

Judge Lets Virginia Challenge ObamaCare's Individual Mandate, Refusing to Dismiss Lawsuit

Posted on 2nd August 2010 by **Hans Bader**

A federal judge in Virginia has [allowed the state's lawsuit](#) challenging the federal individual health care mandate to proceed: "[A judge on Monday refused to dismiss](#) the state of Virginia's challenge to President Barack Obama's landmark healthcare law, a setback that will force his administration to mount a lengthy legal defense of the overhaul effort." The [judge's ruling](#) is [here](#).

Ilya Shapiro of the Cato Institute, who filed a brief in support of Virginia that was joined by constitutional law professor Randy Barnett and the Competitive Enterprise Institute, issued the following statement:

Today's ruling should finally silence those who maintain that the legal challenges to Obamacare are frivolous political ploys or sour grapes. The constitutional defects in the healthcare "reform" are very real and quite serious. Never before has the government claimed the authority to force every man, woman, and child to buy a particular product - and indeed such authority, whether claimed under the Commerce Clause or the taxing power, does not exist (as Cato's amicus brief in the Virginia case argues). I look forward to further favorable rulings as these lawsuits progress.

I discussed Virginia's lawsuit [here](#), and the [constitutional problems](#) with the health care bill's "individual mandate" [here](#).

The so-called "individual mandate" is [unprecedented](#) and exceeds Congress's power under the Commerce Clause of the Constitution. As the Congressional Budget Office [noted in 1994](#), "A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States."

In Supreme Court [rulings issued in 1995 and 2000](#), "the high court said the commerce clause is limited to economic activities that substantially affect interstate trade." (I was an attorney in the latter ruling, *United States v. Morrison* (2000).) The health care law reaches beyond that to regulate pure inactivity, namely the refusal to buy health insurance even if you don't need it (when I was young, I went for a decade without ever going to the doctor or dentist). [As UPI once noted](#), "the weight of Supreme Court jurisprudence seems to favor a Commerce Clause challenge" to the healthcare legislation.

Virginia's lawsuit only raises federalism-based objections to ObamaCare. There are other constitutional problems not raised in its suit.

The healthcare legislation also contains potentially unconstitutional [racial preferences](#) for minority applicants, and [lower standards for treatment of patients in predominantly-minority institutions](#). These drew [criticism](#) from the [Civil Rights Commission](#).

Law professor Rob Natelson has raised [additional constitutional objections](#) to ObamaCare's individual mandate.

Here's an additional constitutional issue that occurred to me. Would requiring people to buy health insurance — and thus disclose private medical information to insurers — under government compulsion violate the Constitution by infringing their privacy rights, under rulings like *Roe v. Wade* and *Robinson v. Reed*, 566 F.2d 911 (5th Cir. 1978), which allowed a public employee to sue over invasive questions she was compelled to answer in a race-relations seminar? In one respect, it's a stronger case than in *Robinson v. Reed*, because that case involved the government acting in its proprietary capacity, where civil liberties are subject to greater restrictions (see *Waters v. Churchill*, 511 U.S. 661, 673 (1994)), whereas the individual mandate involves the government acting in its regulatory capacity, where its actions and restrictions on civil liberties are subject to tighter limits. (See *Carepartners LLC v. Lashway*, 545 F.3d 867, 880 (9th Cir. 2008) ("regulated entities" enjoy more protection than government employees).) The fact that private insurers rather than the government would be collecting the information would not automatically obviate a constitutional claim, since the government effectively compels people to provide such information through the government penalties associated with the "individual mandate." (See *Truax v. Raich*, 239 U.S. 33 (1916) (although private discrimination does not constitute state action or violate the Constitution, when state law requires the private employer to discriminate, the discrimination by the private employer then does become state action and does violate the Constitution).)