Written by **Joe Wolverton, II, J.D.** on November 10, 2011

D.C. Court of Appeals Upholds Constitutionality of ObamaCare

In a 2-1 decision, the U.S. Court of Appeals for the District of Columbia Circuit held that the individual mandate of ObamaCare is constitutional. Writing for the majority, Senior Judge Laurence Silberman (left), a Reagan appointee, affirmed that by enacting the Patient Protection and Affordable Care Act, specifically the provision mandating that everyone purchase qualifying health insurance, Congress did not exceed the authority ceded to it by the states in the Constitution.

The ruling was made in the case of *Seven-sky, et al. v. Holder*, wherein the American Center for Law and Justice claimed on behalf of the plaintiffs that the ObamaCare mandate at the heart of the issue violated the Constitution, including the Commerce Clause, the Necessary and Proper Clause, and the First Amendment's guarantee of the right to freely exercise religious freedom without the interference of Congress. The suit sought declaratory and injunctive relief, requesting that the court prevent the Obama administration from enforcing the offending mandate.

The First Amendment claim implicated ObamaCare in that it forced citizens to rely on health insurance, regardless of religious beliefs to the contrary.

The D.C. Court affirmed the lower court's rejection of this argument.

In the opinion, Judge Silberman addressed several issues of vital importance to constitutionalists and those who advocate the protection of the sovereignty of the states.

At the heart of the appellants' argument is the assertion that were the individual mandate of ObamaCare enacted as scheduled, the rewriting of the Necessary and Proper and Commerce Clauses of the Constitution would "remove any limitations on federal power, at the expense of state sovereignty."

Furthermore, the appellants warn that should the courts uphold the individual mandate provision of the health care law, the Commerce Clause would be absolutely unmoored from its original meaning and be converted into a grant of plenary police power to the federal government.

The majority's response to this claim is less than compelling:

> if Congress can regulate even instances of purely local conduct that were never intended for, or entered, an interstate market, we think Congress can also regulate instances of ostensible inactivity inside a state. The aggregate effect of that behavior, after all, is just as injurious to interstate commerce.

One commentator, writing in the *Wall Street Journal*, offered the following opinion of Judge Silberman's interpretation of the separation of powers established by the Constitution:

> More startling than this misreading is Judge Silberman's cavalier attitude to the separation of powers. He notes that a judicial validation of the mandate could "turn the Commerce Clause into a federal police power, at the expense of state sovereignty" — and then asks, more or less, so what?

Most of the text of the D.C. Court's opinion discusses the limits on the power granted to Congress by the Commerce Clause.

Judge Silberman wrote:

> The Framers, in using the term "commerce among the states," obviously intended to make a distinction between interstate and local commerce, but Supreme Court jurisprudence over the last century has largely eroded that distinction.…
>
> Today, the only recognized limitations are that (1) Congress may not regulate non-economic behavior based solely on an attenuated link to interstate commerce, and (2) Congress may not regulate intrastate economic behavior if its aggregate impact on interstate commerce is negligible.…

An analysis of several of the cases cited in Judge Silberman's defense of the unlimited power of Congress to "regulate commerce" is necessary.

Section 1, Article 8 of the Constitution grants Congress the authority to "regulate commerce with foreign nations, and among the several states." The fact that Congress passed and President Obama signed the Patient Protection and Affordable Care Act into law demonstrates that neither the legislative nor executive branch of the national government is bothered by constitutional restrictions on their power. As a matter of fact, it is imprecise to say that the Constitution restricts the power of the national government. The truth is that *the Constitution empowers the national government with very specific, limited, and enumerated powers*, leaving all others to the "states, respectively, or to the people."

In recent years, the Supreme Court has heard challenges to the unlimited scope of this authority, and exercising its proper role as a check on the other branches of the government, limits on the federal power to regulate commerce have been imposed.

One of the chief cases wherein the Court sought to mark the metes and bounds of congressional authority to regulate commerce was the case of *United States v. Alfonso Lopez, Jr.* In the Lopez case, Lopez was convicted of having violated the federal Gun-free School Zone Act of 1990 by having brought a handgun and cartridges to school. In this act, Congress outlawed the possession of firearms within a "school zone" and based this law on its power to regulate commerce. According to the Attorney General, this law was a reasonable exercise of the powers granted by the Commerce Clause in that carrying a firearm near a school might lead to commission of a violent crime, which in turn would adversely affect the overall economic condition of the states and effectively impede the free flow of commerce nationwide.

Unimpressed with the legal tenability of this tenuous link between commerce and the activity for which

he was convicted, Lopez's attorneys appealed his conviction, asserting that the act was unconstitutional as Congress exceeded its constitutional authority in exercising such regulation over schools.

Remarkably, the Fifth Circuit Court of Appeals overturned the conviction, whereupon the government petitioned the Supreme Court for review and the Court accepted. In a 5-4 decision, the Court affirmed the decision of the Court of Appeals and held that:

> To uphold the Government's contentions here, we have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

Another important decision attempting to effect a restriction on the flexibility of the Commerce Clause was *United States v. Antonio Morrison, et al*. The issue in this case was the constitutionality of the Violence Against Women Act of 1994. The matter involved a young woman at Virginia Tech University who accused Antonio Morrison of rape. The state grand jury failed to indict Morrison, and the accuser then brought charges against Morrison under the Violence Against Women Act.

This law, as the Gun-free School Zone Act, was promulgated under the ostensible authority of the Commerce Clause. The Congress excused the federal assumption of police power on the grounds that a gender that lived in fear of crime could not be productive and that commerce would be negatively affected. In another split decision, the Court ruled in favor of Morrison and held that violent crimes such as those addressed by the Violence Against Women Act had at best an attenuated effect on interstate commerce, certainly not a substantial one.

Noticeably, neither *Lopez* nor *Morrison* dealt with a law mandating compulsory purchase of a commodity. Not only does ObamaCare require every individual to buy a health insurance policy or be punished, but it also makes compliance with that mandate a condition of legal residency in the United States.

While the Constitution explicitly authorizes Congress to regulate commerce and the Supreme Court has validated the exercise thereof in a string of decisions, there is no precedent in our over 200 years of constitutional jurisprudence for the ability of Congress to force citizens to buy something regardless of their own preference.

Ultimately, the matter will be decided by the Supreme Court. In fact, Judge Silberman's opinion begins by predicting that the constitutionality of ObamaCare "will almost surely be decided by the Supreme Court…."

An abcnews.com blog reports that the Supreme Court is set to meet Thursday to discuss whether to hear an appeal from any of the four challenges to ObamaCare currently awaiting review of decisions made in federal courts of appeal.