurance.”

Both the 11th Circuit and 6th Circuit courts reached 2 to 1 decisions against and for the individual mandate, respectively, and in each instance one member of the majority “crossed party lines.” One of the two 6th Circuit court judges who ruled to uphold the individual mandate, Judge Jeffrey S. Sutton, was appointed by President George W. Bush, and one of the 11th Circuit judges joining in the majority opinion against the mandate was a Clinton nominee, Judge Frank M. Hull (who is a woman, incidentally). Judge Hull was the first federal judge appointed by a Democrat to rule against the mandate. Previously, all federal trial court decisions on the individual mandate have neatly divided along party lines, with Republican-appointed judges ruling against it and Democratic appointees upholding the law.

What are next steps? The federal government may seek an “en banc” review of the 11th Circuit panel's decision, or can directly seek review by the Supreme Court. The plaintiff in the case before the 6th Circuit, the Thomas More Law Center, has already sought review by the Supreme Court. However,

unlike lower federal courts, the Supreme Court has discretion over what cases it hears, and is under no compulsion to grant review of the issue simply because a conflict now exists between the 11th and 6th circuits. Orrin Kerr, [writing on SCOTUSblog](#), suggests that the Supreme Court will be in no hurry to take up the constitutionality of the individual mandate, and instead will wait to see how the issue is resolved in other circuits, or possibly by a circuit court ruling en banc. (The next circuit court to rule on the individual mandate will be the 4th Circuit court in Richmond, Virginia.) For those curious about the mandate's long-term odds, Mr. Kerr also shares his well-informed predictions on how the Supreme Court may eventually rule on the mandate.