Judicial Restraint and Severability in the Healthcare Reform Challenge

The day after U.S. District Judge Vinson ruled the individual mandate of the new healthcare reform law to be unconstitutional, the New York Times in its lead editorial switched gears. Though many commentators had previously characterized the constitutional challenge as bordering on frivolous, the Times on Feb. 1, 2011 conceded that the basic challenge to the individual mandate is based on "principled arguments" that "will likely be decided by the Supreme Court." The Times unloaded on Judge Vinson, though, for finding that the individual mandate was not "severable" from the rest of healthcare reform, and that the unconstitutionality of the individual mandate basically infected the entire law. The Times said Judge Vinson was "way out on a limb" and "wildly off-base" in his ruling on severability.

As Judge Vinson himself carefully explained, judges ordinarily do what they can to limit their rulings on an unconstitutional provision of a law to save as much of the rest of the law as possible. But in this atypical case, the same spirit of judicial restraint led Judge Vinson, after the individual mandate failed, to refrain from picking through the rubble left to see what might be salvageable.

Throughout the briefing and at the oral arguments before Judge Vinson, the Obama Administration repeatedly insisted that the individual mandate is inextricably intertwined with the rest of the law, and is "essential" to the operation of healthcare reform as a whole. The Administration even used the key word "sever" in a brief, stating that the insurance provisions of the Act "cannot be severed from the [individual mandate.]"

Not only did the federal government argue the point strongly, repeatedly and consistently throughout the proceedings before Judge Vinson, but Congress itself in the act specifically found that the individual mandate is "essential" to healthcare reform overall.

Then there was the matter of the omission of a severability clause. In a departure from typical practice, despite having included a severability clause in an earlier version, Congress opted for a final version with no severability clause. Such clauses are commonly used by Congress to signal that it intends for the rest of a particular act to remain valid if a portion of the act is deemed unconstitutional. Why the omission? Some have called it an error; some, a political calculation. It could be that Congress was concerned about constitutional problems with its assertions of power in healthcare reform and wanted to shore up those constitutional weaknesses by stressing the interconnectivity of the entire scheme of reform. If so, that strategy backfired when Judge Vinson ruled that congressional powers to regulate insurance and to tax did not rescue the individual mandate from the constitutional dust bin.

Regardless of why it did what it did, Congress and the Administration presented Judge Vinson with quite a clear case. The statutory text, the statutory omission, the legislative history, and the administration's repeated

arguments in court all suggested that severability was not what Congress intended. So in the end, the federal government was awkwardly forced to ask Judge Vinson to overlook all that and just invoke a general presumption of severability. Showing judicial restraint, Judge Vinson chose to honor what Congress appeared to have intended.

If Judge Vinson had ruled that the individual mandate was severable from some but not all parts of healthcare reform, he would then have been in the position of sorting through 2,700 pages of the act to identify which of its 458 sections might survive without the individual mandate. For instance, could the new rule against denying insurance to people with preexisting conditions survive without the individual mandate, or would that just mean that people would wait until they get sick before buying insurance? Pondering whether any particular section should be saved would have seemed more of a legislative than judicial act here. After the Supreme Court gets done with this case (or possibly even before), Congress can decide for itself which pieces it wishes to salvage.