Second Opinion:
Where health care policy experts have their say

December 16, 2010:

Without the Individual Mandate, What Will Happen to Obamacare?

On Monday, a Virginia federal district court struck down the individual mandate to purchase health insurance in the Patient Protection and Affordable Care Act (PPACA). In his ruling, the judge wrote that:

Because an individual's personal decision to purchase – or decline to purchase – health insurance from a private provider is beyond the historical reach of the Commerce Clause, the Necessary and Proper Clause does not provide a safe sanctuary. This clause grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers. This authority may only be constitutionally deployed when tethered to a lawful exercise of an enumerated power...

The Minimum Essential Coverage Provision is neither within the letter nor the spirit of the Constitution. Therefore, the Necessary and Proper Clause may not be employed to implement this affirmative duty to engage in private commerce.

Will the Supreme Court agree to hear the case on an expedited basis? As litigation continues, how will this ruling affect the ongoing implementation of PPACA? Finally, how will the litigation affect – and reflect – public unhappiness with the PPACA? Leading health care experts lend their predictions for where Obamacare is headed next.

This edition of our expert panel includes:

- Joseph Antos Wilson H. Taylor Scholar in Health Care and Retirement Policy and adjunct professor at the Gillings School of Global Public Health at the University of North Carolina at Chapel Hill.
- Michael Cannon is the Cato Institute's director of health policy studies.
- Dr. David Gratzer, senior fellow at the Manhattan Institute
- Sally Pipes, Taube Fellow in Health Care Studies, president and chief executive officer of the Pacific Research Institute
- Peter Suderman is an associate editor of *Reason* magazine and a 2010 Robert Novak Journalism Fellow
- Grace Marie Turner, president of the Galen Institute

By Joseph Antos

Monday's ruling against the insurance mandate is only the latest skirmish in what promises to be a long legal battle that ultimately will be superseded by the inherent contradictions of Obamacare. A Clinton-appointed judge in Michigan ruled on October 7 that the law is constitutional. Another Clinton judge in Virginia dismissed a case on November 30. Now a Bush-appointed judge sides with conservatives. Does anyone see a pattern?

The Supreme Court will be in no rush to take on this issue, hoping that lower courts winnow down the cases and arguments to something that the Supremes can deal with. It is likely that they might settle the question of constitutionality before 2014, but that decision will be narrowly construed—raising even more issues than the court settles. In the mean time, implementation will continue in Washington, the States, and private companies inside and outside the health sector. The prospect of a high court ruling sometime in the future does little to change the need for businesses to decide how to comply with the hundreds of requirements that the health law imposes on them. As a practical matter, private firms have little choice but to assume that the new rules will be enforced.

Whatever the courts ultimately decide, Obamacare is certain to fall of its own weight. It is too complex, too expensive, and too divorced from the realities of the marketplace to continue as the Congress has specified. Even a Democratic win in the courts will not change that fact.

Joseph Antos is a commissioner of the Maryland Health Services Cost Review Commission, a health adviser to the Congressional Budget Office, and an adjunct professor at the Gillings School of Global Public Health at the University of North Carolina at Chapel Hill.

* * *

Recent Second Opinion:

Post-Election Predictions for Obamacare
November 11, 2010

Improving the FDA's REMS Program
August 05, 2010

Are Foreign Clinical Drug Trials Safe?
July 08, 2010

FDA's Bad Ad Program
June 03, 2010

Obesity and Public Health
May 05, 2010

The Route to Reconciliation
March 05, 2010

Conflict of Interest
January 28, 2010

Analyzing the Healthcare Bills
November 18, 2009

President Obama's Plan for Reform
August 24, 2009

The Healthcare Reform Debate
July 23, 2009

Priorities for the New FDA Commissioner
December 19, 2008

PhRMA's New Marketing Code
August 28, 2008

Personal Genetics Testing
July 29, 2008

Where health care policy experts have their say
June 13, 2008

Sources of Medical Research Funding
April 24, 2008

Off-Labeling Marketing
March 17, 2008

By Michael F. Cannon

Federal Court Declares ObamaCare's Individual Mandate Unconstitutional

(re-posted from Cato@Liberty)

ObamaCare has always hung by an absurdity. ObamaCare supporters claim that the Constitution's words "Congress shall have the Power…To regulate Commerce…among the several States" somehow give Congress the power to *compel* Americans to engage in commerce. This ruling exposes that absurdity, and exposes as desperate political spin the Obama administration's claims that these lawsuits are frivolous.

This ruling's shortcoming is that it did not overturn the entire law. Anyone familiar with ObamaCare knows that Congress would not have approved any of its major provisions absent the individual mandate. The compulsion contained in the individual mandate was the main reason that most Democrats voted in favor of the law. Yet the law still passed Congress by the narrowest of all margins — by *one vote*, in the dead of night, on Christmas Eve — and required Herculean legislative maneuvering to overcome nine months of solid public opposition. The fact that Congress did not provide for a "severability clause" indicates that lawmakers viewed the law as one measure.

Despite that shortcoming, this ruling threatens not just the individual mandate, but the entire edifice of ObamaCare. The centerpiece of ObamaCare is a three-legged stool, comprised of the individual mandate, the government price controls that compress health insurance premiums, and the massive new subsidies to help Americans comply with the mandate. Knock out any of those three legs, and whole endeavor falls.

Moreover, the individual mandate is not the law's only unconstitutional provision.

