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The New York Times

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## Room for Debate: A Running Commentary on the News

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### A Fatal Blow to Obama's Health Care Law?

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The strengths and weaknesses of a federal judge's decision rejecting the insurance mandate.

## A Noxious Commandment

December 13, 2010

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The days of calling the constitutional challenges to the Affordable Care Act “frivolous” and “political” are now officially over. Judge Hudson’s ruling that the individual insurance mandate is unconstitutional is a milestone in the legal process of deciding whether Congress has the power to command every person in the United States to enter into an economic relationship with a private company.

Until 2010, the only mandates ever imposed on American citizens pertained to their citizenship: register for the draft and serve if called, sit on a jury, file a tax return, respond to the census. In the U.S., one cannot even be commanded to vote.

If economic mandates like this one are allowed, however, Americans will be demoted from citizens to subjects. They will have to obey any commands that Congress deems convenient to its regulation of interstate commerce. No more expensive tax credits and subsidies to raise taxes to pay for; Congress can just command you to buy its favored products. Forget cash for clunkers; just make Americans buy cars from G.M. Or make them undergo medical exams to save on health care costs. Gone will be a federal government of limited and enumerated powers established by the Constitution and repeatedly affirmed by the Supreme Court.

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In his ruling today, Judge Hudson recognized that such an unprecedented claim of power had never been sanctioned by the Supreme Court. Even Judge Steeh, the district court judge in Michigan who upheld the mandate in October, said this “arguably presents an issue of first impression.”

True, today’s decision is just a single ruling by one judge. But had it gone the other way, cries that such challenges were frivolous and political would again have been heard from pundits, professors, and politicians. So today’s ruling is big, both legally and atmospherically.

On Thursday morning, the spotlight moves to Pensacola, Fla. where oral arguments on the challenge brought against the law by 20 attorneys general will be heard. Like Judge Hudson today, Federal District Court Judge Roger Vinson has already dismissed the government’s invocation of its tax power on the merits, while signaling his skepticism about the government’s Commerce Clause theory.

If he now joins in striking down the individual mandate, I would not be surprised to see the next Congress and President Obama agree to “reform” the law by eliminating this constitutionally noxious mandate before the Supreme Court ever has a chance to rule.

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