

# A bad day for the individual mandate in the 11th Circuit

*By Jennifer Rubin*

Yesterday, 26 states and the Obama administration duked it out in the U.S. Court of Appeals for the 11th Circuit in oral argument on the appeal of the decision by Judge Roger Vinson to strike down Obamacare in its entirety.

Ilya Shapiro of the Cato Institute recaps:

The government's lawyer, 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 of regulating economic activity that has a substantial aggregate effect on interstate commerce.

As the lawyer representing 26 states against the federal government said, "The whole reason we do this is to protect liberty." With those words, former solicitor general Paul Clement reached the essence of the Obamacare lawsuits. With apologies to Joe Biden, this is a big deal not because we're dealing with a huge reorganization of the health care industry, but because our most fundamental first principle is at stake: we limit government power so people can live their lives the way they want.

Katyal had a tough time with the panel, including the two Clinton appointees:

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).

The Los Angeles Times had a similar take:

"I can't find any case like this," said Chief Judge Joel Dubina of the 11th Circuit Court of Appeals. "If we uphold this, are there any limits" on the power of the federal government? he asked.

Judge Stanley Marcus appeared to agree. "I can't find any case" in the past where the courts upheld "telling a private person they are compelled to purchase a product in the open market. . . . Is there anything that suggests Congress can do this?"

Oral arguments are imperfect indicators of courts' final rulings, but the Obama team certainly can't be pleased with Wednesday's hearing. Yes, we are almost certainly headed for the Supreme Court, but, no, it's not a good sign for Obamacare defenders if less-than conservative judges don't buy their central premise.

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