



## SCOTUS should side with 11th Circuit

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“The judiciary is called upon not only to interpret laws,” the 11th Circuit Court of Appeals ruled, “but at times to enforce the Constitution’s limits on the power of Congress, even when that power is used to address an intractable problem.”

With those words, the Atlanta-based court reviewed the government’s unprecedented assertion of federal power to compel people to buy health insurance — and found it constitutionally wanting.

In the most important lawsuit challenging President Barack Obama’s health care legislation — brought by 26 states and the National Federation of Independent Business — the court struck down the individual health insurance mandate as going beyond Congress’s power to regulate interstate commerce.

By doing so, the court — including, for the first time, a judge appointed by a Democratic president — reaffirmed that the Constitution places principled limits on federal power. It rejected the government’s argument for a situational limit on Congress’s regulatory authority based on the idea that health care is “unique,” and somehow different both from other products that everyone consumes (like food, clothing and shelter) and other types of insurance against unpredictable events (like death, disability and natural disasters).

The government’s position failed to sway the court because it did not suggest a constitutional interpretation of the commerce power. Indeed, factors like the inevitability and unpredictability of treatment, the requirement that hospitals treat people with emergency medical conditions and the high cost of advanced care “speak more to the complexity of the problem being regulated than the regulated decision’s relation to interstate commerce. They are not limiting principles, but limiting circumstances.”

Limits based on legal principles rather than “unique” facts are important, because without them government loses its legitimacy. If Congress can do whatever it thinks is wise, whenever it thinks a problem is “big enough,” constitutional checks and balances become a dead letter. We are left with the rule of man, however well-intentioned — not the rule of law.

Even when faced with a serious problem affecting a significant part of the national economy — everybody recognizes that our health care system is in bad shape — Congress cannot just ignore constitutional structure. As James Madison wrote in Federalist 45, the federal government’s powers are “few and defined,” while those remaining with the states are “numerous and indefinite.”

“While these structural limitations are often discussed in terms of federalism,” the 11th Circuit explained, citing a unanimous Supreme Court decision from June, “their ultimate goal is the protection of individual liberty.”

Congress can now do many more things under modern jurisprudence than it could in

Madison's day. But, as the court concluded, "what Congress cannot do under the Commerce Clause is mandate that individuals enter into contracts with private insurance companies for the purchase of an expensive product from the time they are born until the time they die."

Indeed, just because Congress can regulate the health insurance industry does not mean it can also require people to buy that industry's products.

So what does this mean going forward? We now have conflicting rulings from two federal courts of appeal — with one more court expected to rule any time now and a fourth to hear yet another case next month. This situation is plainly untenable — calling out for final resolution by the Supreme Court.

After so many briefs and arguments, and so many detailed opinions by so many thoughtful judges — Friday's ruling consumed more than 300 pages — there is nothing gained by further delay. It's now time for the government to take this case directly to the Supreme Court.

The administration may not want to ask for such review quite yet, because the high court would then likely rule in June 2012 — in the heat of the presidential race. But it should put resolving one of the biggest constitutional issues in the nation's history ahead of base political maneuvering.

In these difficult financial times, the country simply can't afford any more uncertainty over the fate of this economically damaging piece of legislation.

The 11th Circuit's decision shows that the constitutional issues raised by the health care law — and especially the individual mandate — are complex and serious. It also heartens those who believe that there are some things beyond the government's reach — and that the judiciary cannot abdicate its duty to hold Congress's feet to the constitutional fire.

Let's hope that the Supreme Court confirms that belief. And soon.

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