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Subject: More on Friday's Obamacare Court Ruling

As previously reported, on Friday afternoon the 11th Circuit Court of Appeals in Atlanta issued a ruling striking down Obamacare's individual mandate, but preserving the rest of the law. Below are some key points and excerpts from the 304-page ruling and accompanying dissent.

The Issue: "Properly formulated, we perceive the question before us to be whether the federal government can issue a mandate that Americans purchase and maintain health insurance from a private company for the entirety of their lives." (Page 112)

Unprecedented Nature of the Mandate: The opinion walks through the history of the national flood insurance program's pitfalls, to make the following point: "Despite the unpredictability of flooding, the inevitability that floods will strike flood plains, and the cost shifting inherent in uninsured property owners seeking disaster relief funds, Congress has never taken the obvious and expedient step of invoking the power the government now argues it has and forcing all property owners in flood plains to purchase insurance" (Page 119)

Intrusive Scope of the Mandate: Discussing the case of *Wickard v. Filburn*, a 1930s Supreme Court case in which a farmer was penalized for growing wheat on his own farm for self-consumption, the majority wrote that "Although *Wickard* represents the zenith of Congress's powers under the Commerce Clause, the wheat regulation therein is remarkably less intrusive than the individual mandate….The wheat-acreage regulation imposed by Congress, even though it lies at the outer bounds of the commerce power, was a limitation—not a mandate—and left Filburn with a choice. The Act's economic mandate to purchase insurance, on the contrary, leaves no choice and is more far-reaching….Individuals subjected to this economic mandate have not made a voluntary choice to enter the stream of commerce, but instead are having that choice imposed upon them by the federal government." (Pages 122-23)

"From a doctrinal standpoint, we see no way to cabin the government's theory only to decisions not to purchase *health insurance*….We are unable to conceive of *any* product whose purchase Congress could not mandate under this line of argument." (Page 125)

Broad Scope of the Mandate: "In sum, 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." (Pages 130-31)

No Limiting Principles – aka Health Care is NOT "Unique": "The first problem with the government's proposed limiting factors is their lack of *constitutional* relevance. These five factual criteria comprising the government's "uniqueness" argument are not limiting principles rooted in any constitutional

understanding of the commerce power. Rather, they are *ad hoc* factors that—fortuitously—happen to apply to the health insurance and health care industries. They speak more to the complexity of the problem being regulated than the regulated decision's relation to interstate commerce. They are not limiting principles, but limiting circumstances." (Page 132)

"Were we to adopt the "limiting principles" proffered by the government, courts would sit in judgment over every economic mandate issued by Congress, determining whether the level of participation in the underlying market, the amount of cost-shifting, the unpredictability of need, or the strength of the moral imperative were enough to justify the mandate." (Page 134)

"Ultimately, the government's struggle to articulate cognizable, judicially administrable limiting principles only reiterates the conclusion we reach today: there are none." (Page 137)

Federal Mandate Overrides State Sovereignty: "We recognize the argument that, if states can issue economic mandates, Congress should be able to do so as well. Yes, some states have exercised their general police power to require their citizens to buy certain products—most pertinently, for our purposes, health insurance itself. But if anything, this gives us greater constitutional concern, not less. Indeed, if the federal government possesses the asserted power to compel individuals to purchase insurance from a private company forever, it may impose such a mandate on individuals in states that have elected *not* to employ their police power in this manner. After all, if and when Congress actually operates within its enumerated commerce power, Congress, by virtue of the Supremacy Clause, may ultimately supplant the states. When this occurs, a state is no longer permitted to tailor its policymaking goals to the specific needs of its citizenry. This is precisely why it is critical that courts preserve constitutional boundaries and ensure that Congress only operates within the proper scope of its enumerated commerce power.

