

Somin: Insurance mandate has fatal flaws

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Last week's Eleventh Circuit Court of Appeals decision striking down the individual mandate in President Barack Obama's health care plan is an important milestone. The court correctly recognized that there is no way to uphold the mandate without giving Congress unlimited power to mandate anything.

The individual mandate requires most Americans to purchase government-approved health insurance by 2014. Numerous lawsuits have been filed, arguing that this exceeds Congress' powers under the Constitution. The Eleventh Circuit decision addresses the most important of these cases, a suit filed by 26 state governments, the National Federation of Independent Business and others.

The ruling was co-authored by Judge Frank Hull, who became the first Democratic judge to vote to strike down the mandate. This undercuts already dubious claims that the lawsuits are frivolous; her opinion signals that the arguments against the mandate are strong enough to persuade at least one appellate judge likely to favor it on political grounds.

Since another federal appellate court, the Sixth Circuit, recently upheld the law, it's extremely likely that the Supreme Court will decide to hear the case within the next year.

The federal government argues that the mandate is authorized by three provisions of the Constitution: the Commerce Clause, the Tax Clause, and the Necessary and Proper Clause. The Eleventh Circuit effectively refutes all three contentions.

The Commerce Clause gives Congress the power to regulate interstate commerce. But people who purchase health insurance aren't engaging in commercial activity. As the Eleventh Circuit noted, even the Supreme Court's broadest decisions applying the clause "involved attempts by Congress to regulate pre-existing, freely chosen classes of activities,"

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like operating a business or farm. If Congress could use the clause to regulate the mere inactivity of failing to purchase a product, there would be no meaningful limits to its power.

Defenders of the mandate claim this is a special case because everyone eventually uses health care at some point. But the argument relies on shifting the focus from health insurance to health care. The same bait-and-switch tactic can justify any other mandate.

For example, not everyone eats broccoli. But everyone does participate in the market for food. Therefore, a mandate requiring everyone to purchase and eat broccoli would be permissible under the federal government's logic, as would any other purchase requirement. As the Eleventh Circuit puts it, "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." Whatever we do, we are always implicitly making decisions not to purchase some product or other, and those choices all have economic effects.

The government's Tax Clause argument is equally dubious. It asserts that the individual mandate is really a tax, because it imposes a monetary fine on those who don't comply. If this logic is correct, it would also justify any other mandate enforced by a monetary penalty. Like every other court to have considered the issue, the Eleventh Circuit rejected this reasoning and ruled that the mandate is a penalty, not a tax. As President Obama puts it, "for us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase."

The argument based on Congress' authority to adopt measures that are "necessary and proper" for executing its other powers similarly lacks constraints. The federal government argues that requiring people to purchase health insurance is "necessary" to implementing Congress' power to regulate the insurance industry through the Commerce Clause. But even if the mandate is "necessary," it isn't "proper." Both requirements are essential. In this case, the law is improper because its logic would give Congress virtually unlimited power to mandate anything, destroying the balance between the federal government and the states. Pretty much any purchase mandate could be justified as "necessary" to the regulation of commerce, because all have economic effects.

The legal battle over the individual mandate is far from over. When the issue reaches the Supreme Court, the justices should follow the Eleventh Circuit and refuse to give Congress an unlimited mandate for mandates.

[< back to article](#)