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ObamaCare Exceeds the Limits of Congressional Authority. Judge Miffed.

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One of the first orders of business for the 112th Congress is for the new House to fulfill its campaign promise to pass a repeal of ObamaCare. This will be a vain effort, however, as repeal will likely die in the Senate. But even if repeal were to get through the Senate, President Obama would surely veto a repeal of ObamaCare.

The better way for ObamaCare to be struck down is not by repeal, but by appeal: appeal to the courts. A Supreme Court decision on the constitutionality of ObamaCare would set huge precedents having far-reaching ramifications. The end of the first major skirmish in the legal war came December 13 with U.S. District Judge Henry Hudson's decision in *Virginia v. Sebelius*. For ObamaCare, Friday the 13th came on a Monday.

Created by the states, the federal government is a government of enumerated powers. The 10th Amendment makes this clear. But the Constitution does not *specifically* grant to the feds the power to do much of what they do. The feds therefore must find that power *somewhere* in the Constitution. So they invoke the Commerce Clause or the General Welfare Clause or *something* to justify what they do. But there must be limits to what the feds can do; otherwise America degenerates into just another totalitarian state. Where those limits are was the question before Judge Hudson, who ruled that the Minimum Essential Coverage Provision (Section 1501) of ObamaCare — better known as the "individual mandate" — is unconstitutional. Page 37 of Hudson's decision:

> Congress lacked power under the Commerce Clause … to compel an individual to involuntarily engage in a private commercial transaction, as contemplated by the Minimum Essential Coverage Provision. … The unchecked expansion of congressional power to the limits suggested by the Minimum Essential Coverage Provision would invite unbridled exercise of federal police powers.

And then on page 38 Hudson delivers his *coup de grâce*: the individual mandate "exceeds the constitutional boundaries of congressional power." On the day of Hudson's decision, Ilya Shapiro of the Cato Institute (who filed two briefs in the case) wrote:

> Indeed, not even in the infamous 1942 case of *Wickard v. Filburn* — when the Supreme Court ratified Congress' regulation of what farmers grew in their backyards on the theory that such local activity, in the aggregate, affects national wheat prices — have courts faced such a breathtaking assertion of raw federal power. Even at the height of the New Deal, Congress did not attempt to *force people to buy wheat to support the new national agricultural policy*. [Emphasis added.]

At *American Thinker* on January 4, attorney Monte Kuligowski outlined the history of case law precedent relating to the Commerce Clause, going back as far as Chief Justice Marshall in 1824. For the constitutionalist, it's not a pretty history, as Kuligowski dilates on *Wickard* and other offensive decisions. Since FDR, judges are increasingly likely to take their cue from "case law" (i.e., judicial precedent) rather than the Constitution. The operative principle in case law is stare decisis: "stay with what has been decided."

But if stare decisis were the Court's only principle, wouldn't we still be operating under *Plessy v. Ferguson*? There are many vile, ridiculous, and even un-American judicial decisions. The Supreme Court shouldn't defer to "case law" precedents; they should look to the Constitution.

Whether they're on the left or the right, many Americans exhibit a schizoid attitude toward judicial precedent: If the Supreme Court agrees with you, they're the supreme law of the land and we mustn't question them; if the Supremes don't agree with you, they're nine dummies who've upset the space-time continuum. Folks invoke stare decisis when it works for them; they pick and choose the precedents that support their prejudices.

Citing precedents out the ying-yang, lefty Mark Levine became unhinged on The Kudlow Report (below) as he tore into the Hudson decision; he even seemed to endorse FDR's packing of the Court. But one interesting issue Levine did raise is whether under the Hudson decision Medicare would be constitutional. (At *NRO's Critical Condition* blog, John Graham provides an answer.)

Those who cleave to the "living Constitution" think that a law is constitutional because that's the way, in their estimation, things *should* be. Government, however, cannot be allowed to negate an individual's rights just to make a government program workable. One of the rights at issue in *Virginia* is the right of the individual to be let alone.

Progressives like Mr. Levine don't accept that an individual should have this right. Progressives think government should be able to intrude into everything (except, of course, telephone conversations between terrorists).

If the Constitution specifically granted to the federal government the power to provide health care, then justifications for ObamaCare (like the Commerce Clause) wouldn't need to be invoked because the 10th Amendment would present no impediment. But even if such a power were indeed granted to the feds, the individual mandate would *still* clash with the Constitution, namely the Equal Protection Clause of the 14th Amendment.

That's because ObamaCare's individual mandate requires some individuals to do something (and merely because they're individuals), yet exempts other individuals from that same requirement. This is unequal on its face. The individual mandate is like a capitation, or head tax, that exempts some from paying the tax and/or levies varying tax bills. Such a tax couldn't be called a capitation because it treats individuals unequally.

For those on the political left who are forever harping about equality, this should be a problem. But it's not. That's because ObamaCare isn't about equality; it's about power. Congress must *not* be allowed to have such raw, unchecked power.

The one disappointment in Hudson's otherwise fine decision is that he didn't issue an injunction on further implementation of ObamaCare. An injunction would fast track the coming appeals. It's important that the Supreme Court hears this case before a new Congress and a new president summarily repeal the whole misbegotten mess. For a Supreme Court decision on *Virginia v. Sebelius* would give us clarity about the limits of both the Commerce Clause and congressional power.

And it would let us know whether we Americans are citizens — or subjects.

Jon N. Hall is a programmer/analyst from Kansas City.

Judge Henry E. Hudson
