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## Ruling hinged in part on terminology

By [Stephen Dinan](#)

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When [Congress](#) was writing the health care bill, lawmakers insisted the individual mandate that consumers buy insurance was backed up by a penalty, not a tax. On Monday, that decision came back to bite them.

[U.S. District Judge Henry E. Hudson](#), who in a 42-page ruling found key parts of the health care law unconstitutional, said he was convinced by the government's repeated denials during the debate that the law is not part of the government's taxing powers, and therefore must meet much stricter limits — which it failed to do.

The ruling is a major setback for President [Obama](#) and his administration, which belatedly argued in court that the penalty was, in fact, a tax, and thus the individual mandate to force insurance purchases is allowable by the broad limits the Constitution allows [Congress](#) under its taxing powers.

"It's incontrovertible that [Congress](#) thought it was acting under the commerce power, not the taxing power. There's just no other way of resolving this issue," said [Michael Cannon](#), director of health policy studies at the [Cato Institute](#).

During the health care debate, [Mr. Obama](#) said the penalty for those who didn't buy insurance was "absolutely not tax increase." But by June, [the New York Times](#) reported, government lawyers were defending the law in court by arguing that [Congress](#) can use its taxing power to do things that other powers, such as the General Welfare or Commerce clauses of the Constitution, cannot do.

In this case, the administration argued that the only way to achieve the goals of requiring insurers to expand coverage was to force more people to buy insurance — and the way to do that was to penalize them for not buying it.

"This is a good example of the kinds of leaps of logic and language that the [federal government](#) needed to prevail. Today, it did not prevail," said [Virginia Attorney General Kenneth T. Cuccinelli II](#), the Republican who brought the case before Judge [Hudson](#).

After the ruling, the [White House](#) insisted that the health care overhaul is constitutional and said it would eventually be upheld.

"Obviously, the administration argued on the other side of this case and disagrees with the ruling," [White House](#) press secretary [Robert Gibbs](#) told reporters, adding that in two other cases judges have ruled in favor of the administration. "We are confident that the Affordable Care Act will be upheld."

[Mr. Gibbs](#) said doing away with the "individual responsibility portion" would undermine the entire law since it is the foundation for eliminating insurance company discrimination against patients with pre-existing conditions.

In a blog post, [Stephanie Cutter](#), a senior adviser to [Mr. Obama](#) on health care, compared the health insurance requirement to states' requirement that automobile owners purchase insurance.

But whereas the lawyers pointed to the taxing power, she pointed instead to other parts of the Constitution for authority.

"Contrary to what opponents argue, the new law falls well within [Congress](#)' power to regulate economic activity under the Commerce Clause, the Necessary and Proper Clause and the General Welfare Clause," she wrote.

Democrats appeared to suffer in Judge [Hudson](#)'s ruling for the tortuous way in which they passed the health care bill.

The [Senate](#) passed its version in late 2009, on the strength of Democrats' 60 votes, or enough to overcome a filibuster. Just a month later, however, Sen. Scott Brown's surprise victory in a special election in Massachusetts gave the GOP 41 seats in the [Senate](#), which meant Republicans had the votes to block a final compromise bill with the House.

That meant House Democratic leaders had to pass the [Senate](#) bill as is, without any changes - including the "penalty" language the [Senate](#) adopted. And that was a critical factor in Judge [Hudson](#)'s thinking.

"In the final version of the ACA enacted by the [Senate](#) on Dec. 24, 2009, the term 'penalty' was substituted for 'tax in Section 1501(b)(1)," Judge [Hudson](#) wrote. "A logical inference can be drawn that the substitution of this critical language was a conscious and deliberate act on the part of [Congress](#)."

Cato's [Mr. Cannon](#) said that even if the judge had upheld the penalty as a tax, it still could have been found unconstitutional because it doesn't fit under the authorized types of taxes: income, excise or direct taxes.

"Even if they were right it was a tax, it would be an unconstitutional tax," he said.

Democratic lawmakers tried to portray the ruling as a political decision, rather than a legal one.

Reps. Sander M. Levin and Pete Stark, two high-ranking Democrats on one of the House committees with jurisdiction over the law, pointedly noted that Judge [Hudson](#) was appointed by a Republican president, and accuse him of "judicial activism."

More than 20 lawsuits have been filed challenging the overhaul, and both sides expect the buck ultimately to stop with the U.S. Supreme Court.

c Seth McLaughlin contributed to this article.

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