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Health Care Reform After *Florida v. United States*: Now What?

BY MARK S. HEDBERG

On Jan. 31, Judge Robert Vinson of the U.S. District Court for the Northern District of Florida issued the court's decision in the multistate challenge to the Patient Protection and Affordable Care Act,[1] *Florida v. United States*[2] Like the court in *Virginia v. Sebelius*,[3] the court in *Florida* decided that the act's individual mandate[4] is unconstitutional. But unlike the *Virginia* case, the court in *Florida* decided that the individual mandate is not severable from the rest of the act, and therefore declared PPACA unconstitutional in its entirety.[5] This article will examine the Commerce Clause analysis in the *Florida* decision.[6] It will then discuss the significant questions it raises with regard to implementation of the act by the federal government and the states.

The Constitutionality of the Individual Mandate

There is little doubt that PPACA is the most significant piece of health care legislation since the Medicare and Medicaid programs were created over 45 years ago.

[1] Pub. L. No. 111-148, 124 Stat. 119 (2010). The law, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 11-152, 124 Stat. 1029 (2010), will be referred to herein as ''PPACA'' or the ''act,'' and cited as ''PPACA § __.''

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[2] *Florida v. United States,* Order Granting Summary Judgment, No. 3:10-cv-00091-RV (N.D. Fla. Jan. 31, 2011) (cited as ''Order'' at __).

[3] 728 F. Supp. 2d 768 (E.D. Va. Dec. 13, 2010). The court's opinion is available at http://op.bna.com/hl.nsf/r?Open=mapi-8dms88

[4] PPACA § 1501.

[5] The individual mandate was upheld in two other cases decided before *Florida* and *Virginia: Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. Oct. 7, 2010) and *Liberty University v. Geithner*, Memorandum Opinion Granting Defendants' Motion to Dismiss, No. 6:10-cv-00015-nkm-mfu (W.D. Va. Nov. 30, 2010).

[6] *Florida* also rejected the claim that the act's ''massive'' changes to the Medicaid program are unconstitutional. *See Florida,* Order at 6-13.

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But it is also arguably the most controversial. It was passed after a brutal, partisan legislative process, and its individual mandate is the first and only time a federal statute has compelled individuals to purchase a good or service from the private sector. The potential difficulties presented by such a requirement, however, had been identified more than 15 years earlier. As the *Florida* court noted, the Congressional Budget Office stated in a 1994 memorandum that ''[a] mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action,'' and a 2009 Congressional Research Service report stated that '''whether Congress can use its Commerce Clause authority to require a person to buy a good or a service' raises a 'novel' issue and 'most challenging question.' ''[7] The court agreed, observing that ''[n]ever before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States.''[8] Not surprisingly, dozens of lawsuits have been filed challenging the individual mandate (and other aspects of PPACA).[9]

The government has defended the individual mandate on two principal grounds. One is that the mandate's penalty is really a tax authorized by Congress's powers under the General Welfare Clause of the Constitution, and therefore not subject to challenge under the Anti-Injunction Act.[10] To date, every court to consider these arguments has rejected them.[11] The other defense raised by the government is that the mandate is a valid exercise of Congress's powers under the Commerce Clause or under the Necessary and Proper Clause.[12] The bulk of the analysis in *Florida* is devoted to the extent of Congress's power under the Commerce Clause.

The Commerce Clause provides, in pertinent part, that ''The Congress shall have Power . . . To regulate Commerce . . . among the several States.''[13] As construed by the United States Supreme Court, the Commerce Clause authorizes Congress to regulate in three ''broad categories of activity''; the individual mandate implicates the power ''to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.''[14]

As a threshold matter, the court considered ''whether activity is required before Congress can exercise its power under the Commerce Clause,''[15] an issue that had not been addressed before.

