

Health Care Reform That Is Unconstitutional

A second federal judge has declared ObamaCare, the so-called Patient Protection and Affordable Care Act, to be unconstitutional. The issue is destined for the Supreme Court.

The issue appears hopelessly arcane to most Americans. But we all have much at stake in maintaining the Constitution's limits on federal power.

No one in Washington pays much attention to the nation's fundamental law. The institutional provisions, such as the number of Senators, usually are respected. Even so, many legislators are pushing legislation to grant the District of Columbia congressional representation, contrary to the Constitution's explicit language. The Bill of Rights also retains some vigor, despite continuing erosion of protections against improper searches and seizures, for instance, because it is seen by many as the only limit on government power.

Yet an equally important safeguard for institutional liberty was supposed to be vesting the national government with only limited, enumerated powers. States have what is called a general "police power." The federal government does not. Congress is to legislate where it has explicit authority and the president's chief powers are administering laws approved by the legislature and conducting wars approved by the legislature.

However, Article 1, Section 8, which specifies the authority of Congress, is largely a dead letter. Presidents constantly seek to expand executive authority. President George W. Bush essentially argued that the chief executive was an elective dictator, who in war could ignore Constitution and law. Congress' responsibility was simply to rubber-stamp the president's decisions.

Even worse, Congress treats its own powers, at least those which have not been appropriated by the executive, as ubiquitous. There is no issue upon which members do not legislate. When asked about the constitutionality of the health care bill, House Speaker Nancy Pelosi (D-CA), responded: "Are you serious?" Then-Majority Whip James Clyburn (D-SC) admitted that "There's nothing in the Constitution that says that the federal government has anything to do with most of the stuff we do."

Thus, advocates of the bill dismissed constitutional challenges as frivolous. But no longer.

The issues are complex and a number of creative arguments have been advanced. However, the simplest point is that even under the most expansive reading of the powers listed under Article 1, Section 8, the federal government has no authority to mandate that individuals purchase health insurance. Washington can't force someone who hasn't chosen to enter the marketplace to buy a private good.

The Commerce Clause, added largely to allow the federal government to break down state barriers to commerce, by its own terms reaches only "interstate" commerce. In a dubious case during the New Deal, the Supreme Court ruled that Washington could limit a farmer's wheat production for his own use, because in aggregate personal production would affect the interstate market. More recently the Court applied a similar rationale to federal regulation of marijuana produced legally under state law for medical purposes.

The Obama administration contends that failure to buy insurance is an "economic decision" that affects the interstate market for health care. But the earlier cases applied to people who participated in the regulated activity, only within a state. It is hard to imagine the Court allowing the federal government to require that we all become farmers or start growing pot, the equivalent of the insurance mandate.

In fact, if failing to act becomes an "economic decision" warranting federal regulation, as argued by the administration, there is virtually nothing beyond Uncle Sam's authority. We could be told to purchase GM autos to rescue the auto industry and Lehman Brothers securities to save the investment banking house, and to eat vegetables to reduce health care costs. No government exercising such powers could be characterized as "limited."

In fact, in one of the few recent cases to deny Congress a power under the Commerce Clause, overturning a prohibition on gun possession near schools, the Supreme Court explicitly refused to grant the national government "police powers." Federal lawyers piled "inference upon inference" to make a connection to interstate commerce, but the justices refused to go there.

Thus, federal District Court Judge Roger Vinson read these precedents against ObamaCare. If he validated the insurance mandate, “we would have a Constitution in name only.”

The Obama administration alternatively contended that the requirement was a tax. However, even the two judges who have upheld the legislation decided the other way. Congress said the fine for not purchasing insurance was a penalty, failed to count it among the bill’s revenue provisions, established less than normal enforcement provisions, and insisted that the objective was to force everyone to buy insurance rather than pay the fine. The judges said they would take Congress at its word.

Judge Vinson was especially sharp: “Congress should not be permitted to secure and cast politically difficult votes on controversial legislation by deliberately calling something one thing, after which the defenders of that legislation take an ‘Alice-in-Wonderland’ tack and argue in court that Congress really meant something else entirely, thereby circumventing the safeguard that exists to keep their broad power in check.”

ObamaCare supporters made a third argument: the mandate is absolutely necessary for the legislation to be effective. The Constitution empowers Congress to act when something is “necessary and proper.” However, the latter criterion requires that the means be within the legislature’s authority. This clause gives Congress discretion, but does not expand its reach.

Still, the Obama administration contended that the new system would fail disastrously without the mandate, creating an incentive for people to game the legislation, putting the insurance industry at risk. In essence, legislators’ bad judgment in passing a bad law could be remedied only by violating the Constitution.

Judge Vinson rejected this argument: “Such an application of the Necessary and Property Clause would have the perverse effect of enabling Congress to pass ill-conceived, or economically disruptive statutes, secure in the knowledge that the more dysfunctional the results of the statute are, the most essential or ‘necessary’ the statutory fix would be. Under such a rationale, the more harm the statute does, the more power Congress could assume for itself.”

The Vinson decision set off extraordinary wailing by politicians and activists who never imagined any limit to congressional power. *The Washington Post's* Ezra Klein responded with a threat: if the courts toss out the mandate, then Congress might respond by simply expanding Medicare to most everyone. This would “be a big step towards squeezing out private insurers,” he warned. Maybe, though this Congress appears far less enthusiastic about expanding government irrespective of consequences.

In any case, this would be a bad approach, given the problems of Medicare—massive fraud, declining acceptance by doctors and other providers, huge unfunded liabilities. But expanded Medicare would not necessarily be worse than ObamaCare, which turns private insurance companies into quasi-public utilities, financial organizations banned from underwriting and forced to provide the government’s preferred benefit package. Ironically, last year’s legislation was written to benefit insurance companies, whose product the government now requires individuals to purchase. It is far more important to oppose expansion of government control over health care than to worry about what form that control might take.

There is an even more important issue, however. The constitutional fight over ObamaCare reaches far beyond medicine. At issue is protection of individual liberty. Are there any limits left to Washington’s reach?

Obviously, the Constitution has been changed since it was drafted in Philadelphia more than two centuries ago. However, while the post-Civil War amendments expanded federal power over states, the former did not generally increase federal authority over individuals.

Judicial interpretation has broken down many of the traditional barriers to national power, but turning the Supreme Court into a continuous constitutional convention is a dangerous usurpation of the amendment power placed in the people’s hands by the Constitution. The Constitution does not always yield clear answers, but constitutional interpretation should seek to effect the general expectations of those who agreed to the nation’s basic law. Otherwise the Constitution becomes irrelevant surplusage.

Without an effective Constitution, the legislative and executive branches are allowed to do whatever they feel like, subject only to review by judges, who decide based on whatever they feel like. Such a process has nothing to do with *constitutional interpretation*.

Advocates of judge-made law complain that the original Constitution is outdated, but if so, the document can and should be formally amended. Anyway, the threat of government to individual liberty is greater today than at the time the Constitution was drafted. The people must hold the government to the law.

All Americans have a stake in the ongoing constitutional litigation over ObamaCare. First is saving the health care system from Uncle Sam's not so tender mercies. Second is enforcing one of the important limits on national power. If the justices instead rule that the Constitution no longer means what it says, then no Americans' liberty will be secure.