National Developments

National Political Conventions

The Democratic and Republican parties held their national conventions over the summer.

At the Democratic convention, Democrats for Life held a forum at which former Congressmen Bart Stupak and Kathy Dahlkemper spoke. Their votes were essential to the passage of the health care reform in 2010, the Patients Protection and Affordable Care Act ("PPACA"). At the forum, Stupak and Dahlkemper protested that the regulations promulgated by the Department of Health and Human Services (HHS) implementing the "preventive services" mandate were *ultra vires*, that is, the regulations went beyond the terms of the executive order issued by President Barack Obama. (The issuance of the executive order had been necessary to secure their vote for the PPACA.[1])

While the Democratic Party's "platform document" (outlining the party's official goals) continued to call for "legal" and "safe" abortions, it failed to call for abortions being rare. The platform had endorsed the goal of making abortions rare in 2000 and 2004. However, the "safe, legal and rare" formulation was dropped in 2008.[2]

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[1] Tabitha Hale, "Stupak: His Mandate Violates My Obamacare Compromise," *Breitbart*, September 4, 2012, http://www.breitbart.com/Big-Government/2012/09/04/Stupak-President-Played-Me-with-Obamacare-Deal.

[2] John McCormack, "Democratic Platform Endorses Taxpayer-Funded Abortions," *Weekly Standard*, September 4, 2012, http://www.weeklystandard.com/blogs/democratic-platform-endorses-taxpayer-funded-abortions_651589.html.

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By contrast, the Republican platform, while continuing to support a Human Life Amendment and to protest abortion, emphasized for the first time the ill effects of abortion on women.[3]

Litigation

With Congress and the President involved in the election season, and with most state legislatures in recess, most of the action shifted to the courts. There were developments in many cases of importance, including litigation challenging (a) the individual mandate under the PPACA, (b) the regulations of the National Institutes of Health (NIH) concerning human embryonic stem cell research, (c) the preventive services mandate under the PPACA, (d) enforced speech for pregnancy resource centers, (e) a ban on abortions after twenty weeks' gestation, (f) state laws concerning informed consent for abortion, (g) state laws concerning conscience protection for pharmacists, and (h) the right of religious nonprofit corporations and organizations to contract with the government and to receive government grants. All of these cases are important—and the last mentioned might turn out to be the most important of all—but I will begin with the case directly involving issues most commonly considered "bioethical."

Stem Cell Research

In the litigation concerning the NIH stem cell regulations, *Sherley v. Sebelius*,[4] the appellate federal court upheld, on a vote of 3 to 0, the dismissal of the case by the lower court. The case was challenging the validity of the regulations governing human embryonic stem cell research. These regulations were adopted after the election of President Obama and replaced the regulations that were in place under President George W. Bush.[5]

The underlying issue was whether human embryonic stem cell research necessarily involves the destruction of an embryo and whether that was prohibited by the Dickey-Wicker Amendment.[6] Dickey-Wicker prohibits federal funding for research in which human embryos are damaged or destroyed or subjected to risk of the same. In an earlier appeal concerning a preliminary injunction in this case, the court decided that the NIH's "narrow" interpretation of what "research" is prohibited by Dickey-Wicker was "reasonable." Essentially, the argument between NIH and the plaintiffs was whether Dickey-Wicker should be interpreted "narrowly" (i.e., to discrete acts) or "broadly" (i.e., to a "process" involving a series of acts); if interpreted narrowly, then the "discrete act" of destroying an embryo could be separated from the subse-

[3] "Through Obamacare, the Obama Administration has promoted the notion that abortion is healthcare. We, however, affirm the dignity of women by protecting the sanctity of human life. Numerous studies have shown that abortion endangers the health and well-being of women and we stand firmly against it." 2012 Republican Party platform, under "Repealing Obamacare," http://www.gop.com/2012-republican-platform_Renewing/.

[4] 689 F.3d 764 (D.C. Cir. 2012).

[5] The history of this case has been reviewed in my three prior Washington Insider columns.

[6] Pub. L. No. 112–74, sec. 508(a)(1–2).

quent act of doing research with its stem cells, and only the former must be denied federal funding. The court had reached this conclusion (i.e., that NIH's "narrow" interpretation was reasonable) in the earlier appeal because of a doctrine requiring judicial deference to administrative (in this case, NIH) decisions; this is called the "Chevron doctrine." Under a different judicial doctrine called "the law of the case," the appellate court then held that these matters could not be re-visited by it during the later appeal in the same case.

