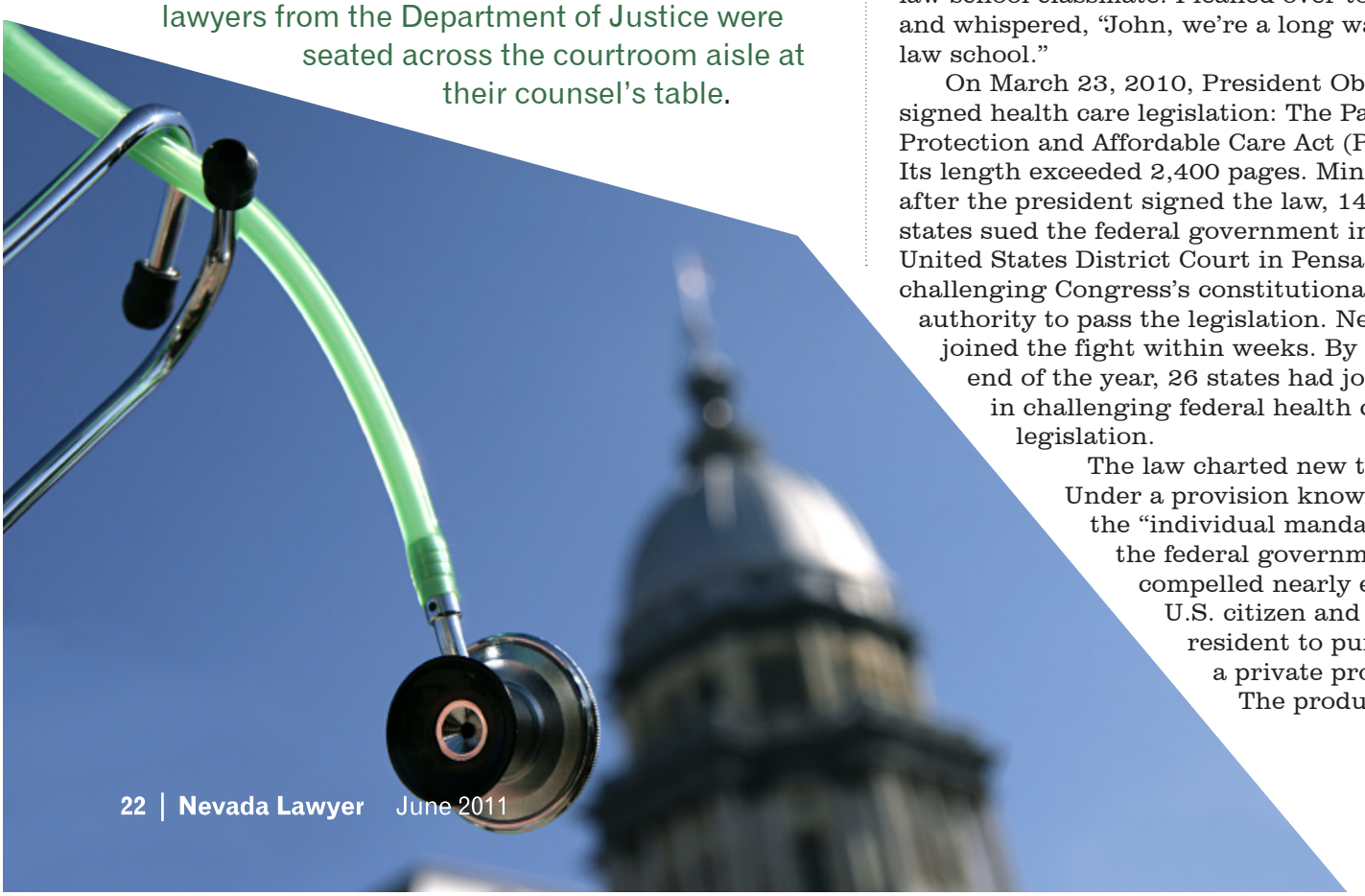
HEALTH CARE LEGISLATION–

ONE LAWYER'S JOURNEY WITH THE CONSTITUTIONAL QUESTION OF OUR TIME

BY MARK A. HUTCHISON, ESQ.

The federal courthouse in Pensacola, Florida is grand and beautiful. It is an old southern building, constructed in the early 20th Century, with marble floors that echo as you walk and old elevators that move slowly. United States District Court Judge Roger Vinson's courtroom is large and majestic with beautiful law-themed murals mounted on wood-paneled walls. On December 16, 2010, I was seated at counsel's table, along with representatives of the majority of the states in the union: attorneys general, deputy attorneys general and special counsel to governors. Six lawyers from the Department of Justice were seated across the courtroom aisle at their counsel's table.



Vinson looks like a seasoned and experienced federal judge. With his white hair, black robe, keen intellect and direct manner, he commands respect. When Vinson entered the courtroom, the audience, members of the media, and more than 30 lawyers representing the states and the federal government, stood and introduced themselves and their clients to the judge. You could sense the historic nature of the proceedings. It was like the feeling you get when rising in a courtroom after a jury returns from deliberations – times 10. Seated next to me was the deputy attorney general of another state, who also happened to be a law school classmate. I leaned over to him and whispered, "John, we're a long way from law school."