"In sum, the fact that Congress has enacted this insurance mandate in an area of traditional state concern is a factor that strengthens the inference of a constitutional violation. When this federalism factor is added to the numerous indicia of constitutional infirmity delineated above, we must conclude that the individual mandate cannot be sustained as a valid exercise of Congress's power to regulate activities that substantially affect interstate commerce." (Pages 155-57)

Mandate Is Neither Necessary Nor Proper: "The mere placement of a particular regulation in a broader regulatory scheme does not, *ipso facto*, somehow render that regulation *essential* to that scheme. It would be nonsensical to suggest that, in announcing its "larger regulatory scheme" doctrine, the Supreme Court gave Congress *carte blanche* to enact unconstitutional regulations so long as such enactments were part of a broader, comprehensive regulatory scheme. We do not construe the Supreme Court's "larger regulatory scheme" doctrine as a magic words test, where Congress's statement that a regulation is "essential" thereby immunizes its enactment from constitutional inquiry. Such a reading would eviscerate the Constitution's enumeration of powers and vest Congress with a general police power" (Pages 162-63)

"The individual mandate does not remove an obstacle to Congress's regulation of insurance companies. An individual's uninsured status in no way interferes with Congress's ability to regulate insurance companies. The uninsured and the individual mandate also do not prevent insurance companies' regulatory compliance with the Act's insurance reforms. At best, the individual mandate is designed *not* to enable the execution of the Act's regulations, but to counteract the significant regulatory costs on insurance companies and adverse consequences stemming from the fully executed

reforms. That may be a relevant political consideration, but it does not convert an unconstitutional regulation (of an individual's decision to forego purchasing an expensive product) into a constitutional means to ameliorate adverse cost consequences on private insurance companies engendered by Congress's broader regulatory reform of their health insurance products." (Pages 164-65)

Individual Mandate is NOT a Tax: "It is not surprising to us that all of the federal courts, which have otherwise reached sharply divergent conclusions on the constitutionality of the individual mandate, have spoken on this issue with clarion uniformity. Beginning with the district court in this case, all have found, without exception, that the individual mandate operates as a regulatory penalty, not a tax. (Page 173) *Note that the position that the mandate is not a tax was also upheld in the opinion's dissent*.

Severability: The multiple features of the individual mandate all serve to weaken the mandate's practical influence on the two insurance product reforms [i.e., guaranteed issue and community rating]. They also weaken our ability to say that Congress considered the individual mandate's existence to be a *sine qua non* for passage of these two reforms. There is tension, at least, in the proposition that a mandate engineered to be so porous and toothless is such a linchpin of the Act's insurance product reforms that they were clearly not intended to exist in its absence. (Page 202)

"We are not persuaded that it is *evident* (as opposed to possible or reasonable) that Congress would not have enacted the two
reforms in the absence of the individual mandate." (Page 204)

Dissent: The dissenting opinion alleges that the majority "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." (Pages 208-09) It further discusses the "expansive powers" granted Congress under the commerce clause, noting that "Creating an artificial doctrinal distinction between activity and inactivity is thus novel and unprecedented, resembling the categorical limits on Congress' commerce power the Supreme Court swept away long ago." (Page 231) Despite this self-described expansive power, the dissent then attempts to argue that upholding the mandate would not raise questions about the limits of federal power, because future courts would address that issue (in ways not expressed in the ruling): "I have little doubt that the federal courts will be fully capable of addressing future problems raised in future cases in the fullness of time." (Page 261)

Even though the dissent alleges that "the majority would presume to sit as a superlegislature" by scrutinizing Congressional findings regarding the commerce clause (Page 243), it goes on to argue that, if the mandate must be stricken as unconstitutional, "the guaranteed issue and community rating provisions necessarily rise and fall with the individual mandate," and thus should have been stricken with the mandate itself. (Page 268n) Some may argue that, rather than determining which provisions of the statute "necessarily rise and fall" with the mandate, as the dissent implies, the majority should have stricken the entire statute, as the trial court did. Regardless, it is worth noting that the same dissent that criticizes the majority for acting as a superlegislature likewise ***criticized the majority for not attempting to divine other portions of the statute that needed to be stricken with the mandate itself***.

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