



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

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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.

Several lower courts have said the mandate falls within the bounds of the Commerce Clause, but even they have been wary about the Justice Department's inability to clearly define a limit on Congress's power.

The U.S. Circuit Court for the District of Columbia, which upheld the mandate, said it was "troubling, but not fatal" that the Justice Department had not identified a limit to Congress's power.

"We acknowledge some discomfort with the government's failure to advance any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce," the court's opinion said.

Tim Jost, a Washington and Lee University law professor who supports the healthcare law and the mandate, also said the lack of a clear limiting principle is the government's biggest weakness heading into the Supreme Court.

The problem is "not insurmountable," Jost said, but gained new importance when a lower-court judge asked whether Congress could also make citizens buy broccoli, since a healthier population would do more to cut health costs than universal insurance coverage.

In lower courts, the Justice Department has worked around the issue of a limiting principle by arguing that healthcare is a unique market. Because hospitals are legally required to treat people who can't pay, the system is inevitably stuck with unpaid bills. Those costs are then passed on to insured people and the government.

A decision upholding the insurance mandate wouldn't open the door to other mandates because no other products involve the same kind of cost-shifting, the Justice Department says. The D.C. Circuit court accepted that rationale, but the 11th Circuit said the logic would simply put the courts in charge of determining whether future mandates are close enough to the insurance requirement.

Shapiro said the position is a policy argument, not a legal one.

"Everything is unique in some way," he said. "A rutabaga is not a car."