

Florida Judge's Obamacare Ruling Passionate, If Futile

Jan. 31 2011 - 9:32 pm By DANIEL FISHER

Academics have a little code they use when they think someone's idea is really, really stupid: "That's an interesting theory," they say. The White House had a similar response to [U.S. District Judge Roger Vinson's ruling](#) today invalidating Obamacare.

There's "something thoroughly odd" about the decision, a highly placed official of the Obama administration said in a conference call with reporters today. "The analysis on the whole is, to put it charitably, quite unconventional," he went on to say, opining that the decision will be seen as "an outlier" and ultimately reversed by a higher court.

That may be true. Judge Vinson strides boldly into waters that most judges, for good reason, seek to avoid. Judicial restraint is a pet cause of conservatives, along with the sensible idea that legislators should free to legislate, since if they do so in a stupid way the voters will respond by chucking them out of office. By that theory, there's little utility in a judge deciding Obamacare is a silly law; the voters can do that themselves. And as I noted recently, none less than the Chief Justice of the U.S. Supreme Court [signed off on a quite expansive view of the Necessary and Proper Clause](#), the constitutional Swiss Army Knife that lets Congress do pretty much whatever it wants in the area of economic regulation.

Judge Vinson's decision, therefore, is unlikely to survive higher review.

But the highly placed official's other criticisms don't hold up on a close reading of Vinson's decision. Yes, the judge engages in extended discourses on constitutional history and theory, quotes the [Federalist papers](#) and even mentions the events that led up to the original Tea Party. If he's trying to win over liberals, this guy has a tin ear.

His reasoning, however, is well laid out. The White House, for example, said the judge cites Supreme Court precedents he likes and ignores the ones he doesn't. That's not true. Obviously Vinson likes the *Lopez* and *Morrison* decisions, in which the Supreme Court invalidated federal laws prohibiting guns near schools and violence against women as stretching Congressional power to regulate interstate commerce beyond the breaking point. But he also discusses at length — and with about as much distaste as the highly placed official has for Vinson's ruling — the two other rulings that seem to support Obamacare's individual insurance mandate.

One, *Wickard v. Filburn*, upheld a Roosevelt-era law limiting grain production to prop up prices even when the farmer in question was growing grain entirely for his own consumption. More recently the court upheld a federal law prohibiting the private

cultivation of marijuana under the theory that even private cultivation has an impact on the price of a commodity that is subject to intensive federal regulation.

The problem with the Obamacare requirement that individuals buy health insurance is that it penalizes them for *not* engaging in activity, Vinson writes. This is a bedrock argument of the Obamacare foes, and it must tiptoe around some inconvenient facts of daily life such as state car insurance mandates (they are state laws, and states have practically unlimited powers under the Constitution). But Vinson says he can't find any Supreme Court guidance on this particular question because Congress has never regulated inactivity before. If judges allow such a novel form of regulation to stand, he writes,

Instead of attempting to control wheat supply by regulating the acreage and amount of wheat a farmer could grow as in *Wickard*, under this logic, Congress could more directly raise too-low wheat prices merely by increasing demand through mandating that every adult purchase and consume wheat bread daily, rationalized on the grounds that because everyone must participate in the market for food, non-consumers of wheat bread adversely affect prices in the wheat market. Or, as was discussed during oral argument, Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system. Similarly, because virtually no one can be divorced from the transportation market, Congress could require that everyone above a certain income threshold buy a General Motors automobile — now partially government-owned — because those who do not buy GM cars (or those who buy foreign cars) are adversely impacting commerce and a taxpayer-subsidized business.

The highly placed White House official scoffed at this reasoning, saying it has no place in a judicial opinion because it's based entirely on hypotheticals that are unlikely to come true. There have been a consistent set of Congressional findings that the uninsured impose costs on the rest of us, the official said, yet Vinson is "constantly removing himself from that context to broccoli to housing."

But Vinson anticipated that argument and said his examples are no mere "parade of horrors" (a favorite phrase of [Antonin Scalia](#)'s, that). The individual insurance mandate itself depends on a chain of hypotheticals, he said, including that the uninsured a) get sick or injured b) seek medical care c) they are unwilling or unable to pay for that care d) they also are unwilling or unable to make arrangements with the physician or with family members to pay for that care. Lots of people die without burial insurance and have their costs covered by local governments, he notes. Why not require burial insurance too?

The most elegant and eviscerating criticism of rulings like Vinson's is that they represent "empty formalism." That's academic code for Neanderthal reliance on the text of the Constitution, instead of what it has become through 200 years of judicial interpretation.

Vinson has a retort to that, too. He cites a Supreme Court decision that noted the difficulty of deciding when Congress has gone too far:

The Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

I'm skeptical Vinson's logic will win the day. But conservatives are cheering and some scholars think the White House is wrong when it says the decision will have no effect on the implementation of Obamacare. While Vinson didn't issue an injunction, he did discuss how a declaratory judgment by a federal judge has pretty much the same effect. [Ilya Shapiro at the Cato Institute](#) says the decision stops Obamacare "dead in its tracks." While the judge may issue a stay of his ruling, Shapiro says, he hasn't done that yet.