



## Lawyers, Courts See Weaknesses in Obamacare Defense



**Lawyers, courts see weaknesses in defense of Obama's healthcare law**

*By Sam Baker, The Hill - 01/05/12 12:59 PM ET*

The Obama administration is headed into a Supreme Court case over healthcare reform without a clear answer to significant questions about Congress's power.

The Justice Department will file its first brief on the merits of the case Friday — the beginning of a long process that will almost surely culminate in a ruling this summer. The first briefs will focus on the core question of whether it is constitutional to make almost every American buy health insurance.

The Obama administration has a winning record on that point in federal appeals courts. But even in the cases it has won, the administration has failed to answer a key question: If Congress has the power to enforce the insurance mandate, where does that power stop?

It's known in legal jargon as a "limiting principle." When courts evaluate a new application of Congress's constitutional authority, they have historically wanted to see clear limits to those powers.

"The DOJ has to do a better job of answering, 'What goes beyond your theory of federal power?' " said Ilya Shapiro, a legal scholar at the libertarian Cato Institute who opposes the insurance mandate. "They've been asked this in every court and they've never satisfied the court, even in the cases they've won."

The 11th Circuit Court of Appeals — the specific case now before the Supreme Court — struck down the insurance mandate partially on the grounds that upholding it would open the door to a flood of regulation.

"Ultimately, the government's struggle to articulate ... limiting principles only reiterates the conclusion we reach today: There are none," the court said in its ruling.

The mandate is, in a literal sense, unprecedented: Congress has never before required citizens to buy something from a private company solely on the basis of being citizens. The question is whether Congress is exerting a new power not authorized by the Constitution, or using its authority under the Commerce Clause in a new way, consistent with Supreme Court precedent.