> In all the cases discussed [earlier in the Order], the Supreme Court was called upon to decide different issues . . . but it has never been called upon to consider if ''activity'' is required. . . . [T]here is a simple and rather obvious reason why the Supreme Court has never distinguished between activity and inactivity before: . . . until now, Congress had never attempted to exercise its Commerce Clause power in such a way. . . In every Supreme Court case decided thus far, Congress was not seeking to regulate under its commerce power something that could even arguably be said to be ''passive inactivity.''[16]

The court concluded that ''activity'' is an ''indispensable part of the Commerce Clause analysis (at least as currently understood, defined, and applied in Supreme Court case law).''[17] According to the court,

> [i]t would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause. If it has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting—as was done in the Act—that compelling the actual transaction is *itself* ''commercial and economic in nature, and substantially affects interstate commerce'' . . . it is not hyperbolizing to suggest that Congress could do almost anything it wanted. . . . If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain for it would be ''difficult to perceive any limitation on federal power'' and we would have a Constitution in name only. Surely this is not what the Founding Fathers could have intended. In *[United States v.] Lopez*, the Supreme Court struck down the Gun Free School Zones Act of 1990 after stating that, if the statute were to be upheld, ''we are *hard pressed* to posit any *activity* by an individual that Congress is without power to regulate.'' If some type of already-existing activity or undertaking were not considered to be a prerequisite to the exercise of commerce power, we would go beyond the concern articulated in *Lopez* for it would be virtually *impossible* to posit *anything* that Congress would be without power to regulate.[18]

The court next considered whether the failure to buy health insurance constitutes an ''activity'' for Commerce Clause purposes. Based on ''plain reading of the Act itself,'' the court concluded that the ''individual mandate regulates inactivity.''[19] The court then consid-

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[7] *Florida,* Order at 38.

[8] *Id.* (footnote omitted).

[9] The pending challenges are tracked by several websites; the list maintained by *The Washington Post* tracks the status of 25 lawsuits and is available at http://www.washingtonpost.com/wp-srv/special/health-care-overhaul-lawsuits/ (last visited Feb. 7).

[10] *See, e.g., Liberty University,* slip op. at 16-21 (Nov. 30, 2010).

[11] *Florida*, Order at 4 n.4 (referring to a prior ruling in the Florida case that rejected such arguments and citing five other decisions that also rejected the tax argument and/or the Anti-Injunction Act argument).

[12] The *Florida* court noted that the ''Necessary and Proper Clause is not really a separate inquiry, but rather is part and parcel of the Commerce Clause analysis as it augments that enumerated power by authorizing Congress [t]o make all Laws which shall be necessary and proper to regulate interstate commerce,'' but nonetheless analyzed them separately ''for ease of analysis and because that is how [the United States] framed and presented [its] arguments.'' *Id*. at 13 n.7 (quotations and citations omitted).

[13] U.S. Const. Art. I, § 8, cl. 3.

[14] *Florida,* Order at 19, 43 (quoting *United States v. Lopez,* 514 U.S. 549, 558-59 (1995)); *see generally id.* at 19-39.

[15] *Id.* at 39.

[16] *Id.* at 40-41 (citations and footnotes omitted).

[17] *Id.* at 43-44.

[18] *Id.* at 42-43 (citations omitted) (emphasis in original).

[19] *Id*. at 44.

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ered two overlapping arguments advanced by the defendants in support of the proposition that the uninsured are, in fact, engaged in an activity that substantially affects interstate commerce: (1) the uninsured are actively engaged in interstate commerce because of the unique attributes of the health care market, and (2) the uninsured are actively engaged in interstate commerce because they make a calculated economic decision to go without health care insurance.[20] The court rejected each of these contentions.

The defendants in *Florida* argued that three unique aspects of the health care market reflect that the uninsured are not inactive: (a) no one can opt out of the health care market, (b) if and when an individual seeks health care services, hospitals are required by law to provide care, regardless of the ability to pay, and (3) if the cost of the care received cannot be paid, these costs are shifted to third parties, which has economic consequences for all. The court was not persuaded that these factors are constitutionally significant, and explained that the same arguments also could be made about the markets for food, transportation, and housing.[21] The court then compared the ''unique market'' argument to the arguments that were made in *Lopez* in support of the Gun Free School Zones Act of 1990:

> Two things become apparent after reading these arguments attempting to justify extending Commerce Clause power to the legislation in [*Lopez*], and the majority opinion (which is the controlling precedent) rejecting those same arguments. First, the contention that Commerce Clause power should be upheld merely because the government and its experts or scholars claim that it is being exercised to address a ''particularly acute'' problem that is ''singular[],'' ''special,'' and ''rare''—that is to say ''unique''—-will not by itself win the day. Uniqueness is not an adequate limiting principle as every market problem is, at some level and in some respects, unique. If Congress asserts power that exceeds its enumerated powers, then it is unconstitutional, regardless of the purported uniqueness of the context in which it is being asserted.
>
> Second, and perhaps more significantly, under *Lopez* the causal link between what is being regulated and its effect on interstate commerce cannot be attenuated and require a court ''to pile inference upon inference,'' which is, in my view, exactly what would be required to uphold the individual mandate. For example, . . . the mere status of being without health insurance, in and of itself, has absolutely no impact whatsoever on interstate commerce . . . The uninsured can only be said to have a substantial effect on interstate commerce in the manner as described by the defendants: (i) if they get sick or injured; (ii) if they are still uninsured at that specific point in time; (iii) if they seek medical care for that sickness or injury; (iv) if they are unable to pay for the medical care received; and (v) if they are unable or unwilling to make payment arrangements directly with the health care provider. . . and the costs are thereafter shifted to others. In my view, this is the sort of piling ''inference upon inference'' rejected in *Lopez* . . . and subsequently described in *[United States v.] Morrison*[22] as ''unworkable if we are to maintain the Constitution's enumeration of powers.''[23]

As for the ''economic decision'' argument, the *Florida* court noted that such argument was accepted in two prior cases, *Thomas More Law Center* and *Liberty University,* and that the *Liberty University* court had stated that

> ''by choosing to forego insurance, Plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now, through the purchase of insurance,'' and concluded that these decisions constitute economic activity ''[b]ecause of the nature of supply and demand, Plaintiff's choices directly affect the price of insurance in the market, which Congress set out in the Act to control.''[24]

The problem, according to the *Florida* court, however, is that such a rationale

> would essentially have unlimited application. There is quite literally *no* decision that, in the natural course of events, does not have an economic impact of some sort. The decisions of whether and when (or not) to buy a house, a car, a television, a dinner, or even a morning cup of coffee also have a financial impact that—when aggregated with similar economic decisions—-affect the price of that particular product or service and have a substantial effect on interstate commerce. . . .
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> The important distinction is that ''economic decisions'' are a much broader and far-reaching category than are ''activities that substantially affect interstate commerce.'' While the latter necessarily encompasses the first, the reverse is not true. ''Economic'' cannot be equated to ''commerce.'' And ''decisions'' cannot be equated to ''activities.'' Every person throughout the course of his or her life makes hundreds or even thousands of life decisions that involve the same general sort of thought process that the defendants maintain is ''economic activity.'' There will be no stopping point if that should be deemed the equivalent of activity for Commerce Clause purposes. . . .
>
> Because I find both the ''uniqueness'' and ''economic decision'' arguments unpersuasive, I con-

[20] Interestingly, these arguments appear to go more directly to the question of ''substantial impact on interstate commerce'' than they do the question of ''activity.''

[21] *Id.* at 45-48. For example, rather than controlling wheat supply by ''regulating the acreage and amount of wheat a farmer could grow as in *[United States v.] Wickard,*'' the court observed that ''under this logic, Congress could more directly raise too-low wheat prices merely by increasing demand through mandating that every adult purchase and consume wheat daily, rationalized on the grounds that because everyone must participate in the market for food, non-consumers of wheat bread adversely affect prices in the wheat market.'' *Id.* at 46.

[22] 529 U.S. 598 (2000) (holding the Violence Against Women Act of 1994 unconstitutional because it exceeded the limits of the Commerce Clause).

[23] *Florida,* Order at 49-50 (citations omitted).

[24] *Id.* at 52-53.

> clude that the individual mandate seeks to regulate economic inactivity, which is the very opposite of economic activity. And because activity is required under the Commerce Clause, the individual mandate exceeds Congress' commerce power, as it is understood, defined, and applied in the existing Supreme Court case law.[25]

The court next turned to the defendants' arguments under the Necessary and Proper Clause, which take the position that the act's other insurance market reforms prohibit such practices as denying coverage or charging higher premiums due to pre-existing conditions (driving the costs of insurers up), that such prohibitions create an incentive for individuals to delay obtaining insurance until they are sick or injured (driving revenues down), resulting in fewer healthy people in the health insurance pool (driving up premiums for all). ''Consequently, it is necessary to require that everyone ''get in the pool'' so as to protect the private health insurance market from inevitable collapse.''[26] In analyzing this argument, the court first noted that the Necessary and Proper Clause is not an independent source of federal power. Instead, it is simply ''a caveat that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of [section] 8 'and all other Powers vested by this Constitution.'[27]