These lawsuits and the continuing legislative debate over ObamaCare are about more than health care. They are about whether the United States has a government of specifically enumerated powers, or whether the Constitution grants the federal government the power to do whatever the politicians please, subject only to a few specifically enumerated restraints. This ruling has pulled America back from that precipice.

Michael Cannon is the Cato Institute's director of health policy studies. Previously, he served as a domestic policy analyst for the U.S. Senate Republican Policy Committee under Chairman Larry E. Craig, where he advised the Senate leadership on health, education, labor, welfare, and the Second Amendment.

* * *

By David Gratzer

ObamaCare suffered a set back this last week, with a Virginia federal district count striking down the individual mandate. This is good if minor news – in an age of judge shopping, a low court win isn't a shock.

Higher courts, and ultimately the highest, will weigh in over the years to come.

And let's just remember that ObamaCare is much more than pressing a 25 year-old kid who feels he's immortal into buying an insurance policy. Expanding Medicaid by tens of millions, regulating the insurance market, establishing countless committees and panels – ObamaCare is a complicated and expensive beast. Whether or not the Supreme Court strikes down the individual mandate, the legislation – most unfortunately – largely continues on.

If last week's election results are any indication, Obamacare may soon be history.

David Gratzer, a physician, is a senior fellow at the Manhattan Institute. His research interests include consumer-driven health care, Medicare and Medicaid, drug reimportation, and FDA reform. The late Milton Friedman, Nobel Laureate in Economics, wrote that Gratzer is "a natural-born economist." Gratzer's most recent book, with Foreword by Milton Friedman, is *The Cure: How Capitalism Can Save American Health Care* (Encounter Books, October 2006).

* * *

By Sally C. Pipes

This week, a Virginia judge ruled the cornerstone of the president's healthcare reform effort -- the requirement that individuals buy insurance -- unconstitutional. The Supreme Court will have the final word on this issue. Regardless of when -- or how -- the high court decides, Obamacare is already unraveling at the seams.

Virginia Attorney General Ken Cuccinelli, who is leading the repeal drive in his state, has asked the Supreme Court to expedite consideration. But with the mandate not set to take effect until 2014, Cuccinelli's day in court is likely a few years away.

Obamacare may prove a failure well before then. In just nine months since passage, the feds have distributed more than 200 waivers exempting companies from many of the law's new rules.

Further, many Americans will soon lose their current coverage. Although President Obama promised that folks who liked their health plans could keep them, his administration's "grandfather" regulations are so restrictive that they effectively outlaw most existing plans and force people into plans of the government's choosing.

Some 60 percent of likely voters recently told Rasmussen Reports that they favored repealing the healthcare law. The federal judiciary may soon comply with their request.

Sally C. Pipes is President, CEO, and Taube Fellow in Health Care Studies at the Pacific Research Institute. Her latest book, The Truth About Obamacare *(Regnery 2010), was just released*.

* * *

By Peter Suderman

If conservative state officials needed any more excuse to delay, obstruct, or otherwise slow the implementation of ObamaCare's state-level provisions, Judge Henry Hudson's decision to strike down the law's individual mandate to purchase health insurance probably gave it to them. Now that a key part of the recent health care overhaul has been overturned, conservative state legislators will likely be even more wary of following through on the law's state-level requirements.

That wariness will no doubt be shared by much of the public, which has consistently opposed the law -- and especially the mandate -- since debate over it first began. Thanks to Judge Hudson, ObamaCare's defenders will be forced to engage in a complex constitutional argument -- the crux of which is that the government both can and should compel everyone to purchase health insurance. That argument may ultimately win with the Supreme Court. But given the mandate's clear unpopularity, it will likely play far less well with the public at large.

Peter Suderman is an associate editor of *Reason* magazine, where he writes regularly on health care, tech policy, and pop culture. He is also a 2010 Robert Novak Journalism Fellow

* * *

By Grace-Marie Turner

Numerous experts argued during the debate over ObamaCare that the federal government doesn't have the constitutional authority to compel otherwise free Americans to purchase private health insurance, as defined by government, with their personal money. On Monday, U.S. District Judge Henry Hudson agreed, declaring that the individual mandate represents an "unchecked expansion of congressional power" that "would invite unbridled exercise of federal police powers."

Where would it stop? Nowhere, he concludes.

The White House and Congress chose to ignore those who warned them about the individual mandate. But in their hubris, they decided they could not only reengineer one-sixth of our economy but rewrite the Constitution in the process.

The astonishing thing is that virtually the entire health-care establishment bought into this. The health-insurance industry staked its future on the individual mandate as necessary to make all of the other provisions of this Rube Goldberg monstrosity work.

Was there ever anyone at any of these meetings who raised his hand to say that maybe it wasn't a good idea to pass a major piece of legislation that was premised on violating the Constitution?

Judge Hudson declared that the mandate is "neither within the letter nor the spirit of the Constitution."

This is the tall pole in the tent of Obamacare. While Judge Hudson did not halt implementation of the law or declare the whole thing invalid, supporters and opponents alike argue that losing the individual mandate could cause the whole flawed structure to collapse.

The House of Representatives is likely to vote on the individual mandate in the upcoming Congress. Then members will have to go on record as to whether or not they believe in freedom and the sovereignty of the individual or in a new world order in which government is king.

Grace-Marie Turner is president of the Galen Institute, a public policy research organization that she founded in 1995 to promote an informed debate over free-market ideas for health reform.

* * *