Although all three judges agreed with that conclusion, two of them—Karen Henderson and Janice Brown —felt the Chevron doctrine had been *wrongly* applied *originally*. In other words, they did not think the court was required to defer to NIH. Nonetheless, one of those two—Brown—believed the court's holding would not have changed (i.e., the case would still have been dismissed) even if the deferential Chevron doctrine had not been applied. Why?

The Dickey-Wicker amendment was adopted by Congress prior to the beginning of human embryonic stem cell research. Thus, its application to such research was ambiguous and required interpretation. Subsequent Presidents—both Bill Clinton and George Bush—favored policies permitting *at least some research* utilizing human embryonic stem cells. In neither case, however, did Congress act to change the language of Dickey-Wicker. The conclusion to be inferred, then, is that Congress *intended* that at least some kinds of human embryonic stem cell research could be carried out without violating Dickey-Wicker. In other words, Judge Brown was arguing that NIH's narrow interpretation of Dickey-Wicker is consistent with the intent of those (i.e., Congress) who passed Dickey-Wicker in the first place (1996) and every year after (it is an appropriations "rider" that must be renewed yearly); otherwise, Congress would have objected to President Bush's policy, which was based on the precise notion that the destruction of embryos was a discrete act that could be separated from the subsequent research. (Bush's policy permitted federal funding for stem cell lines in which the destruction of the embryo had occurred prior to 9 p.m. on August 9, 2001.)

In conclusion, although one can only note the complex and odd reasoning (odd at least for non-lawyers), the bottom line is clear: the court (all three judges) rejected any grounds for challenging NIH's current human embryonic stem cell research guidelines under the Dickey-Wicker amendment.

PPACA: The Individual Mandate and the Preventive Services Mandate

In another important case, as readers are surely aware, the Supreme Court upheld the constitutionality of the requirement of the PPACA that individuals purchase insurance ("the individual mandate"), which was a central component of financing PPACA.[7] Many commentators predicted that the Court would invalidate the individual mandate and, with it, the entire health PPACA.[8] However, the Court

[7] The case is *National Federation of Independent Businesses v. Sebelius*, 567 U. S. __, 132 S. Ct. 2566 (2012).

[8] See, for example, Chris Moody, "Insider Poll: Legal Experts Now Expect Supreme Court to Strike Down Individual Mandate," *Yahoo! News*, June 20, 2012, http://news.yahoo.com/blogs/ticket/insider-poll-legal-experts-now-expect-supreme-court-123441478.html.

upheld the mandate by the narrowest of margins, on a vote of 5 to 4. Four justices felt that the individual mandate violated the commerce clause of the Constitution because the failure to purchase insurance—a failure to act—cannot be "activity" regulated by the clause.[9] While Chief Justice John Roberts agreed, he found that the taxing power of Congress was broad enough to permit it to pass the PPACA, and the remaining four justices agreed with him on that point.[10] (The justification of the individual mandate as Congressional power to tax had hardly been argued before the Court, as the focus had been on the commerce clause.)

For our purposes, it is perhaps sufficient to note that, concerning the health care reform, the decision was a relatively narrow one. It simply upheld *the individual mandate*. It did not address the constitutionality of the *preventive services mandate*, which is under litigation in thirty or more cases.

In fact, new cases are being filed frequently. For instance, the College of the Ozarks filed in mid-September,[11] as did Hobby Lobby, a Christian-owned business with five hundred stores in forty-one states.[12] One of the plaintiffs in a new lawsuit (Triune Health Group) had even been named "Best Place in Chicago for Women to Work."[13] Just these three cases give a good idea of the breadth of the opposition to the HHS mandate—a Christian college, a private business, and a health insurer. It is to those cases that I will now turn.

In my previous columns, I examined the evolution of the HHS preventive services mandate in great detail. Summarizing briefly here, I note that, as provided for in the PPACA, all health insurance plans that are not grandfathered or exempted must provide coverage of preventive services for women. HHS has interpreted this to include contraception, sterilization, and several abortifacients. (I will use "objectionable services" to refer to them collectively in the following paragraphs.) Because of widespread protest, the president granted a "one-year safe harbor" from government enforcement, during which time organizations and institutions could determine *how* to comply with the regulations. Following more protest, the president announced

[9] These four judges were Clarence Thomas, Samuel Alito, Anthony Kennedy, and Antonin Scalia. The commerce clause states that "Congress shall have the power to … regulate commerce … among the several states" (art. 1, sec. 8).

