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Is There a Weak Link in the Government's Case for Obamacare?

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The Supreme Court will host some high drama this week, as the justices hear arguments about the constitutionality of health care reform. But when the justices ask questions, veteran court observers say, they're not really interested in the answers. Instead, they are mostly just talking to one another, setting up the arguments they will use in their internal deliberations. In that sense, the real insights to come out of oral arguments are hints about what the justices are already thinking—and how they may eventually rule.

Of course, those hints can be pretty inscrutable, even for the legal experts (of which I am not one). But over the next few days, you should listen for talk about a "limiting principle" on the government's power. The law's critics believe this is the weak link in the government's argument—and a big reason why the individual mandate, which requires almost everybody to get insurance or pay a fine, should not survive.

Every liberal legal expert I know disagrees with this argument. Quite a few conservatives seem to feel the same way, among them two highly respected judges from the Circuit Courts who, in previous rulings, found the mandate to be clearly constitutional.

But other conservative judges have found this argument persuasive—and it's entirely possible that five members of the Supreme Court will, as well. I've certainly heard conservative pundits make the argument, or some version of it.

Do they have a point?

Roughly speaking, the conservative argument goes like this. By forcing people to get insurance or pay a fine, the government is not regulating commerce, as the government claims. After all, somebody who has chosen not to get health insurance is, by definition, not engaging in commerce. If the Court agrees that the government can nevertheless compel that

person to take some kind of action, the critics say, the Court would be granting the federal government nearly unlimited power. There would be nothing to stop the government from, say, making people buy broccoli or a General Motors car. Washington would have a blank check to do anything it wants.

For a fuller explanation of this view, see the Cato Institute's Ilya Shapiro's essay in the American Bar Association's recent publication on the case. Or just read Paul Clement's brief on behalf of the states suing to throw out the mandate.

The simple response, according to the law's defenders, is that the premise is wrong: Boundaries to the commerce power already exist and the mandate lies well within them. Ever since the 1930s, the Supreme Court has given the federal government wide latitude to regulate interstate commerce, partly in recognition of the fact that the modern economy is so very interconnected—and that a person's wallet is not as sacred as, say, his or her body. As long as it was related to commerce, the Court ruled, the government could act.

But the Court has drawn a few limits, too. Chief among them: It has said the federal government may not manage matters that are strictly local in nature and which the states can control. Most famously, the courts struck down federal laws banning gun possession near schools and criminalizing domestic violence, on the theory that the states could handle these problems just fine by themselves. Health care, which represents one-sixth of the U.S. economy and is inherently inter-state, would seem to be a rather different matter—a truly federal matter.

In addition, while the courts have given the government similarly broad authority to do whatever is "necessary and proper" to carry out its duties, it has identified a few limits to that power, too—and, once again, the mandate seems to fall comfortably within them. Recent cases, involving most of the justices who will be on the bench this week, have suggested regulations that are "reasonably related" and "rationally adapted" to legitimate goals are constitutional. And the mandate, which makes possible regulations guaranteeing access to health insurance for all people, would appear to meet standard easily. (This is, arguably, the strongest argument for the law.)

But put that aside—and put aside the question of whether, as the government asserts, the mandate is also a legitimate use of the power to tax. Focus instead on this question of the limiting principle, because at least some conservatives believe it to be important and at least some commentators believe this is a problem for the government. Can the government identify one? Can it draw a line that justifies the mandate but still provides some constraints on federal action?

Actually, it more or less has, although I'm not quite sure it's put it that way: Government may regulate what the plaintiffs call "inactivity" when it is merely a prelude to an inevitable activity that government has the right to regulate. Since getting sick and consuming medical services is inevitable, and since even (most of) the law's critics acknowledge the government can regulate the way sick people pay for their medical care, the mandate is acceptable.

A government mandate to buy broccoli would not satisfy this limiting principle, because not everybody will eventually consume broccoli. Similarly, a government mandate to buy a GM car might not pass muster because not everybody will eventually buy a GM car. Broader mandates, on the other hand, might work. Congress could, for example, force everybody to obtain food vouchers, join a grocery club, or demonstrate they had plans for paying for their food—paying some sort of fine if they did not. And Congress might be able to pass a law requiring everybody to get a car, obtain a transit pass, or, again, pay a fee to offset the costs of future transportation.

These would be constitutional because everybody really does need to eat—and everybody, or almost everybody, has to get places from time to time. Of course, such laws would also be really stupid. Congress can, presumably, find better ways of preventing hunger and providing adequate transportation. But, as Justice Elana Kagan noted at her confirmation hearings, the constitution doesn't prohibit stupid laws—only ones that violate liberty.

Again, all of this may be beside the point. The government won't need to give a new limiting principle if the justices think the mandate falls within existing constraints on the commerce and "necessary and proper" clauses—or if they believe it's a legitimate exercise of the government's authority to tax. But if the justices are still craving a new limiting principle, because they are honestly torn about what to do or simply need an excuse for upholding the law, one is there for the taking.

Whether they think it's enough, or whether they really care, is obviously another matter entirely.

Note: I'll be filing dispatches about the case all week. My colleague Jeff Rosen—who is, unlike me, a real legal expert—will be weighing in, too. But if you want to read more, I'd highly recommend the ACA litigation blog. Also, I updated this item to clarify what the government was saying in its briefs.