Written by **Joe Wolverton, II, J.D.** on September 9, 2011

Federal Court Rejects Va.'s ObamaCare Challenge

A federal court of appeals threw out Virginia's legal challenge to Obamacare and with it, the principles of federalism and state sovereignty. Thursday, the three-judge panel of the Richmond, Virginia-based 4th Circuit Court of Appeals unanimously held that the state of Virginia lacks jurisdiction to challenge the twin federal health care measures passed in 2010 and known collectively as Obamacare.

In their decision, the federal judges held that "Virginia … lacks standing to bring this action. Accordingly, we vacate the judgment of the district court and remand with instructions to dismiss the case for lack of subject matter jurisdiction."

Of all the unconstitutional elements included in the Patient Protection and Affordable Care Act, it is the individual mandate that Virginia (and the 28 other states that have filed similar complaints) finds most irksome and offensive to its sovereignty.

Simply put, the individual mandate is the provision of Obamacare that compels every American, under penalty of law, to purchase a qualifying health insurance plan by 2014 or face punishment.

Virginia's position on the constitutionality of the individual mandate was set out in the complaint filed by state Attorney General Ken Cuccinelli, "We believe the federal law is unconstitutional as it is based on the commerce clause. Simply put, not buying insurance is not engaging in commerce. If you are not engaged in commerce, the federal government cannot regulate this inaction. Just being alive is not interstate commerce. If it were, Congress could regulate every aspect of our lives."

And therein lies the rub. Congress intends very emphatically to regulate every aspect of our lives. The multitude of mandates woven into the fabric of the Obamacare statute is only the beginning. From what clause of the Constitution does Congress claim this right to regulate? According to other federal benches that have heard this and other challenges to Obamacare, the power to enact the provision is found in the shadows of the Commerce Clause.

Curiously (cowardly?), the four judges on the Fourth Circuit bench avoided opining on the larger constitutional issues, preferring instead to base its reversal of the lower court's ruling on grounds that Virginia (and all other states) lack standing to challenge the constitutionality of a federal law. Said the court:

If we were to adopt Virginia's standing theory, each state could become a roving constitutional watchdog of sorts; no issue, no matter how generalized or quintessentially political, would fall beyond a state's power to litigate in federal court. We cannot accept a theory of standing that so contravenes settled jurisdictional constraints.

The irony drips from every page of this decision. Our Founding Fathers explicitly intended the states to

be constitutional watchdogs. Witness, for example, the words of James Madison in *Federalist* Number 46:

Were it admitted, however, that the Federal government may feel an equal disposition with the State governments to extend its power beyond the due limits, the latter would still have the advantage in the means of defeating such encroachments. If an act of a particular State, though unfriendly to the national government, be generally popular in that State and should not too grossly violate the oaths of the State officers, it is executed immediately and, of course, by means on the spot and depending on the State alone. The opposition of the federal government, or the interposition of federal officers, would but inflame the zeal of all parties on the side of the State, and the evil could not be prevented or repaired, if at all, without the employment of means which must always be resorted to with reluctance and difficulty. On the other hand, should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

However, the federal government, for decades, has been willing to encounter any and all resistance in the states to unconstitutional "laws" passed by Congress. The states, unfortunately, have failed to exercise the full panoply of their sovereign powers to repel these frequent encroachments.

After receiving the ruling of the court, Attorney General Cuccinelli declared his intent to appeal the decision, likely to the Supreme Court:

Not only does the court's opinion reject the role of the states envisioned by the Constitution, it dismisses an act of the Virginia General Assembly -— the Health Care Freedom Act -— as a mere pretense or pretext. It is unfortunate that the court would be so dismissive of a piece of legislation that passed both houses of a divided legislature by overwhelming margins with broad, bipartisan support.

As one would expect, the Obama administration's Justice Department lauded the ruling -— a ruling aimed at abolishing that niggling and outdated concept of state sovereignty.

"Throughout history, there have been similar challenges to other landmark legislation such as the Social Security Act, the Civil Rights Act, and the Voting Rights Act, and all of those challenges failed as well," said a statement released by the Department of Justice. "We will continue to vigorously defend the health care reform statute in any litigation challenging it, and we believe we will prevail."

The central contention cited by lawyers for the Old Dominion is that the Commerce Clause of the Constitution does not grant additional powers to Congress beyond those already enumerated therein. Particularly, the mandating of the purchase of a commodity certainly was never contemplated by the authors of the Commerce Clause and cannot logically be considered within the realm of "interstate commerce," the only commerce over which the federal government has any authority.

Section 1, Article 8 of the Constitution grants Congress the authority to, "regulate commerce with foreign nations, and among the several states." The fact that Congress passed and President Obama signed the Patient Protection and Affordable Care Act into law demonstrates that neither the legislative

nor executive branch of the national government is bothered by constitutional restrictions on their power. As a matter of fact, it is imprecise to say that the Constitution restricts the power of the national government. The truth is that the Constitution empowers the national government with very specific, limited and enumerated powers, leaving all others to the "states, respectively, or to the people."

For nearly 80 years, the Commerce Clause has been wrested by a national government determined to appear to justify its unlawful behavior by donning a cloak of constitutionality. That cloak is tattered and worn, and fortunately, there are a few who refuse to be fooled by the disguise. In recent years, the Supreme Court has heard challenges to the unlimited scope of this authority, and exercising its proper role as a check on the other branches of the government, limits on the federal power to regulate commerce have been imposed.

While the Constitution explicitly authorizes Congress to regulate commerce and the Supreme Court has validated the exercise thereof in a string of decisions, there is no precedent in our over 200 years of constitutional jurisprudence for the ability of Congress to force citizens to buy something regardless of their own preference.

This latest expression of legislative madness denigrates the very principle of personal liberty that is at the core of our constitutional Republic. If Congress is permitted to envelope the iron fist of absolutism within the velvet glove of the Commerce Clause, then there is nothing that will not fall within that purview.

Despite this setback, twenty-eight other states continue to pursue their legal objections to the Obamacare individual mandate and the administration's reliance on a non-existent grant of authority to enact such based on a wresting of the Commerce Clause.

Challenging the federal government in federal court seems a bit like asking the the accused to be the judge in his own case. There is little surprise as to how that case will turn out.

There is yet hope for federalism, state sovereignty, and the Constitution, however. These lawsuits are ultimately doomed as they are, in essence, asking a branch of the federal government to undo the act of a sister branch. While such decisions might be handed down by this or that federal court, there will never be an absolute jurisprudential repeal of Obamacare, as Congress, if determined will find ways around contrary holdings of judges.

Nullification is accomplished when states exercise their sovereignty by setting aside laws passed by the national legislature that exceed its constitutional power. Any measure passed by Congress that doesn't conform to the express, limited, and enumerated powers granted to it therein by the people and the states, is null and has not the force of law.

Virginia and all her sister states seeking to rebuild the walls of sovereignty separating them from invasions on the part of the federal government may do well to remember that outside the Constitution, there is no law. When an act of the federal government violates this maxim, then there exists not only the option of nullification, but the obligation to do so — in the name of the Constitution.

Illustration: The Lewis F. Powell, Jr. United States Courthouse, Richmond, Virginia