There is Reason to be Cautiously Optimistic

By Hadley Heath

Judge Roger Vinson has just ruled that counts one and four in State of Florida v. Department of Health and Human Services will be heard on December 16. Count one challenges the law's individual mandate as a violation of Article I and the 9th and 10th Amendments, and count four challenges the law's coercion and commandeering as to Medicaid as a violation of Article I and the 9th and 10th Amendments. More to come...

Read the Order here.

Legal scholars are reacting to today's ruling:

A statement from **Ilya Shapiro, Senior Fellow in Constitutional Studies at the Cato Institute:**

> *Yes, Speaker Pelosi, the constitutional concerns people have with the health care legislation you rammed through Congress despite overwhelmingly negative public opinion are serious. The Florida court's ruling, denying the government's motion to dismiss the challenge to the new health care law brought by 20 states and the National Federation of Independent Business, mirrors the one we saw in July in Virginia's separate lawsuit. These have been the most thoroughly briefed and argued lawsuits, so these significant and lengthy opinions conclusively establish that the constitutional concerns raised by the individual mandate and other provisions are serious. Nobody can ever again suggest with a straight face that the legal claims are frivolous or mere political gamesmanship.*
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> *And that should come as no surprise to those who have been following the litigation because the new law is unprecedented -- quite literally, without legal precedent -- both in its regulatory scope and its expansion of federal authority. Never before have courts had to consider such a breathtaking assertion of raw federal power -- not even during the height of the New Deal. "While the novel and unprecedented nature of the individual mandate does not automatically render it unconstitutional," Judge Vinson observed, "there is perhaps a presumption that it is." This means at the very least that "the plaintiffs have most definitely stated a plausible claim with respect to this cause of action."*
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> *Just so -- and the deliberate consideration that these district courts are giving to these serious constitutional arguments (unlike the Michigan judge's perfunctory treatment last week) indicates that the probability that the Supreme Court will ultimately strike down the individual mandate continues to increase.*

A statement from **Stephen B. Presser, Professor of Legal History, Northwestern University School of Law:**

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In Judge Vinson's extraordinarily-detailed and thoughtful opinion he has concluded that the plaintiffs in the Florida case have stated "a plausible claim" that Obamacare's individual mandate requiring all Americans to purchase health insurance crossed "the line" of unconstitutionality. This was because, in his view (which I believe to be correct), never before has Congress used its power to regulate interstate commerce to regulate decisions that people had made not to act. In sensibly recognizing the differences between "activity" (which Congress can

regulate) and "inactivity" which it probably may not, Judge Vinson has reaffirmed that the federal government is one of limited and enumerated powers, and Judge Vinson has struck a powerful blow for the rule of law. Judge Vinson will hold further hearings and hear further evidence before he issues a final ruling, but his statement is the clearest indication yet that the power of the federal government is not unlimited, and that those who believed that when it passed the health care law Congress forgot the limits imposed on it, especially by the 10th Amendment, are correct. This was a good day for the Constitution.

A statement from **David McIntosh, former congressman from Indiana and co-founder of the Federalist Society:**

This ruling confirms that ObamaCare is deeply flawed and likely violates the constitutional limits on Federal government power. It's a vindication of what of an overwhelming majority of Americans from all backgrounds – Republicans, moderates, tea party activists, and many conservative Democrats – believe: ObamaCare should be overturned or repealed. This ruling a set back for the President and will have the effect of strengthening voters' resolve to replace Members of Congress who voted for it – whether or not they read the bill, or were for it before they were against it, or any other reason they give for having voted for the healthcare bill.

A statement from **Ilya Somin, Associate Professor of Law, George Mason University School of Law:**

This ruling, like the Virginia decision before it, is an important success for the plaintiffs in the individual mandate case.

The judge refused the federal government's motion to dismiss and emphasized that the individual mandate cannot be upheld by reference to any current precedent. Of special note is the fact that Judge Vinson rejected one of the federal government's main arguments - the claim that the mandate is constitutional because it is a "tax" - outright. The government's claim that the mandate is constitutional under the Commerce Clause and Necessary and Proper Clause won't be fully considered until the summary judgment stage. But Judge Vinson casts doubt on these arguments as well, emphasizing that "The power that the individual mandate seeks to harness is simply without prior precedent."