[10] "Congress shall have the power to lay and collect taxes" (ibid.) The four dissenting justices made a telling rejoinder to this: How could it be that the individual mandate did not count as a "tax" for purposes of a statute that prohibits challenging taxes until they are laid (otherwise the case should have been dismissed as not ripe for judicial review), but did count as a tax for purposes of evaluating whether Congress had the power to impose it? The dissenting judges were Ruth Ginsburg, Elena Kagan, Sonia Sotomayor, and Stephen Breyer.

[11] See Senator Roy Blunt, "Protect All Religious Groups' Rights," *Springfield News-Leader* (Missouri), September 21, 2012.

[12] Becket Fund for Religious Liberty, "Hobby Lobby Sues over HHS Mandate," news release, September 12, 2012, http://www.becketfund.org/hobbylobbysueshhs/.

[13] Jubilee Campaign Law of Life Project, "Federal and State Civil Rights Violations Cited in New HHS Mandate Lawsuit Filed in Federal District Court in Chicago for Private Employer," news release, August 22, 2012, http://www.lawoflifeproject.org/sites/default/files/pdf/pr/Triune_Press_Release_Final.pdf.

that religious organizations and institutions would not have to provide coverage for the objectionable services; instead, their insurance companies would be required to provide it free of charge. However, this latter "accommodation," whatever its merits,[14] exists only as a *promise* by the president; it is not part of the binding regulations.

The regulations bind in a rolling fashion. Beginning August 1, they bound insurance plans as of the first date of a "plan year" thereafter. In other words, if your institution or organization's insurance plan year begins in February, for example, you are not bound to provide the objectionable services until then. Failing to provide them will be a breach of the law only after that date.

As noted, many cases have been filed challenging the constitutionality of the mandate, and also challenging it under a federal law called the Religious Freedom Restoration Act.[15] Some of these cases have been dismissed by federal courts; among these are suits by Belmont Abbey College, Wheaton College, seven states' attorneys general, and others.[16] The reason for the dismissals can be taken straight from the Belmont Abbey case: "Because the government has indicated its intention to amend the regulations to better take into account religious objections and because Plaintiff is protected in the interim by a safe-harbor provision, the Court agrees that Belmont's injury is too speculative to confer standing and that the case is not ripe for decision. Dismissal without prejudice is thus appropriate."[17] In other words, the court is relying on the interim safe harbor and Obama's promise to change the regulations for religious organizations and institutions as the ground for concluding that the matter is not acute (not "ripe") (an injury may never occur), and thus the plaintiffs lack "standing" to pursue their case. If, in the future, the institutions find themselves actually suffering injury from the preventive services mandate, they may renew their claims.

Something similar happened to Wheaton College, which objects to the provision of abortifacients but not contraception. Prior to the case, to qualify for the one-year "safe harbor," an institution must have established by February 10, 2012, that it has consistently not provided the objectionable services because of religious objections. This Wheaton College could not do; thus, it did not qualify for the safe harbor. However, during the pendency of the case, HHS amended the regulation to expand the safe harbor if the organization had *begun* to take action to exclude the objectionable services from existing coverage, and no longer required that the institution be objecting to the provision of *all* the objectionable services. Since Wheaton fit into this amended safe harbor, the judge dismissed the case.

In a highly unusual move, the U.S. Court of Appeals for the D.C. Circuit on its own initiative consolidated and expedited appeals from the decisions involving Belmont Abbey and Wheaton Colleges. (Both cases were decided by federal courts

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[14] See the Summer 2012 "Washington Insider" for criticism of the accommodation on the merits.

[15] The legal grounds of these cases were extensively analyzed in the Summer 2012 "Washington Insider."

[16] Paige Winfield Cunningham, "Federal Judge Dismisses Contraception Lawsuits," *Washington Times*, July 17, 2012.

[17] *Belmont Abbey College v. Sebelius*, civil action no. 11–1989 (D.D.C. July 18, 2012), 2.

sitting in the District of Columbia.) This will be the first time a federal *appellate court* has heard arguments relating to the preventive services mandate. While the court is likely to focus on the issues of ripeness and standing, it could go further and examine the constitutional claims. In any case, since this is on an expedited schedule, it appears the appellate court is ready to render a decision in the near future.

While some cases were dismissed for ripeness or standing (because the institution is not yet being penalized), those cases involved *religious educational institutions.* The "safe harbor" and the possibility of new regulations to protect religious institutions and organizations do not apply to *private employers*. Thus, the regulations apply against them now, and fines ($100 per employee per day) start accumulating now for providing insurance without the objectionable services. In fact, it was in one such case that the very first ruling *implicating the merits* of these claims occurred.

