

Statement of  
**The Honorable Richard J. Durbin**

United States Senator  
Illinois  
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Assistant Senate Majority Leader Dick Durbin

Hearing on "The Constitutionality of the Affordable Care Act"  
Opening Statement

As Prepared for Delivery

When Judge Vinson of the Northern District of Florida issued a ruling on Monday striking down the Affordable Care Act in its entirety, many parents of children with preexisting conditions likely spent a sleepless night.

Senior citizens probably started checking their savings accounts see if they could afford to pay back the prescription drug money the law gave them.

Millions of Americans no doubt felt betrayed by this ruling - college students who just rejoined their parents' insurance plans, cancer patients who had joined the Act's new high risk pools, small businesses who thought tax credits were coming their way.

I want those millions of Americans to know that they should not despair.

Many of America's landmark governing achievements - Social Security, the Civil Rights Act of 1964, the federal minimum wage - ran into trouble in lower courts before they were ultimately upheld by the Supreme Court. I believe the same will happen with the Affordable Care Act.

For those keeping score, twelve federal district court judges have dismissed challenges to the law, two have found the law to be constitutional and two have found the opposite. How is it possible that federal judges who not only study the Constitution but swear to uphold it can read its words and draw such different conclusions?

It is unlikely that this hearing will produce a national consensus or even agreement in this room. But if it serves the Congress and the Nation by fairly laying out the case on both sides, then it will be a worthy undertaking.

At the heart of the issue is Article I, Section 8 which enumerates the only powers delegated to Congress. One side argues that with the passage of the Affordable Care Act, Congress went beyond its constitutional authority. The other side, which includes those of us who voted for the Act, disagrees.

Within those enumerated powers is one described as "the plainest in the Constitution": the power

to regulate commerce. So the threshold question is whether the health care market is commerce. I think the answer to that question is obvious, but ultimately the Supreme Court will decide. Over the course of its history, the Supreme Court has interpreted this "plainest of powers" through its application of the Founders' vision to current times. Whether it was Roscoe Filburn, growing wheat to feed his chickens in 1941, or Angel Raich, using homegrown marijuana to treat her chronic illnesses in 2002, Justices from Robert Jackson to Antonin Scalia have made it clear that Congress has broad power to regulate private behavior where there is any rational basis to conclude it substantially affects interstate commerce.

The role of the lower courts is to apply those precedents to the facts. But sometimes lower court judges, whom some might call "activists", try to make new law. And this has happened in Florida and Virginia, as judges ignored precedent and created a new legal test distinguishing "activity" from "inactivity" - a distinction that cannot be found anywhere in the Constitution or Supreme Court precedent.

When the Affordable Care Act comes before the Supreme Court, I am confident the Court will recognize that Congress can regulate the market for health care that we all participate in, and that it can regulate insurance, which is the primary means of payment for health care services.

The political question which has enervated this debate focuses primarily on one issue. Even if Congress has the enumerated power under Section 8 to tax and to pass laws affecting the health care market, did it go too far in requiring that individuals who do not buy health insurance coverage face a tax penalty, the individual responsibility section of the law?

Returning to Article I, Section 8 which allows Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers", the Supreme Court just last year in the *Comstock* case said "the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are convenient, or useful or conducive to that authority's beneficial exercise." The test is whether the means is rationally related to the implementation of a constitutionally enumerated power. Is an individual mandate "rationally related" to Congress' goals of making health care more affordable and prohibiting health insurance companies from denying coverage for those with preexisting conditions? It is clear to me that private health insurance companies could not function if people only bought coverage when they faced a serious illness.

It is also worth noting that many who argue the Affordable Care Act is unconstitutional are the same people who condemn judicial activism. They are pushing the Supreme Court to strike down this law because they could not defeat it in Congress and they are losing the argument in the court of public opinion where 4 out of 5 Americans oppose repeal.

Why is public sentiment not lining up behind repeal? Because a strong majority of Americans do not believe their children should be denied health insurance because of pre-existing conditions. They want to cover their young adult children under their family plans. They believe small businesses should be given tax credits to cover the health insurance of their employees. They oppose caps on coverage and the health industry's cancellation of coverage when people need it the most.

With many parts of our world in turmoil today over questions of freedom, we should never forget that the strength of our Constitution lies in our fellow citizens who put their faith in its values and trust the President, Congress and the courts to set aside the politics of the moment and to fairly apply eighteenth century rhetoric to twenty-first century reality.

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