> Ultimately, the Necessary and Proper Clause vests Congress with the power and authority to exercise *means* which may not in and of themselves fall within an enumerated power, to accomplish *ends* that must be within an enumerated power. Although Congress' authority to act in furtherance of those ends is unquestionably broad, there are nevertheless ''restraints upon the Necessary and Proper Clause authority.''[28]

The court in *Florida* concluded that the ''essential attributes'' of the Commerce Clause limitations on the federal government's power

> would definitely be compromised by this assertion of federal power via the Necessary and Proper Clause. If Congress is allowed to define the scope of its power merely by arguing that a provision is 'necessary' to avoid the negative consequences that will potentially flow from its *own* statutory enactments, the Necessary and Proper Clause runs the risk of ceasing to be the ''perfectly harmless'' part of the Constitution that Hamilton assured us it was, and moves that much closer to becoming the 'hideous monster [with] devouring jaws' that he assured us it was not.
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> The defendants have asserted again and again that the individual mandate is absolutely ''necessary'' and ''essential'' for the Act to operate as it was intended by Congress. I accept that it is. Nevertheless, the individual mandate falls outside the boundary of Congress' Commerce Clause authority and cannot be reconciled with a limited government of enumerated powers. By definition it cannot be ''proper.''[29]

The court accordingly held that the individual mandate is unconstitutional.

The Inability to Sever the Individual Mandate From the Act

Many were surprised by the *Florida* court's declaration that the entire act is unconstitutional. The basis for the court's decision was that the individual mandate could not be severed from the rest of the act, either alone or with the act's other insurance related provisions. Although at first blush this might appear to be a case of judicial overreaching or activism, the order in fact reflects a thorough analysis of the severability question.

The starting point for the court's analysis was the defendants' concession that the individual mandate and the act's health insurance reforms ''will rise or fall together as these reforms 'cannot be severed from the [individual mandate].' ''[30] Thus, the only question left for the court to decide was ''whether the Act's other, non-health-insurance-related provisions can stand independently or whether they, too, must fall with the individual mandate.''[31]

The court then observed that ''[s]everability is a doctrine of judicial restraint'' in which courts ''try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact.''[32] Although the normal rule is that partial invalidation of a statute is proper, the

> question of severability ultimately turns on the nature of the statute at issue. For example, if Congress intended a given statute to be viewed as a bundle of separate legislative enactment [sic] or a series of short laws, which for purposes of convenience and efficiency were arranged together in a single legislative scheme, it is presumed that any provision declared unconstitutional can be struck and severed without affecting the remainder of the statute. If, however, the statute is viewed as a carefully-balanced and clockwork-like statutory arrangement comprised of pieces that all work toward one primary legislative goal, and if that goal would be undermined if a central part of the legislation is found to be unconstitutional, then severability is not appropriate.[33]

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[25] *Id.* at 52-56.

[26] *Id.* at 56-57. It is worth noting that a system that permits the purchase of insurance after the loss has occurred is not really an ''insurance'' system at all, which is, of course, why the private insurance market would collapse if the act went into effect without the individual mandate.

[27] *Id.* at 58.

[28] *Id.* at 60; see also *id.* at 61 & 62 (quoting the concurrences of Justice Kennedy and Justice Alito in *Comstock* for the proposition that ''the . . . Clause 'must be controlled by some limitations lest, as Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another *ad infinitum*' '' (Kennedy), that ''the Clause 'does not give Congress carte blanche,' and it is the 'obligation of this Court' to impose limitations' '' (Alito), and that '''[i]t is of fundamental importance to consider whether essential attributes [of federalism embodied in the Constitution] are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power' '' (Kennedy)).

[29] *Id.* at 62-63 (footnotes omitted).

[30] *Id.* at 63.

[31] *Id.* at 64.

[32] *Id.* (quotations and citations omitted).

[33] *Id.* at 64-65.

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The court then applied the ''well-established'' two part test for determining the severability of an unconstitutional statutory provision: (1) can the other provisions of the act function independently and remain fully operative as a law, and (2) would Congress, had it been presented with a statute that did not contain the struck part, have preferred to have no statute at all.[34] Regarding the first part of the test, the court readily concluded that some or even most of the non-health insurance provisions could stand alone, but observed that ''the question is not whether these . . . provisions can function as a technical or practical matter; instead, the 'more relevant inquiry' is whether these provisions will comprise a statute that will function 'in a *manner* consistent with the intent of Congress.' ''[35] That observation led the court to the second prong of the test.