The case is known as *Hercules v. Sebelius*.[18] Hercules is a private company; it is by no means a religious organization or institution. However, its owners are religious. They claim the First Amendment right not to provide the objectionable services. The government's response is that private employers have *no* First Amendment religious freedom rights; a secular business can make no religious freedom claims.

However, the federal district court in Colorado agreed with Hercules and entered an injunction against the government to prevent it from enforcing the regulations against the company. While that injunction has been appealed, it is still in effect today, and it is worth noting what the district court said: "The government has exempted over 190 million health plan participants and beneficiaries from the preventive services mandate . . . ; this massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs." The judge noted that the government's interests in enforcing the mandate "are countered, and indeed, outweighed, by the public interest in the free exercise of religion."[19]

Preliminary injunctions are granted on the basis, in part, of the likelihood of success at trial. Thus, the granting of the injunction indicates that the court believes the plaintiffs will prevail; that is, the court appears to believe the issuance of the HHS preventive services mandate violates the First Amendment guarantee of religious freedom. Thus, the granting of the injunction is significant, not just for Hercules Industries but for all those protesting the mandate on the same grounds.

On September 28, a federal judge in St. Louis dismissed a suit *on the merits*, i.e., *not* on the procedural grounds of ripeness or standing. In *O'Brien v. Sebelius*, U. S. judge Carol Jackson ruled that "regulations [pursuant to the preventive services mandate] do not impose a 'substantial burden' on [the plaintiffs] and do not violate

[18] The company name is Hercules, but the family's name is Newland. The actual title of the case is *Newland v. Sebelius*.

[19] *Newland v. Sebelius*, civil action no. 1:12-CV-1123-JLK (July 27, 2012), 9, 14–15. The exempted plans are "grandfathered" plans, i.e., those that have not been changed in material ways since the passage of PPACA. If material changes are made, plans lose their grandfathered protection.

their rights."[20] The judge held that the Religious Freedom Restoration Act "does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." (I believe the judge is exactly wrong on this point, as I discussed in my prior column.[21])

The decision will certainly be appealed. The disagreement between courts in different circuits (i.e., between the federal court in St. Louis and the federal court in Colorado), assuming the different federal appellate courts uphold the rulings in both cases, will provide a likely reason for the Supreme Court to review the mandate and resolve the issue quickly.

Conscience Rights of Pharmacists

In mid-September, the Appellate Court of Illinois for the Fourth District ruled in favor of pharmacists seeking to vindicate their conscience rights. The case, *Morr-Fitz v. Quinn*, has been working its way through the Illinois court system since 2005, when then-Governor Rod Blagojevich first issued a rule that would force pharmacies to dispense life-ending drugs in the form of so-called emergency contraception. Pharmacists Luke Vander Bleek and Glenn Kosirog and their pharmacies filed suit against the state to defend their rights of conscience. A state court found in favor of the pharmacists in 2011. In September, the state's appellate court upheld the lower-court decision, ruling that enforcement of the rule would violate the Illinois Health Care Right of Conscience Act.[22]

The victory in *Morr-Fitz* allows me to mention another important victory. That case, *Stormans v. Selecky*,[23] though decided in February, was appealed by the state of Washington during the summer. It is no surprise that the state appealed, because the trial court found that state rules denying pharmacists conscience protection on religious-freedom grounds (while granting it on other grounds) had been motivated by religious animus and violated the pharmacists' First Amendment rights. Accordingly, the court vacated those regulations.

A Woman's Right to Know

In my previous "Washington Insider," I noted a case in the Eighth Circuit having to do with informing women about increased risks of suicide following an abortion, *Planned Parenthood v. Rounds*. On July 24, the Eighth Circuit upheld the law passed by South Dakota. The ruling applied the holding from the most recent U.S. Supreme Court decision on abortion, *Gonzales v. Carhart* (2007). In that decision,

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[20] Robert Patrick, "Judge Dismisses Suit Challenging Health Care Law's Contraception Mandate," *St. Louis Today*, October 2, 2012, http://www.stltoday.com/news/local/metro/judge-in-st-louis-dismisses-suit-challenging-health-care-law/article_23181cac-0c1b-11e2-b7a3–001a4bcf6878.html.

[21] See the Summer 2012 "Washington Insider," 211–212.

[22] *Morr-Fitz v. Quinn*, IL App 4th 110398 (Sept. 12, 2012), http://www.state.il.us/court/Opinions/AppellateCourt/2012/4thDistrict/4110398.pdf.

