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# Staying Informed

Ideas, Information, and Perspectives In  
the New Health Care World

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## Health Care Reform- The Process of a Democracy Continues

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*“the Act is a controversial and polarizing law about which reasonable and intelligent people can disagree in good faith.”*

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Last week Judge Robert Vinson of the United States District Court of the Northern District of Florida handed down a decision of what will most likely be many challenges to the Patient Protection and Affordable Care Act. A separate challenge is proceeding in Virginia with opening arguments scheduled for mid-December and a District Court Judge in Michigan dismissed a challenge brought forward in his jurisdiction. Several other challenges are also proceeding through legal channels.

Many have already positioned these events politically. Others are legitimately concerned with tipping the balance of power between the government and the private market too far in one direction or another. With respect to the Virginia challenge Virginia Attorney General Ken Cuccinelli commented, “If Virginia loses this fight and the federal government is allowed to cross this line, Congress will be granted virtually an unlimited power to order you to buy anything.”

While some may view this as a fight, others will view this as a continuation of the democratic processes available in our country to assure the health care reform legislation is within the boundaries of authority established in our Constitution. If it is, we’ll need to continue to make the best of it and fix what needs to be fixed. If it’s not- it will have to be changed. That’s the way it’s supposed to work.

Judge Vinson states at the beginning of his Order and Memorandum Opinion that the “Act is a controversial and polarizing law about which reasonable and intelligent people can disagree in good faith.” He notes in his Order that even within the group in Florida bringing the action on behalf of the states and businesses there is not complete agreement among them. Some of the states participating in the challenge do believe the legislation will improve the system we have today. There is disagreement within the group who disagrees.

We’ve been discussing and debating the approaches to change our health care system for over 100 years. We’ve waited to take any action and have reached the point where health care costs now threaten the economic stability of our country for our children. Over the past 18 months we’ve watched a rather ugly legislative process produce the legislation we have today. There is no doubt attempting to reform the costly and unsustainable system in our country is off to a rocky start.

Now, it’s time to let the process continue. Let’s hope the judicial process works better than the legislative part did.

## PPACA- The Legal Challenges

Minutes after the Patient Protection and Affordable Care Act was signed into law the legal challenges began. The challenge receiving the most attention was brought forward in Florida by the Attorneys General of 16 states, four governors, the National Federation of Independent Businesses, and two individual business owners.

On October 14, 2010, Judge Robert Vinson of the United States District Court in the Northern District of Florida handed down a 65 page Order and Memorandum Opinion addressing the six causes of action brought forward on behalf of the plaintiffs in Florida. While it is likely the issue itself will not be resolved until it reaches the United States Supreme Court his rulings provide a good starting point to clarify some of the real issues being discussed.

Judge Vinson states in the introduction to his order that if the PPACA is found to be unconstitutional, "it must be struck down- even if it is a good law." However, if the PPACA is found to be constitutional and we just don't like it, he affirms "For the removal of unwise laws from the statute books appeal lies, not in the courts, but to the ballot and to the processes of democratic government." It is up to the people to change it- not the courts.

The following is a brief summary of the decisions made by Judge Vinton. This is not intended to be a "legal analysis" but simply a summary of the challenges and findings to assist in encouraging some informed discussions. This is brief; the complete Order is posted in our Library at [www.collaborationhealthcare.com](http://www.collaborationhealthcare.com).

### **Count 1: Challenge to the Individual Mandate Exceeding the Commerce Clause**

The primary issue of many of the legal challenges relate to the requirement that everyone have health insurance coverage by 2014 (individual mandate). Judge Vinson provides considerable discussion concerning whether the "fine" for not having health insurance is a tax- or a penalty (it is a penalty in his view).

The plaintiffs argue that instead of regulating economic activity, this mandate essentially regulates and penalizes economic inactivity and is outside the scope of Congress's powers provided in the Commerce Clause.

The defense (the government) relies on its ability to regulate commerce through the Commerce Clause where Congress has the ability to regulate: 1. the channels of interstate commerce; 2. the instrumentalities of interstate commerce; 3. activities affecting interstate commerce in its argument. The defense further argues that all individuals are part of the health care system at some point in their life no matter if they have insurance or not and, ultimately, someone ends up paying for it. They do not believe anyone is "economically inactive" in health care.

*Judge Vinson's Decision: "Of course to say something is 'novel' or 'unprecedented' does not necessarily mean it is 'unconstitutional' and 'improper.' There may be a first time for anything. But, at this stage in the case, the plaintiffs have most definitely stated a plausible claim with respect to this cause of action."*

### **Count 2: Challenge to the Individual Mandate on Due Process Grounds**

The plaintiffs argue that the individual mandate further violates a citizen's rights for due process granted under the Fifth Amendment of the Constitution. While this argument may have had constitutional merit in the past (when due process decisions included economic rights and liberties), the law has since narrowed its focus on those rights deemed as fundamental to our citizens. As we all know, access to health care is not a "fundamental right" in this country.