The court first focused on the act's lack of a severability clause, which the court found to be ''significant because one had been included in an earlier version of the Act, but it was removed in the bill that subsequently became law.''[36]

> Moreover, the defendants have conceded that the Act's health insurance reforms cannot survive without the individual mandate, which is extremely significant because the various insurance provisions, in turn, are the very heart of the Act itself. . . . [In addition to the defendants,] Congress has also acknowledged in the Act itself that the individual mandate is absolutely ''essential'' to the Act's overarching goal of expanding the availability of affordable health insurance coverage and protecting individuals with pre-existing medical conditions. . . . In other words, the individual mandate is indisputably necessary to the Act's insurance market reforms, which are, in turn, indisputably necessary to the purpose of the Act.[37]

The court then quoted the Supreme Court's description of the rationale underlying the severability doctrine:

> Three interrelated principles inform our approach to remedies. First, we try not to nullify more of a legislature's work than is necessary, for we know that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people. . . . Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting [a] law to conform it to constitutional requirements even as we strive to salvage it . . . Third, the touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature.[38]

With such principles in mind, the court concluded as follows:

> Severing the individual mandate from the Act along with the other insurance reform provisions—and in the process reconfiguring an exceedingly lengthy and comprehensive legislative scheme—cannot be done consistent with the principles set out above. Going through the 2,700-page Act line-by-line, invalidating dozens (or hundreds) of some sections while retaining dozens (or hundreds) of others, would not only take considerable time and extensive briefing, but it would, in the end, be tantamount to rewriting a statute in an attempt to salvage it, which is foreclosed by Ayotte, supra. Courts should not even attempt to do that. It would be impossible to ascertain on a section-by-section basis if a particular statutory provision could stand (and was intended by Congress to stand) independently of the individual mandate. The interoperative effects of a partial deletion of legislative provisions are often unforseen and unpredictable. For me to try and ''second guess'' what Congress would want to keep is almost impossible. To highlight one of many examples, consider the Internal Revenue Service Form 1099 reporting requirement, which requires that businesses, including sole proprietorships, issue 1099 tax forms to individuals or corporations to whom or which they have paid more than $600 for goods or services in any given tax year [Act § 9006]. This provision has no discernable connection to health care and was intended to generate offsetting revenue for the Act, the need of which is greatly diminished in the absence of the ''health benefit exchanges,'' subsidies and tax credits, and Medicaid expansion (all of which, as the defendants have conceded, ''work in tandem'' with the individual mandate and other insurance reform provisions). How could I possibly determine if Congress intended the 1099 reporting provision to stand independently of the insurance reform provisions? Should the fact that it has been widely criticized by both Congressional supporters and opponents of the Act and the fact that there have been bipartisan efforts to repeal it factor at all into my determination?
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> In the final analysis, this Act has been analogized to a finely crafted watch, and that seems to fit. It has approximately 450 separate pieces, but one essential piece (the individual mandate) is defective and must be removed. It cannot function as originally designed. There are simply too many moving parts in the Act and too many provisions dependent (directly and indirectly) on the individual mandate and other health insurance provisions—which, as noted, were the chief engines that drove the entire legislative effort—-for me to try and dissect out the proper from the improper, and the able-to-stand-alone from the unable-to-stand-alone. Such a quasi-legislative undertaking would be particularly inappropriate in light of the fact that any statute that might conceivably be left over after this analysis is complete would plainly not serve Congress' main purpose and primary objective in passing the Act. The statute is, after all, called ''The Patient Protection and Affordable Care Act,'' not ''The Abstinence Education and Bone Marrow Density Testing Act.'' The Act, like a defectively designed watch, needs to be redesigned and reconstructed by the watchmaker.[39]

[34] *Id.* at 65-66.
[35] *Id.* at 66 (citations omitted) (emphasis in original).
[36] *Id.* at 67.
[37] *Id.* at 68-71.
[38] *Id.* at 71 (quoting *Ayotte v. Planned Parenthood,* 546 U.S. 321, 329-30 (2006)).
[39] *Id.* at 72-74.

Accordingly, the court declared PPACA unconstitutional in its entirety.[40]

Now What?

