Washington Post Online

Posted at 02:59 PM ET, 08/12/2011

11th Circuit on the individual mandate: Unconstitutional! (Part 1)

By Jennifer Rubin

The 11th Circuit Court of Appeals, in the case involving some 26 states, has upheld a lower court ruling finding that the ObamaCare individual mandate is unconstitutional. However, unlike the federal court Judge Roger Vinson did, the appeals court did not strike down the entire statute. The AP reports:

A federal appeals court panel on Friday struck down the requirement in President Barack Obama's health care overhaul package that virtually all Americans must carry health insurance or face penalties.
The divided three-judge panel of the 11th Circuit Court of Appeals struck down the so-called individual mandate, siding with 26 states that had sued to block the law. But the panel didn't go as far as a lower court that had invalidated the entire overhaul as unconstitutional.

The opinion is over 300 pages. However, some items stand out on a cursory read. Section V (beginning on page 99) is the crux of the matter. The majority found "the individual mandate exceeds Congress's commerce power." The issue of "activity" vs. "inactivity," the court reasoned, only get us so far. The court noted that the decisions to purchase or not purchase product are "legion." After an extensive discussion of precedent and the unique legislation, the court concluded that there was no way to "cabin" (that is, contain) the mandate only to health insurance.

Deeming the mandate "overinclusive," the court ruled (p.130), "In sum, the individual mandate is breathtaking in its expansive scope. It regulates those who have not entered the health market at all.. . . The government's position amounts to an argument that the mere fact of an individual's existence substantially affects interstate commerce, and therefore Congress may regulate them at every point in their lives. This theory affords no limiting principles in which to confine the Congress's enumerated power."

The principal legal scholar behind the challenge on the individual mandate, Randy Barnett, e-mailed me: "Now that judges appointed by both Democratic and Republican presidents have found the individual insurance mandate to be unconstitutional, the nation's interest requires the Supreme Court to hear this case next term. Only then would the uncertainty inflicted upon the national economy by this unprecedented and

unconstitutional law be lifted. Both the country and the Constitution cannot afford any delay."

Ilya Shapiro of the Cato Institute also weighs in via e-mail:

Today is a great day for liberty. By striking down the individual mandate, the Eleventh Circuit has reaffirmed that the Constitution places limits on the federal government's power. Congress can do a great many things under modern constitutional jurisprudence, but, as the court concludes, "what Congress cannot do under the Commerce Clause is mandate that individuals enter into contracts with private insurance companies for the purchase of an expensive product from the time they are born until the time they die." Indeed, just because Congress can regulate the health insurance industry does not mean it can also require people to buy that industry's products.

One of the striking things about today's ruling is that, for the first time in one of these cases, a Democrat-appointed judge, Frank Hull, has ruled against the government. Just as the Sixth Circuit Judge Jeffrey Sutton made waves by being the first Republican appointee to rule in the government's favor, today's 300-page ruling shows that the constitutional issues raised by the healthcare reform — and especially the individual mandate — are complex, serious, and non-ideological.

Supporters of limited constitutional government need to temper their celebrations — just as they wisely tempered their sorrows after the last ruling — because we must all now realize that this will not end until the Supreme Court rules. Nevertheless, today's decision gives hope to those who believe that there are some things beyond the government's reach and that the judiciary cannot abdicate its duty to hold Congress's feet to the constitutional fire.

There will be much to discuss after the case is fully digested, but several points should be clear. The opinion is meticulous and reasoned. The Supreme Court, should it grant certiorari on the case now or in the future, will need to contend with hefty legal arguments. Second, if the individual mandate collapses the funding of the exchanges and other aspects of the bill would become untenable. We may be left as a practical matter with only restrictions on, for example, disqualifying consumers for pre-existing illnesses. Third, the argument which the left pooh-poohed, namely that the legislation and its supporters have not articulated a compelling limit on Congress, is now the law of the land in 26 states. For now, it seems the central feature of ObamaCare is comatose.

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