



Mandate Challenge Could Prevail

By ILYA SOMIN | TIMES-DISPATCH COLUMNIST
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Fairfax, Va. -- When 21 states and several private groups initiated lawsuits challenging the constitutionality of the Obama health care law earlier this year, critics denounced the suits as frivolous political grandstanding. But it is increasingly clear that the plaintiffs have a serious case with a real chance of victory.

The suits focus primarily on challenges to the new law's "individual mandate," which requires most American citizens to purchase a government-approved health insurance plan by 2014 or pay a fine. One of the cases was filed by 20 state governments and the National Federation of Independent Business in a federal court in Florida. Another was initiated by the Commonwealth of Virginia in a federal court in this state, and a third by the Thomas More Law Center in Michigan.

The judges considering the Florida and Virginia cases have both issued rulings rejecting the federal government's motions to dismiss the suits and indicating that the mandate can't be upheld based on current Supreme Court precedent. By contrast, Michigan district Judge George Caram Steeh wrote a decision concluding that the mandate is constitutional. But even he agreed that the case raises an "issue of first impression."

In the most recent of the three rulings, Florida federal District Court Judge Roger Vinson wrote that the government's claim that the mandate is clearly authorized by existing Supreme Court precedent is "not even a close call." He points out that "[t]he power that the individual mandate seeks to harness is simply without prior precedent," because no previous Supreme Court decision ever authorized Congress to force ordinary citizens to buy products they did not want.

An August ruling in the Virginia case by federal District Judge Henry Hudson reached the same conclusion. As Judge Hudson points out, "[n]o reported case from any federal appellate court" has ever ruled that Congress' powers "include the regulation of a person's decision not to purchase a product."

The federal government claims that Congress has the power to impose the mandate under the Commerce Clause, the Necessary and Proper Clause, and the Tax Clause of the Constitution. On the first two claims, Judge Vinson ruled that Supreme Court precedent doesn't clearly support the government, thereby enabling the plaintiffs' lawsuit to go forward. He outright rejected the government's claim that the mandate is constitutional because it is a "tax." It is instead a financial penalty for refusing to comply with a federal regulation. As Judge Vinson pointed out, congressional leaders consistently emphasized before the law's enactment that it was not a tax.

In September 2009, President Obama himself noted that "for us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase." He was right. If the mandate qualifies as a tax merely because it punishes violators with a fine, then Congress could require Americans to do almost anything on pain of having to pay a fine if they refuse. It could, for example, force citizens to buy virtually any product, such as purchasing General Motors cars for the purpose of helping the struggling auto industry.

The government's Commerce Clause argument is equally dubious. The Clause gives Congress authority to regulate "Commerce . . . among the several states." But the individual mandate regulates that which is neither commercial nor interstate. Virtually all purchases of health insurance are intrastate because a combination of state and federal law makes it illegal to purchase health insurance across state lines. Moreover, the object of the mandate isn't even commerce at all. Instead of regulating pre-existing commerce, the bill forces people to engage in commercial transactions they would have otherwise avoided.

A series of flawed Supreme Court decisions have expanded Congress' Commerce Clause authority well beyond what the text of the Constitution permits. These rulings allow the federal government to regulate almost any "economic activity." But, as Judge Vinson emphasized, even they do not give Congress the power to regulate people "based solely on citizenship and on being alive." Far from engaging in "economic

activity," people who decide not to purchase health insurance are actually refraining from doing so.

In his decision in the Michigan case, Judge Steeh argued that the mandate is constitutional under the Commerce Clause because deciding not to purchase health insurance is an "economic decision."

"Economic decisions," he reasoned, include decisions not to engage in economic activity. This approach would allow the Commerce Clause to cover virtually any choice of any kind. Any decision to do anything is necessarily a decision not to use the same time and effort to engage in "economic activity."

If I choose to spend an hour sleeping, I necessarily choose not to spend that time working or buying products. Under Judge Steeh's logic, the Commerce Clause authorizes Congress to force workers to get up earlier in the morning so that they would spend more time on the job.

Some defenders of the law claim that the individual mandate is similar to federal laws banning racial discrimination against customers by businesses such as motels and restaurants. But federal antidiscrimination laws apply only to existing businesses already engaged in commercial activity in the regulated industry. By contrast, uninsured individuals are not businesses and, by definition, are not participating in the insurance industry.

The federal government also argues that the mandate is authorized by the Necessary and Proper Clause, which gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution" other powers Congress is granted by the Constitution.

Even if the mandate is "necessary," it is not "proper" under our constitutional system of limited federal authority. If the Clause allows Congress to adopt the individual mandate, the same logic would justify almost any other requirement Congress might impose on individuals, thereby gutting the principle of limited federal power.

The legal battle over the mandate is far from over. The Florida and Virginia rulings are not final decisions. Both cases, as well as the Michigan decision, are sure to be appealed to the federal courts of appeals and, ultimately, the Supreme Court. The anti-mandate plaintiffs still face an uphill struggle. Courts are rarely willing to strike down a law that is a centerpiece of the political agenda of the president and his party. Nonetheless, it is increasingly clear that lawsuits are far from "frivolous" and have a real chance to prevail.

Ilya Somin is an associate professor at George Mason University School of Law, where he teaches constitutional law and has written extensively on constitutional limits on federal power. He recently filed an amicus brief on behalf of the [Washington Legal Foundation](#), a prominent public interest law firm, and a group of constitutional law scholars in the Virginia case challenging the health care mandate. Contact him at isomin@gmu.edu.