The *Florida* court's decision leaves federal health reform efforts in a state of significant uncertainty. Although the court declined to issue an injunction prohibiting implementation of the act, it did so pointing out the ''long-standing presumption 'that officials of the Executive Branch will adhere to the law as declared by the court. As a result, **the declaratory judgment is the functional equivalent of an injunction**.' ''[41] That being the case, the 26 state plaintiffs in *Florida* can claim the benefit of the court's decision within their jurisdictions, i.e., a decision that is by its own terms the functional equivalent of an injunction.[42] Thus, until and unless the judgment of the *Florida* court is stayed pending further appeals, health reform would seem to be frozen in its tracks in slightly more than half the country.

As of this writing, no motion for a stay has been filed in the *Florida* case. This is somewhat strange, given that the White House has vowed to proceed with implementation of PPACA despite the *Florida* decision.[43] The lack of a stay also leaves regulations issued and to be issued pursuant to the act vulnerable to attack on the grounds that the issuing agency has no statutory predicate for doing so (at least in the states that were plaintiffs in *Florida*). Of course, even if a stay is requested, there is no guarantee that it would be granted, and weighing the competing interests relevant to such a motion would be no easy task.

Significant uncertainty also surrounds the course of appellate review that will be followed in *Florida* and the other cases challenging the individual mandate. For example, the Commonwealth of Virginia has announced that it intends to file a petition for certiorari before judgment in the U.S. Supreme Court seeking direct review of *Virginia v. Sebelius*.[44] Does the fact that the *Florida* decision leaves the nation effectively split in half make it more likely that the Supreme Court would agree to hear (or decide on its own motion to hear) one or more appeals directly, bypassing the courts of appeal? And which case(s) would the Supreme Court take (now or after the courts of appeal have ruled)? A recusal in the Supreme Court is effectively a vote to affirm, and if Justice Kagan advised the Obama administration on the health reform cases while she was solicitor general, recusal would need to follow.

If Justice Kagan advised the Obama administration on the health reform cases while she was solicitor general, recusal would need to follow.

As a result of these significant uncertainties, it will be necessary to watch the *Florida* case and the other cases challenging PPACA carefully as the appellate process unfolds, keeping in mind that (1) any protections built into the act (such as the secretary of health and human services's waiver authority under the new Medicare shared savings program) may be no protection at all, (2) the act's requirements may not be effective, but ignoring them before the appellate process has concluded is fraught with peril, and (3) any business transactions entered into in reliance on the act ought to include unwind provisions that take into account the potential for the *Florida* decision to be upheld on appeal.

Finally, the *Florida* decision also opens up a very interesting political dynamic. Whether you agree with the *Florida* decision or not, there is no denying that it was well researched and written, and takes into account the three prior decisions that ruled on the merits of the Commerce Clause arguments pertaining to the individual mandate. Does the strength of the decision lead Congress to attempt to ''fix'' the act before the appeals have run their course? For example, might Congress pass a bill that repeals the individual mandate? Doing so would seem to render the Commerce Clause arguments moot. But forging a consensus around this or any other legislative fix is likely to be difficult because many of the health insurance market reforms that prompted the individual mandate to begin with also would have to be repealed, and at least some House Republicans probably would rather see the act declared unconstitutional than save it from that fate, notwithstanding their ''repeal, defund and delay'' mantra. Accordingly, the actions of the 112th Congress relating to the act also bear close watching.

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[40] Id. at 74, 76; see also Florida v. United States, Final Summary Declaratory Judgment, No. 3:10-cv-00091-RV (N.D. Fla. Jan. 31, 2011) (''For all the reasons stated in the Order Granting Summary Judgment . . . it is hereby DECLARED, ADJUDGED, and DECREED that The Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010, is unconstitutional'') (citations omitted).

[41] *Id.* at 75 (quoting *Comm. on Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008)) (emphasis added).

[42] The state plaintiffs in *Florida* are Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming.

[43] Warren Richey, *White House Vows To Implement Health Care Reform, Despite Judge's Ruling*, The Christian Science Monitor, Jan. 31, 2011 (http://www.csmonitor.com/USA/Justice/2011/0131/White-House-vows-to-implement-health-care-reform-despite-judge-s-ruling).

[44] Press Release, Attorney General of Virginia, Attorney General Cuccinelli Announces He Will Seek Expedited Review Of Virginia Health Care Lawsuit In The Supreme Court (Feb. 3, 2011) (http://www.oag.state.va.us/PRESS_RELEASES/Cuccinelli/020311_HealthCare_Expedited.html) (last visited Feb. 7).

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