[23] 844 F Supp 2d 1172 (W.D. Wash. 2012).

the Supreme Court said that legislatures have wide discretion to pass laws concerning abortion in areas where there is medical and scientific uncertainty. In this instance, the legislature considered studies purporting to prove, or disprove, that there is a link between abortion and suicide. It chose to accept the former. And, unless it could be shown (as it could not be shown in this case) that there was *no* evidence supporting this choice, the court said that choosing among competing claims while making law is precisely what the legislature is entitled to do.

Twenty-Week Abortion Ban

A few months ago, Arizona passed a law banning abortions after twenty weeks. The law was based on both the pain felt by a fetus at this point in gestation as well as the increased risk to women of later abortions. The Center for Reproductive Rights (CRR) challenged the law, but the federal district court, following *Gonzales v. Carhart*, held that a facial challenge would not be entertained and the statute could go into effect. CRR filed an emergency appeal with the Ninth Circuit. The Ninth Circuit stayed the lower court's order pending resolution of the appeal (which means the law is not in effect until that point, if then). However this is ultimately resolved by the Ninth Circuit, it seems not unlikely the Supreme Court will have an opportunity to review the decision, and that is significant. A twenty-week ban is unlike any abortion restriction previously upheld by the Supreme Court—the twenty-week ban will preclude *abortion* after that point.[24] The furthest the Supreme Court has previously gone is to permit Congress to preclude *a procedure*.[25]

Pregnancy Resource Centers and Compelled Speech

I wrote previously about decisions by federal district courts finding regulations by local political bodies mandating speech by pregnancy resource centers to be unconstitutional abridgments of speech (protected under the First Amendment).[26] Some of these cases were appealed to the Fourth Circuit Court of Appeals. The circuit court upheld the decisions on June 27. Subsequently, however, the defendants (the local bodies who imposed the restrictions) asked the Fourth Circuit to re-hear the cases *en banc*, which means by all the judges. That request was granted, and the cases will be re-argued in the fall.

May Religious Organizations Contract with the Government?

A final case of note is *ACLU v. Sebelius*.[27] Although this case was decided in March, an appeal was made recently by the party whom the court allowed to "intervene," i.e., file a brief in the case. (An "intervener" is someone who, though neither the plaintiff nor the defendant, has a strong interest in the case.) The intervener is the United States Conference of Catholic Bishops (USCCB).

The case was filed in federal district court in Massachusetts. The plaintiffs, the ACLU, argued that a government contract between the U.S. government and the

[24] Except in the case of medical emergencies.

[25] See *Gonzales v. Carhart*, 550 U.S. 124 (2007).

[26] See the Winter 2011 "Washington Insider," footnote 36 and accompanying text.

[27] 821 F. Supp. 2d 474 (D. Mass. 2012).

USCCB concerning the provision of services to sex-trafficking victims violated the establishment clause of the First Amendment. Readers may be aware that HHS has decided it will make no future government grants to the USCCB regarding these services because the USCCB does not provide abortions and contraceptives. However, that is a different matter and a later development. This government contract came first. Only as it was nearing its end did HHS decide to switch from entering into *government contracts* to making *grants* for these services and to deny the USCCB the opportunity to receive such a grant. This matters, because the protections for the nongovernmental party are much greater with government contracts than with grants.

At any rate, the USCCB intervened in the case to protect its contract. There were no allegations by the ACLU that the facilities provided pursuant to the contract were used for religious services, nor any allegations that the USCCB prevented any trafficking victim from getting an abortion or contraception elsewhere. Rather, the USCCB simply informed its subcontractors that they would not be recompensed for providing such services. All this was known during the "request for proposal" period during which the government considered bids for the contract. And the government graded the USCCB "down" as a result. Still, the USCCB's proposal scored highest overall on relevant measures, and the government awarded the contract to it. Once the matter went to court, the government joined with the USCCB in defending the constitutionality of the contract.

Even so, the district court granted summary judgment to the ACLU. The court accepted the ACLU's argument that by contracting with the USCCB so as to allow it not to provide abortions and contraception, the government had violated the First Amendment by "establishing" the Catholic Church's "religious" views.[28]

Unless this case is reversed, the implications are staggering. Since presumably religious entities will not contract to do what their faith precludes, a judicial doctrine that equates the presence of such provisions in a government contract (or grant) with a prohibited "establishment of religion" would seem to mean the end of all contracts between religious organizations and the federal government.

William L. Saunders Jr.

[28] The First Amendment states, "Congress shall make no law respecting an establishment of religion."