Written by **Michael Tennant** on August 14, 2011

11th Circuit Rules ObamaCare Individual Mandate Unconstitutional

A three-judge panel of the court split in favor of the states — and the Constitution — and against the Obama administration. Chief Judge Joel Dubina, an appointee of President George H.W. Bush, and Circuit Judge Frank Hull, an appointee of President Bill Clinton, authored the panel's 207-page opinion. Circuit Judge Stanley Marcus, also a Clinton appointee (though he was first appointed to the federal bench by President Ronald Reagan), penned a 96-page dissent.

Dubina and Hull declared that "Congress exceeded its enumerated commerce power" when it "mandate[d] 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." They added:

> Few powers, if any, could be more attractive to Congress than compelling the purchase of certain products. Yet even if we focus on the modern era, when congressional power under the Commerce Clause has been at its height, Congress still has not asserted this authority. Even in the face of a Great Depression, a World War, a Cold War, recessions, oil shocks, inflation, and unemployment, Congress never sought to require the purchase of wheat or war bonds, force a higher savings rate or greater consumption of American goods, or require every American to purchase a more fuel efficient vehicle.

Moreover, they wrote,

> The individual mandate is breathtaking in its expansive scope. It regulates those who have not entered the health care market at all. It regulates those who have entered the health care market, but have not entered the insurance market (and have no intention of doing so). It is overinclusive in *when* it regulates: it conflates those who presently consume health care with those who will not consume health care for many years into the future. 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 of their life. This theory affords no limiting principles in which to confine Congress's enumerated power. [Emphasis in original.]

The majority, however, does believe there are limits to Congress's power under the commerce clause, proving that it retains at least a small measure of attachment to constitutional originalism.

Marcus, on the other hand, is a student of the "living document" school of jurisprudence. In his dissent he maintained that the majority "has ignored many years of Commerce Clause doctrine developed by the Supreme Court.… It has ignored the undeniable fact that Congress' commerce power has grown

exponentially over the past two centuries, and is now generally accepted as having afforded Congress the authority to create rules regulating large areas of our national economy." To Marcus, the Supreme Court, not the Constitution, is the ultimate arbiter of what Congress may or may not do. If tomorrow the Court were to rule that Congress could compel every American to face Washington and pray five times a day, Marcus would be in no position to argue that the First Amendment prohibits such a mandate. As far as he is concerned, what nine men and women in black robes say, goes.

Besides, as Dubina and Hull pointed out, the Supreme Court has never ruled on a law compelling Americans to purchase something for the simple reason that Congress has never before passed such a law. Both the Congressional Budget Office (CBO) and the Congressional Research Service (CRS), they noted, "have commented on the unprecedented nature of the individual mandate." For instance, they wrote, "The CBO observed that Congress 'has never required people to buy any good or service as a condition of lawful residence in the United States.'" Marcus is, therefore, attempting to make more out of previous Supreme Court rulings than actually exists.

While the court's decision is good news for those opposed to ObamaCare — indeed, several of the state Attorneys General who are parties to the lawsuit, as well as presidential candidate Rep. Michele Bachmann (R-Minn.), have already praised it — it is certainly no time for them to let down their guard.

The decision was the result of the Obama administration's appeal of a ruling by U.S. District Judge Roger Vinson, who had found the entire law unconstitutional because the individual mandate was "inextricably bound together" with the rest of the law and because Congress had failed to include a severability clause in the law. But the appeals court found that Vinson had "erred" in this regard: first, because "the lion's share of the Act has nothing to do with private insurance, much less the mandate that individuals buy insurance"; and second, because Vinson had "placed undue emphasis on" the lack of a severability clause.

The court also ruled on the states' appeal of Vinson's finding in favor of the administration with regard to ObamaCare's expansion of Medicaid. The states had argued that it would impinge on their sovereignty by forcing them to spend billions more dollars on Medicaid to cover additional low-income individuals. The court, agreeing with Vinson, rejected that argument on various grounds, albeit "not without serious thought and some hesitation."

Thus, while the individual mandate has now been found unconstitutional, the rest of ObamaCare, including the Medicaid expansion, stands — and what's left is arguably far worse than forcing people to buy health insurance, especially since most of them already have insurance anyway. Moreover, the Sixth Circuit Court of Appeals has already found in favor of the individual mandate, so whether the 11th Circuit's ruling will carry the day when the case reaches the Supreme Court — as it almost certainly will — is anybody's guess

Fighting ObamaCare in the courts is essential but probably a losing battle if the goal is to get the entire law overturned. Only repeal at the federal level or nullification at the state level can accomplish that worthy objective.