Obamacare Struck Down by Florida Judge; Properly Applies Severability Principles to Invalidate Whole Law

by Hans Bader
January 31, 2011 @ 4:23 pm

A judge in Florida just declared the health care law known as "Obamacare" unconstitutional, ruling it void in its entirety. Judge Vinson rightly declared the health care law's individual mandate unconstitutional, since the inactivity of not buying health insurance is not an "economic activity" that Congress has the power to regulate under the Interstate Commerce Clause. (Under the Supreme Court's decision in *United States v. Morrison* (2000), which I helped litigate, only "economic activity" can be regulated under the Commerce Clause, with the possible exception of those non-economic activities that harm instrumentalities of interstate commerce or cross state lines.)

Judge Vinson also rightly declared the law as a whole unconstitutional. The health care law lacks a severability clause. So if a major provision like the individual mandate is unconstitutional — as it indeed was — then the whole law must be struck down.

The absence of a severability clause meant that, at a minimum, the burden of proof shifted to the government to prove (among other things) that the law would have passed even without the individual-mandate provision later held unconstitutional. The government could not, and did not, meet that burden of proof, given the incredibly narrow margin by which the health care law passed in the House, and the fact that it circumvented a filibuster with no votes to spare in the Senate.

Earlier, a judge in Virginia declared Obamacare's individual mandate unconstitutional, but declined to strike down the rest of the law.

As I noted earlier in *The Washington Examiner*, "To justify preserving the rest of the law, the judge" in the earlier Virginia case "cited a 2010 Supreme Court ruling [*Free Enterprise Fund v. PCAOB]* that invalidated part of a law — but kept the rest of it in force. But that case involved a law passed almost unanimously by Congress, which would have passed it even without the challenged provision. Obamacare is totally different. It was barely passed by a divided Congress, but only as a package. Supporters admitted that the unconstitutional part of it — the insurance mandate — was the law's heart. Obamacare's legion of special-interest giveaways that are 'extraneous to health care' does not alter that." In short, Obamacare's individual mandate is not "volitionally severable," as case law requires.

The individual mandate provision also was not "functionally" severable from the rest of the law, since the very Congress that passed Obamacare deemed the individual absolutely "essential" to the Act's overarching goals (as Judge Vinson in Florida correctly noted).

(In our amicus brief in the Florida case for Governors Tim Pawlenty and Donald L. Carcieri, we also argue that Obamacare violates the Tenth Amendment by exceeding Congress's power under the Spending Clause, a so-called *Pennhurst* argument.)

Cato legal scholar Ilya Shapiro, who filed briefs against the law in Virginia, comments on today's decision here, calling it a "victory for federalism and individual liberty."

In footnote 27, the judge cited with approval the thoughtful brief of legal scholar Ken Klukowski explaining why Obamacare should be struck down in its entirety under settled principles of severability.