Obviously, this litigation has a long way to go and the final decision will be made by the court of appeals and possibly the Supreme Court. But today's ruling is certainly a success for the plaintiffs.

From **James W. Ely, Jr, Professor of Law, Vanderbilt University:**

In this significant ruling the federal district court in Florida has determined that two challenges to the constitutionality of the health care legislation are sufficiently plausible to warrant further consideration. Particularly noteworthy is the holding that the individual mandate requiring individuals to purchase health care insurance or pay a fine might exceed the scope of Congressional power under the commerce clause. This mandate is simply unprecedented in American history. As the court pointed out, Congress does not have unlimited authority over American life. The government's efforts to justify the individual mandate as affecting commerce are dubious even under an expansive reading of the commerce clause. Clearly the stage is now set for additional discussion and litigation concerning the validity of the health care law.

A statement from **Randy Barnett, Professor of Legal Theory, Georgetown Law:**

> *In denying the government's motion to dismiss the challenge to the individual health insurance mandate, Judge Vinson ruled that "the plaintiffs have most definitely stated a plausible claim with respect to this cause of action." This is because of the unprecedented nature of the government's claim of power. As Judge Vinson explained, all previous commerce clause cases involved the regulation of "voluntary undertaking[s]" or activity. But "in this case we are dealing with something very different. The individual mandate applies across the board. People have no choice and there is no way to avoid it. Those who fall under the individual mandate either comply with it, or they are penalized. It is not based on an activity that they make the choice to undertake."*
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> *This decision now join's District Judge Henry Hudson's ruling in Virginia refusing to dismiss the challenge to the individual mandate. In both Virginia and Florida we now move to a decision on the merits. Given how well both judges understood the constitutional novelty of imposing economic mandates on the people, there is reason to be cautiously optimistic that they will find the individual insurance mandate to be unconstitutional. But, however the district courts rule on this case, their reception of the arguments made by the state attorneys general foretell that the ultimate decision will be made by the U.S. Supreme Court.*

A statement from **David B. Kopel, Adjunct Professor, Advanced Constitutional Law, Denver University, Sturm College of Law:**

> *The court entirely rejected the administration's claim that the penalty for disobeying the mandate is justified under the federal tax power. As the court noted, Congress went out of its way to specify that the penalty is not a tax. Second, the court ruled that the it is proper for the plaintiffs to be heard in their challenge to the mandate, which goes into effect in 2014. The court cited extensive precedent showing that when a future harm is certain, courts can act in the present to protect citizens from that harm. The court rejected the argument that the various employer mandates violate the constitutional sovereignty of states; as the court noted, the law simply treats states like other large employers, and so making states provide the same health benefits as other large employers must provide is no different from making states pay the same minimum wage as all other employers.*
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> *While federal spending programs may set conditions on grants to states, Supreme Court precedent states that the grants must not be coercive. Here, the court agreed that the states had raised a plausible legal argument which should be allowed to go forward: the health control presents states with the unacceptable choice of massively increasing their own Medicaid spending on millions of more people, or of losing all funding for the traditional Medicaid program. Finally, the court agreed that the challenge to the individual mandate could go forward, because the mandate was "unprecedented." Never before has Congress attempted to use its power of regulating interstate commerce to force people to buy a particular product. Because there is no judicial precedent in support of such a mandate, the plaintiffs had raised a plausible constitutional challenge which should be allowed to go forward.*
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> *The court's ruling is not a final decision on the constitutional merits, but it is a solid, meticulously researched, and carefully-reasoned decision declaring that the opponents of the health control law have raised legitimate constitutional objections.*

And a statement from **Carrie Severino, policy director and counsel for the Judicial Crisis Network and former law clerk for Justice Thomas:**

> *Obama, Harry Reid, and company were hoping for something to brighten up their otherwise gloomy election season. But their hopes were dashed by Judge Vinson today because Obama's signature 'achievement' remains under a cloud of constitutional suspicion. In the fight between Obamacare and principled, limited government, round one goes to freedom.*