*Judge Vinson's Decision: "Congress made factual findings in the Act and concluded that the individual mandate was "essential" to the insurance market reforms contained in the statute. This is a "rational basis" justifying the individual mandate --- if it does not relate to a fundamental right, which only the Supreme Court can recognize. In the absence of such a recognized fundamental right, that stated "rational basis" is sufficient to withstand a substantive due process challenge. This count must be dismissed."*

### **Count 3: Violation of Constitutional Prohibition of Unapportioned Capitation or Direct Tax**

As mentioned earlier, Judge Vinson spends considerable time in his discussion determining the "fine" for not having health insurance is a penalty as opposed to a tax (despite the defendants argument to the contrary). The plaintiffs argue that it is an unconstitutional or direct tax prohibited by Article 1, Section 9, Clause 4 of the Constitution (No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken).

While the judge believes the argument certainly has merit, he also believes the issue must be analyzed on the basis of authority under the Commerce Clause rather than its taxing power. He

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*"If the PPACA is found to be unconstitutional it must be struck down- even if it is a good law."*

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*Bring On The Lawyers*

*Continued on the next page*

*Legal Challenges (continued from page 2)*

dismisses this count as moot when pertaining to the discussions relevant to this case.

*Judge Vinson's Decision: "As previously explained, it is quite clear that Congress did not intend the individual mandate penalty to be a tax; it is a penalty. It must be analyzed on the basis of whether it is authorized under Congress's Commerce Clause power, not its taxing power. Therefore, Count Three will be dismissed as moot.*

#### **Count 4: Coercion and Commandeering as to Medicaid**

Under the PPACA the Medicaid programs (jointly financed between the states and federal government) will significantly expand to include more individuals currently uninsured and ineligible for Medicaid under the current rules.

The plaintiffs argue that even though this growth is going to be funded by the federal government initially, the costs in the future will be unsustainable. Since the federal government is a major source of funding for existing Medicaid programs, they further argue that, while participating in Medicaid is voluntary, not participating may result in the collapse of existing programs. They have no choice.

The defendants rest their entire argument on the fact that participation in the Medicaid program is voluntary and Congress does have existing legal authority to make changes and has done so many times over the years. Additionally, the federal government is financing 100% of the costs during the initial implementation

Vinson, due to the limited options available to the states, feels there is a line that must be drawn.

*Judge Vinson's Decision: "Because the Eleventh Circuit (unlike the other circuits) has apparently not directly addressed and foreclosed this argument, and because, in any event, the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, of fact," Steward Machine Co., supra, 301 U.S. at 590 (emphasis added), the plaintiffs have stated a "plausible" claim in this circuit.*

#### **Count 5: Coercion and Commandeering As To Healthcare Insurance**

The PPACA establishes health insurance exchanges within and between states. Like Medicaid, this is a voluntary program that can be administered by the state itself, or by the federal government.

The plaintiffs argue that, again, the choices that exist really amount to no choice. Making the decision to not participate may threaten the state's existing regulatory authority and governance with its citizens. If a state decided not to participate in creating an exchange- one would be created for it by the federal government.

Judge Vinson did not believe they made their case.

*Judge Vinson's Decision: "Because the health benefit exchanges are voluntary and do not compel states to regulate private conduct of their citizens, Count Five does not state a claim upon which relief can be granted. The Act gives the states the choice to establish the exchanges, and is therefore the type of cooperative federalism that was authorized in Hodel, supra."*

#### **Count 6: Interference with State Sovereignty as Employers and Performance of Governmental Functions**

As employers, the plaintiffs argue that the employer mandate will impose "immediate and expensive requirements on the States that will continue to increase." They argue these costs will impact their abilities to govern.

Judge Vinson does not disagree that there could be real and immediate expensive requirements. However, he also brings up the fact that states have already implemented other federally sponsored programs; COBRA, HIPAA, etc. He also stresses PPACA is applicable to all employers and not just limited to the state government.

*Judge Vinson's Decision: "Because the Act's employer mandate regulates the states as participants in the national labor market the same as it does private employers, and because the Supreme Court has held in this context that adversely impacting the state fisc (by requiring a minimum level of employment-based benefits) does not interfere with state sovereignty and impede state functions, the employer mandate does not violate the Constitution as a matter of law --- under the current law. Therefore Count Six does not state a plausible claim upon which relief can be granted and, must be dismissed.*

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## Check Our Web Site, Our Partners, and Join Our Collaboration Health Network

Our goal is to help improve the understanding of how health care works so we make the decisions to help it work better- for everyone. We've collected over 150 studies, positions, essays, and articles (including Judge Vinson's 65 page opinion) from a variety of different and diverse sources to provide an easy-to-use and balanced resource on a number of health care topics. We've designed it for consumers and professionals as an introductory resource to keep informed perspective of the issues and challenges facing health care today.

Also check out our growing list of partners similarly committed to help improve the way health care works. From wellness programs, to claims technology, to internet applications, to nutritional counseling; our partners provide the services that are going to be required for providers, consumers, employers, and other organizations to participate in the new health care landscape that is unfolding.

[www.collaborationhealthcare.com](http://www.collaborationhealthcare.com)



We recently presented to the 2010 ElderLaw Institute in Minneapolis on "The Impact of Health Care Reform on the Health Care Consumer." We'll be posting our presentation on our site- Take a look.



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### Something to Think About

"Creativity seems to emerge from multiple experiences, coupled with a well-supported development of personal resources, including a sense of freedom to venture beyond the known"

*Louis Malaguzzi*

"Service is the rent we pay for the privilege of living on this earth"

*N. Eldon Tanner*