On March 23, 2010, President Obama signed health care legislation: The Patient Protection and Affordable Care Act (PPACA). Its length exceeded 2,400 pages. Minutes after the president signed the law, 14 states sued the federal government in the United States District Court in Pensacola challenging Congress's constitutional authority to pass the legislation. Nevada joined the fight within weeks. By the end of the year, 26 states had joined in challenging federal health care legislation.

The law charted new territory. Under a provision known as the "individual mandate," the federal government compelled nearly every U.S. citizen and resident to purchase a private product. The product

is a qualifying health insurance policy – a policy the federal government heavily regulates – from a private health insurance company. If a citizen or resident chooses not to purchase the policy, a penalty is imposed. The states' chief legal challenge to the legislation is directed at the individual mandate.

This is the kind of case that John and I studied in law school: a case involving a game-changing, constitutional challenge to be decided, ultimately, by the United States Supreme Court. Governor Jim Gibbons asked the state's attorney general to join the federal court case in Florida on behalf of the state. After she declined to participate, the governor appointed Hutchison & Steffen to serve as lead special counsel for Nevada in the litigation. The firm agreed to represent the state pro bono in the endeavor. Although I knew that the case would be politically controversial, for me the case is and has always been fundamentally about our constitutional form of government, not about politics. In my mind, the legal issues far transcend the politics of the day.

Six weeks after that historic day in the Pensacola courtroom, Vinson handed down a landmark legal decision in the case. He began his thorough, well-reasoned, 78-page decision by explaining that the case was not about the wisdom of the legislation or whether it would solve the vexing problems in the nation's health care system. Rather, the case was about "our federalist system," and raised "very important issues regarding the Constitutional role of the federal government." Vinson stated that Congress may enact legislation only when authorized to do so by the United States Constitution. He then declared the individual mandate to be unconstitutional. The Constitution did not grant Congress the authority to compel a citizen or resident of this country to purchase a product. He rejected the federal government's argument that the Commerce Clause of the Constitution granted Congress the power to do.

Vinson reasoned that it would be "a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause." He noted that Congress had regulated voluntary activity before under the Commerce Clause, but had never forced passive individuals into a commercial transaction with a third party as the health care legislation did. Reminding the federal government of its limited powers under the Constitution, Vinson opined, "It is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place." Vinson determined that the individual mandate was indisputably necessary to the very purpose of the health care legislation. Because the defective provision of the law had to be removed, but could not practicably be severed from the rest of the legislation, the entire law was void and unenforceable against the states' citizens.

In the midst of Congress's efforts to pass the health care legislation, a reporter posed a question to then-Speaker Nancy Pelosi. "Madam Speaker, where specifically does the Constitution grant Congress the authority to enact an individual health insurance mandate?" Speaker Pelosi responded, "Are you serious? Are you serious?" When the question remained unanswered and Speaker Pelosi continued to be pressed on the subject, her press spokesman stated to the reporter, "You can put this on the record. This is not a serious question. That is not a serious question." Regardless of your position on the desirability of the PPACA, the constitutionality of the health care legislation is the constitutional question of our time.

The federal government appealed Vinson's decision to the United States Eleventh Circuit Court of Appeals. Rather than await a decision from the Eleventh Circuit Court of Appeals – and a lengthy

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appellate process – the states wanted to proceed directly to the United States Supreme Court – which everyone knows will ultimately decide the constitutional fate of the legislation.

In fact, governors of 28 states, representing hundreds of millions of the country's citizens, wrote a letter to President Obama asking that he join with the states in requesting the United States Supreme Court to take both the Florida case and a companion Virginia case directly without awaiting the customary and lengthy appellate court process. The governors reasoned:

> "Given the daunting and costly financial and regulatory burdens that our states and the private sector will face in implementing PPACA over the coming years, particularly during this unprecedented budgetary time, public interest requires expediting a final resolution of the litigation to give certainty as soon as possible. We should not endure years of litigation in the circuit courts, when the Supreme Court can promptly provide finality. This resolution can help prevent the states and the private sector from undertaking potentially unnecessary measures and expenses. More importantly, our businesses, health care providers, and citizens of our great nation need to know as soon as possible whether all or part of the law will be upheld or stricken, so they know their options and obligations."

The Supreme Court rarely skips over the Courts of Appeal. But its own Rule 11 authorizes the Supreme Court to review a decision of a district court directly when the case is "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this court." The Supreme Court employed this procedural devise in 2000 in the case of *Gore vs.*

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Bush, when an important national issue presented in a district court decision needed to be decided expeditiously by the highest court in the country.

The Department of Justice declined the states' invitation to jointly petition the Supreme Court for direct review of Judge Vinson's decision. Unfortunately, the Supreme Court recently denied the request of the State of Virginia to review the decision of the Virginia district court directly. In the meantime, Nevada and the other states will expend thousands and thousands of hours and millions and millions of dollars just beginning to implement the law. The country deserves to know quickly if the states and the taxpayers must make this massive expenditure of time, energy and resources – in a fiscally constrained environment – or if the law is unconstitutional and Congress must fashion another solution to remedy the challenges of health care in this country.

The Eleventh Circuit has ordered an expedited appellate schedule. The parties are scheduled for oral argument on June 8, 2011. I, again, plan to join 25 other attorneys representing 26 states; in another majestic southern courthouse, we will continue the fascinating legal journey to answer what I believe to be the constitutional question of our time. ■

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