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## A Radical Ruling from the Bench

Jonathan Cohn August 15, 2011 | 12:51 pm

No, I haven't finished analyzing last week's decision, by the **11th Circuit Court of Appeals**, invalidating the Affordable Care Act's individual mandate. But plenty of other legal observers have.

Conservatives are elated about the opinion, not least because, as **Ilya Somin** writes at the *Volokh Conspiracy*, "The decision further undermines claims that the individual mandate suit is a sure loser that goes against a supposed expert consensus that the mandate is clearly constitutional." The Cato Institute's **Ilya Shapiro** agrees:

One of the striking things about today's ruling is that, for the first time in one of these cases, a Democrat-appointed judge, Frank Hull, has ruled against the government. Just as the Sixth Circuit Judge Jeffrey Sutton made waves by being the first Republican appointee to rule in the government's favor, today's 300-page ruling shows that the constitutional issues raised by the healthcare reform—and especially the individual mandate—are complex, serious, and non-ideological.

I fear they are correct about the perception this decision will create: The validation of a Democratic judicial appointee, **even a conservative one made to appease Republicans in the Senate**, makes striking down the law seem less radical. But that doesn't mean striking down the law wouldn't be **radical**. And **Andrew Cohen**, of the *Atlantic*, helps to explain why.

Cohen notes that Joel Dubina and Frank Hull, the two judges in the majority, actually reject the supposed distinction between activity and inactivity. That's the foundation of the case against the law, since, according to its critics, the Commerce Clause of the constitution does not give Congress the authority to regulate inactivity. But Dubina and Hull proceed to reject the mandate because, they say, it would "direct and compel an individual's spending in order to further its overarching regulatory goal." The problem, Cohen writes, is that

when you put it that way *any* regulation is suspect which takes money (and the choice to save or invest) away from Americans. ... directly and indirectly, the government all the time forces individuals to "redirect" their "funds" for "other purposes." This is true on a federal level and at the state level. If anything, then, the 11th Circuit may have just struck down the Affordable Care Act with a less viable legal theory than the one with which it was presented by U.S. District Judge Roger Vinson. And that's saying something. ...

I don't know how all the votes will fall when all these Affordable Care Act cases come to the Supreme Court. It's not hard to believe, for example, that Justice Anthony Kennedy will determine the matter with a "fifth" vote. But even if he does, and votes against the new law, I can't imagine him drafting a majority opinion that tracks the language

of Friday's ruling. If he writes it, it will instead be closer to the center of the debate and certainly more moderate in its tone.

Over at Balkinization, [Andrew Koppelman](#), the Northwestern law professor [familiar to TNR readers](#), thinks Dubina and Hull mischaracterize the mandate, in ways that would weaken its constitutional case:

The joint opinion of Judges Dubina and Hull responds by declaring that it is none of Congress's business if people go without insurance and transfer their health care costs to others: "An individual's uninsured status in no way interferes with Congress's ability to regulate insurance companies." (slip op. 164) This presumes that Congress is indifferent to the consequences of its regulatory scheme: it just likes to regulate insurance companies. Congress's declared aim in the statute, however, is to reduce the number of the uninsured. Without the mandate, the law's protection of people with preexisting conditions would mean that healthy people could wait until they get sick to buy insurance. Because insurance pools rely on cross-subsidization of sick people by healthy participants, that would bankrupt the entire health insurance system. The individual mandate charges those people for at least some of the costs they impose on their fellow citizens. The joint opinion presupposes that these catastrophic effects are irrelevant to the regulatory scheme.

Elsewhere at Balkinization, [Mark Hall](#), a law professor at Wake Forest, traces the contradictions of the decision, step by step.

More soon...

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