Statement of Senator Orrin G. Hatch
Before the Senate Committee on the Judiciary
At the hearing titled "The Constitutionality of the Affordable Care Act"
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The debate over the constitutionality of Obamacare's individual insurance mandate is a debate over what the Constitution really is. Is it the supreme law of the land that Congress must obey, or is it a tool that lets Congress do whatever it wants? In only the second paragraph of his opinion striking down the mandate on January 31, Judge Roger Vinson wrote that the case "is not really about out health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government." Indeed it does. This fight is between those who start with what the Constitution allows Congress to do and those who start with what Congress wants to do.

Liberty requires limits on government. Those limits come from a written Constitution that divides government power between the states and the federal government, separates federal power into three branches, and enumerates the powers of Congress. Every piece of legislation Congress passes must stand on one of those enumerated powers. The question is whether any enumerated powers justify Obamacare's requirement that individuals purchase health insurance or pay a fine.

It should take more than a political agenda and an active imagination properly to interpret the Constitution. Those enumerated powers do not mean whatever Congress wants them to mean. If they did, then Congress could define its own powers. That would be the death of liberty. The only enumerated power seriously suggested as the foundation of the individual insurance mandate is the power to regulate interstate commerce. As broad as this power has become, it does not allow Congress to require individuals to purchase a particular good or service.

Judge Vinson concluded that the interstate "commerce" the Constitution allows Congress to regulate is, at its core, activity. That's what it meant to America's founders, the ones who put the commerce clause in the Constitution. That's even what it meant to the Supreme Court when, in the wake of the Depression, it dramatically expanded Congress' power to cover activity that substantially affects commerce. The choice to engage in that activity triggers Congress' regulation of that activity. No activity, no regulation.

The individual insurance mandate regulates decisions, not activities. Rather than regulate activity in which individuals choose to engage, Obamacare requires individual to engage in that activity. When defending the mandate in court, the Obama administration argues that the decisions actually are activities, that even the decision not to buy something is the same as literally buying it. In their Constitution, Congress apparently has the power to regulate anything that could possibly affect commerce or the economy. Guess what, that would allow Congress to regulate – that is, to control – absolutely everything.

That is not what the real Constitution says, or even what it has ever been interpreted to mean. In 1995, the Supreme Court refused to interpret the commerce clause so broadly that it would be difficult "to posit any activity by an individual that Congress is without power to regulate." The Court was saying that there must be at least some activities that Congress may not regulate in the name of interstate commerce. How, then, can the Constitution be stretched so far to allow Congress to make economic decisions for all of us? As Judge Vinson put it, each of us makes thousands of what could be called economic decisions. "There will be no stopping point if that should be deemed the equivalent of activity for Commerce Clause purposes."

The Constitution is the stopping point. Our liberty depends on it.