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HEALTH

Oral Arguments In Appeal Of Key ObamaCare Court Ruling To Begin Today

Jun. 8 2011 - 9:35 am | 1,979 views | 0 recommendations | 4 comments

In January, Judge C. Roger Vinson of the U.S. District Court for the Northern District of Florida [overturned ObamaCare in its entirety](#), arguing that the individual mandate is unconstitutional, and that the provisions



Paul Clement. Image by Getty Images North America via @daylife.

requiring the individual mandate could not be severed from the rest of the law. After a bit of [foot-dragging](#), the Obama administration appealed the case, *Florida v. HHS*, to the U.S. Court of Appeals for the Eleventh Circuit, headquartered in Atlanta.

While some media reports have painted the Eleventh Circuit as conservative, I [pointed out in March](#) that, of the ten judges sitting in the Eleventh Circuit, five were appointed by Republican presidents and five

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by Democrats. Indeed, a [2004 study](#) of the appeals courts by Cass Sunstein and colleagues found the Eleventh Circuit to be the sixth-most conservative of the twelve federal appeals courts. I concluded, “it would seem that anything could happen at the Eleventh Circuit.”

This morning, beginning at 9:30 ET, oral arguments will begin in the Eleventh Circuit. The court [denied](#) the plaintiffs’ request for an en banc panel of the entire ten-judge court; instead, a traditional [three-judge panel](#) will hear the case: Chief Judge [Joel Dubina](#), a George H.W. Bush appointee from Alabama; [Frank Hull](#), a Bill Clinton appointee from Georgia; and [Stanley Marcus](#), a Clinton appointee from Florida. If rulings follow form, this three-judge panel is likely to overturn the Vinson ruling, given its Democratic appointees outnumber its Republican one.

Paul Clement, the “[LeBron James](#)” of Bush Administration lawyers, will make the case for the plaintiffs. [Neal Kumar Katyal](#), acting Solicitor General for the Obama administration, will defend. For more on the case, visit the [website](#) of the Eleventh Circuit.

UPDATE 1: Commenter John Gillespie observes that, though Stanley Marcus was appointed to the 11th Circuit by Bill Clinton, he was appointed to the U.S. District Court by Ronald Reagan in 1985, and, at least at that point in time, was a Republican.

UPDATE 2: [Hadley Heath](#) of [healthcarelawsuits.org](#) links to comments from Randy Barnett of Georgetown Law and [Ilya Shapiro](#) of the Cato Institute. According to Shapiro, Neal Katyal “spent most of the hearing on the ropes, with the judicial panel extremely cautious not to extend federal power beyond its present outer limits”:

And the 11th Circuit judges saw that. Countless times, Judges Dubina and Marcus demanded that the government articulate constitutional limiting principles to the power it asserted. And countless times they pointed out that never in history has Congress tried to compel people to engage in commerce as a means of regulating commerce. Even Judge Hull, reputed to be the most liberal member of the panel, conducted a withering cross-examination to establish that the individual mandate didn’t help that many people get affordable care, that the majority of people currently without coverage would be exempt from the requirement (presumably due to their income level).

In short, while we should never read too much into an oral argument, I’m more optimistic about this case now than any other.

UPDATE 3: I have a follow-up post with [more commentary](#) on the hearing.

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 11:45 am on 06/08/11

 **John Gillespie**

Marcus was nominated to the US District Court by Reagan, however, and his Court of Appeals confirmation easily went through a Republican-controlled Senate – so I am not sure he can be easily labeled as a ‘Democratic’ appointee

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 1:00 pm on 06/08/11


 **AVIK ROY**
The Apothecary

That’s an accurate and interesting point, John. I’ll mention it up above.

In response to another comment. See in context »


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 3:35 pm on 06/08/11

 **dtwizzy2k8**

From the perspective of Constitutional law, I don’t understand how federally mandated health insurance is any different from federally mandated auto insurance. Can somebody explain?

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 4:13 pm on 06/08/11

 **AVIK ROY**
The Apothecary

Hi Dtwizzy,

There is no federally mandated auto insurance. States do mandate auto insurance, as they have the power to do. What’s under question is whether or not the federal government has this power also.

In response to another comment. See in context »

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ABOUT ME

Avik Roy is an equity research analyst at Monness, Crespi, Hardt & Co. in New York City. Prior to his current position, he worked as an analyst and portfolio manager at J.P. Morgan, Bain Capital, and other firms. He writes on health care, fiscal matters, finance, and other policy issues for *Forbes*, *National Review*, and other publications. He also serves on the Board of Policy Advisors for the Heartland Institute. To contact him, [click here](#). [See my profile »](#)

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About The Apothecary

Oscar Wilde once described “a man who knows the price of everything and the value of nothing.” The same might be often said of how we debate health care policy. It’s easy to lose sight of the fact that health care is not only about cost curves and budget projections, but also the welfare of patients and their families. Government policies enacted in their name have done harm as well as good.

The Apothecary seeks to explore not only the price of health care, but also its value. Most of all, it seeks to remind us that health care reflects the best of America, an America worth preserving: human skill and ingenuity used in the service of human life.

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To view archived blog posts from *The Apothecary* prior to February 2011, please visit its former home, avikroy.org.

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The New York Times – Prescriptions
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