On June 29, 2011, the United States Court of Appeals for the Sixth Circuit upheld the individual mandate against a challenge brought by the Thomas More Law Center. Writing in concurrence with the panel was Judge Jeffrey Sutton, a noted conservative jurist and one-time clerk of Justice Antonin Scalia.

The decision was the first from a court of appeals, and the fact that Judge Sutton voted to uphold the individual mandate was seen by many as an evidence for how some of the conservative Supreme Court justices might rule.

Although it was looking increasingly likely that the Supreme Court would take the case, it was not yet a sure thing. If the challengers to the law could get just one circuit court to strike down all or part of the act, then a date with the Supreme Court was all but guaranteed. A circuit split—that is, a disagreement between two or more circuit courts about the constitutionality of a federal statute—is one of the best ways to get the Supreme Court to take a case.

That circuit split came in August when the Eleventh Circuit Court of Appeals, hearing the government’s appeal from Judge Vinson’s district court decision, upheld Judge Vinson and struck down the individual mandate as unconstitutional. The decision was coauthored by Judges Joel Dubina and Frank Hull. Hull, a President Bill Clinton appointee, was the first Democrat appointee to strike down the mandate.

Perhaps the most interesting part of the Eleventh Circuit’s opinion is how parts of it resemble some conversations posted at the Volokh Conspiracy and collected in this volume. Take this passage, for example:

It is striking by comparison how very different this economic mandate is from the draft. First, it does not represent the solution to a duty owed to the government as a condition of citizenship. Moreover, unlike the draft, it has no basis in the history of our nation, much less a long and storied one. Until Congress passed the Act, the power to regulate commerce had not included the authority to issue an economic mandate. Now Congress seeks not only the power to reach a new class of “activity”—financial decisions whose effects are felt some time in the future—but it wishes to do so through a heretofore untested power: an economic mandate.¹

While there is no evidence that influence came directly from the Volokh Conspiracy blog, Randy Barnett, Ilya Somin, and David B. Kopel all contributed to A Conspiracy Against Obamacare © Randy E. Barnett, Jonathan H. Adler, David E. Bernstein, Orin S. Kerr, David B. Kopel, Ilya Somin, and Trevor Burrus 2013
briefs that were submitted to the Eleventh Circuit. Their writings for the court were of course influenced by the conversations on the blog.

The case had already gone further than many had imagined, and now a date with the Supreme Court was essentially inevitable.

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Today’s Sixth Circuit Decision Upholding the Individual Mandate

*Ilya Somin*

*June 29, 2011*

Today’s 2–1 Sixth Circuit Court of Appeals decision² upholding the constitutionality of the individual mandate is undeniably a setback for mandate opponents. Up until now, judges’ votes in the mandate cases had split along ideological and partisan lines. Every conservative Republican judge had voted to strike it down, while every liberal Democrat voted to uphold it. Even in the Sixth Circuit, two of the three judges fit the same pattern (Judge Boyce Martin and Judge James Graham in dissent). But Judge Jeffrey Sutton, a well-known conservative judge has now become the first exception to it. Like Martin, he voted to uphold the mandate as an exercise of Congress’s powers under the Commerce Clause.

At the same time, Martin and Sutton’s opinions highlight a central weakness of the pro-mandate position in even more blatant form than previous opinions upholding the mandate. Their reasoning has extremely radical implications. Unlike previous decisions upholding the mandate, which ruled that failing to purchase health insurance is “economic activity,” Martin and Sutton conclude that Congress has the power to regulate inactivity as well, so long as the inactivity has some kind of “substantial” economic effect.

The Martin-Sutton approach thereby opens the floodgates to an unlimited congressional power to impose mandates of any kind. Any failure to purchase a product has some substantial economic effect, at least when aggregated with similar failures by other people. This is certainly true of failures to purchase broccoli, failures to purchase cars, failure to buy a movie ticket, and so on. Even failure to engage in non-commercial activity nearly always has such effects. For example, a mandate requiring people to eat healthy food and exercise every day can be justified on the grounds that it would increase economic productivity and also increase the demand for healthy food products and gym memberships. The district court rulings in favor of the mandate all embraced some version of the “health care is special” argument (or at least the argument that not purchasing health insurance is “economic activity”) in order to avoid this slippery slope problem (albeit, unsuccessfully, in my view). By contrast, Martin and Sutton take us all the way to the bottom of the hill in one fell swoop.

Obviously, Congress will not enact every conceivable harmful mandate that the Martin-Sutton reasoning would authorize. But the risk of abuse is far from purely theoretical, since many interest groups can and will lobby for laws that compel people to purchase their products.