Written by **Michael Tennant** on December 13, 2010

Virginia Judge Finds ObamaCare Individual Mandate Unconstitutional

Score one for the Constitution. U.S. District Court Judge Henry E. Hudson, in Richmond, Virginia, ruled December 13 that the ObamaCare individual mandate and its related penalties are unconstitutional, a welcome change of pace from two earlier rulings in favor of the Obama administration.

Hudson's ruling came in response to a lawsuit filed by Virginia Attorney General Ken Cuccinelli, a Republican, seeking to have the individual mandate ruled unconstitutional, particularly in light of the fact that the state had passed a law prohibiting the imposition of such a mandate on its citizens.

ObamaCare both proscribes and penalizes an individual's choice not to purchase health insurance. The earlier judges (in Detroit, Michigan, and Lynchburg, Virginia), both appointed by Democrats, had bought the administration's argument that such a choice has an effect on interstate commerce and is therefore within Congress's power to regulate under the Commerce Clause. But Hudson, an appointee of Republican President George W. Bush, would have none of it. Noting that the administration was relying on precedents such as *Wickard v. Filburn* (1942) that affirmed Congress' authority to regulate "a self-directed affirmative move" that "voluntarily placed the subject within the stream of commerce," Hudson agreed with the Commonwealth of Virginia that under ObamaCare Congress was instead trying "to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market," a power that could not be supported by any previous federal court rulings. Furthermore, he wrote, the administration's argument that the individual mandate could be enacted under the Necessary and Proper Clause was bogus because the mandate provision "is neither within the letter nor the spirit of the Constitution." He concluded:

> The unchecked expansion of congressional power to the limits suggested by the Minimum Essential Coverage Provision [i.e., the individual mandate] would invite unbridled exercise of federal police powers. At its core, this dispute is not simply about regulating the business of insurance — or crafting a scheme of universal health insurance coverage — it's about an individual's right to choose to participate….

On careful review, this Court must conclude that Section 1501 of the Patient Protection and Affordable Care Act — specifically the Minimum Essential Coverage Provision — exceeds the constitutional boundaries of congressional power.

Hudson also agreed with the state that the penalty for not purchasing health insurance under the individual mandate is indeed a penalty and not a tax (notwithstanding the administration's argument to

the contrary, which Hudson called "a transparent afterthought") and, as such, had to be grounded in one of Congress's enumerated powers. Since the constitutionality of the penalty is, therefore, dependent on the constitutionality of the individual mandate itself — a point that, Hudson remarked, even the administration had conceded in oral arguments — he ruled that the penalty, too, is unconstitutional.

In addition to striking down the individual mandate and its dependent provisions, Hudson denied Virginia's request for an injunction against the law, believing that his ruling is sufficient to stay implementation of the law, at least until a higher court can rule on it, and that there is enough time for the appeals process to conclude before the individual mandate goes into effect in 2013.

The judge opined that "the final word will undoubtedly reside with a higher court," almost certainly the Supreme Court. This ruling will be appealed, and the two previous rulings are already in the appeals process. There is another case in federal court in Florida scheduled to begin this week, with a ruling expected early next year. Regardless of the outcome, it will almost certainly be appealed by the losing side as well. If and when all these cases end up before the Supreme Court, it will make for some compelling political theater and could indeed result in some major alterations to ObamaCare: "The administration," wrote the *New York Times*, "has said that if [the individual mandate] eventually falls, related insurance reforms would necessarily collapse with it, most notably the ban on insurer exclusions of applicants with pre-existing health conditions."

"But," continued the paper, "officials said other innovations … would withstand even a Supreme Court ruling against the insurance mandate." Here lies the danger of reading too much into Hudson's ruling, as welcome as it is. As Art Thompson, CEO of The John Birch Society, explained:

> Simply getting rid of the mandatory aspect of a citizen purchasing medical insurance gives the impression that the remainder of the law is Constitutional. It does not address the issue of assisted suicide, euthanasia, and the mandate for the government to come into the homes of America to find out if your children are being educated correctly and living in a government approved environment.

(The reader is invited to peruse Thomas R. Eddlem's "Outcome of ObamaCare" and Michael Tennant's "The New World of ObamaCare" for details on these and other dangerous provisions.)

Furthermore, allowing ourselves to be lulled into a false sense of security by rulings such as this one is "a good way to slow down and ultimately sidetrack the move to repeal or nullify ObamaCare," Thompson said. The entire law needs to be repealed at the federal level or nullified at the state level, with the rest of the federal healthcare apparatus to follow. Every American would do well to heed Thompson's advice "to support your state's efforts to nullify and your congressman's efforts to repeal and defund every part of ObamaCare, as well as return the healthcare industry to the free market."

Photo of Judge Henry Hudson: AP Images