

## **[Randy Barnett Says Those Dismissing Vinson Ruling Are "Whistling Past the Graveyard"](#)**

By [Philip Klein](#) on 2.3.11 @ 4:35PM

Earlier this afternoon, I had the chance to speak with Georgetown University law professor Randy Barnett about the status of the legal fight to overturn the national health care law in the wake of Judge Roger Vinson's decision to strike down the individual mandate and void the rest of the legislation as a result.

Barnett testified at a Tuesday Senate Judiciary Hearing on the constitutionality of the law and his work was cited in Vinson's ruling.

"Step by step, incrementally, these cases develop," Barnett said. "The (Judge Henry) Hudson decision (in Virginia) was a big step, and Vinson's decision was another huge step."

Hudson's decision was significant because it rattled those who had laughed off legal challenges to the health care law that they assumed would be thrown out of court as frivolous. But these supporters quickly dismissed Hudson as a lone partisan judge, and attacked the thinness of his opinion.

Now, Barnett said, "They can no longer dismiss the Hudson ruling as a one off event." In addition, the Vinson decision was "substantial, deep, thoughtful and meant to be influential to the appeals court."

He noted that for all the attacks on Vinson's partisanship, the same judge threw out the states' challenge to the Medicaid expansion.

While critics are still dismissing this second ruling against the mandate, Barnett said, "they're whistling past the graveyard."

Vinson's decision went further than Hudson's by voiding the entire law, rather than severing the mandate from the rest of the legislation. Liberals attacked this as extremist, citing a ruling on a Supreme Court case about the Sarbanes-Oxley law in which the court struck down one provision, but left the rest of the law intact. Chief Justice John Roberts wrote the opinion, a fact that was used to help portray Vinson as [out of the mainstream](#).

"It's only relevant in that it's a severability case," Barnett said of the Sarbanes-Oxley ruling. "There's a tremendous difference between that case, about how members of a commission get appointed, and this case, when the government argued that (the mandate) was essential to the law."

One of the lingering questions from Vinson's decision is whether states can now choose not to implement the health care law. While Vinson did not explicitly grant an injunction, he said voiding the law was effectively the same.

Barnett said that the states who were parties to the case have a reasonable argument that they don't have to implement any of the law's provisions until a higher court rules otherwise.

Given the uncertainty, even Democratic Sen. Bill Nelson of Florida has introduced a resolution to call on the Supreme Court to expedite a hearing on the constitutionality of the law. But Barnett says the idea of the Supreme Court reviewing this early is a "1000 to 1 shot."

The Supreme Court likes to watch arguments get refined as they move up the judicial ladder, he explained, noting that Vinson's decision was deeper than Hudson's because he had more time to grapple with the issues.

"I think the Supreme Court would want to hear from the courts of appeals," he said.

I asked him whether, moving forward, the government would be inclined to deemphasize their argument about the mandate being essential to the law, given that Vinson used those arguments as his basis for voiding the entire legislation. But Barnett said they have to maintain their current posture.

"They have no choice," he said, since the government's entire argument hinges on the mandate being essential to a broader regulatory scheme.

He also said that there have been a number of developments that affect what he calls the "atmospherics" surrounding the case. While the Supreme Court is often reticent to overturn acts of Congress, the underlying reason is that they don't want to override the will of the people. "They are just human beings," he said of the justices, and they don't want to do anything that would be considered "way out of line."

However, the fact that 27 states are suing the federal government over the law, and that following an election, the House of Representatives voted to repeal it by a larger majority than had passed it, helps to convince justices that they wouldn't be out of line by voting to overturn the law.

While, in the past, states have signed on to amicus briefs against the federal government, Barnett said, "I don't think it's ever been the case that this many states have sued the federal government over a major piece of legislation."