REAL CLEAR POLITICS

Return to the Article

December 16, 2010

An Unhealthy Mandate

By Steve Chapman

During her confirmation hearings last summer, Supreme Court nominee Elena Kagan was asked if the Constitution empowers the federal government to pass a law requiring Americans to eat fruits and vegetables.

What did she say in response? She said, "It sounds like a dumb law." She said the commerce clause of the Constitution "has been interpreted broadly." She said the courts have a duty to ensure that "Congress doesn't go further than the Constitution says it can go, doesn't violate individual rights, and also doesn't act outside its enumerated authorities."

This is what she did not say: "No."

This week, however, a federal judge said it. The case wasn't about fruits and vegetables; it was about the federal health insurance law passed this year. But his conclusion was exactly the one Kagan evaded: There are some things the federal government may not make us do. It may not make us purchase medical insurance -- as the new law does -- and by implication, it may not make us eat broccoli.

When the individual mandate to buy coverage was challenged in court, the Obama administration argued, essentially, three things: 1) The Constitution gives the government the authority to regulate interstate commerce, 2) everything people do and don't do affects interstate commerce, and therefore 3) the government may regulate everything and everyone.

This interpretation of the Constitution is at odds with the view of James Madison, who said the powers of the federal government are "few and defined." But even by the elastic standards that apply today, the administration's view is a reach.

As Georgetown University law professor Randy Barnett said last month at the national convention of the conservative Federalist Society, the individual mandate "is an unprecedented act of federal power over individual freedom. And by 'unprecedented,' I mean simply: It's never been done before."

In the past, Washington has been permitted to regulate commerce that crosses state lines. It's been permitted to forbid a man to take a young woman from one state to another for the purpose of sexual intercourse. It's been permitted to bar a farmer from growing more wheat than the federal government allowed, even if he wasn't going to sell it.

But, noted U.S. District Judge Henry Hudson, "Neither the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause power to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market."

The courts have approved extensive, incessant, burdensome regulation of economic activity. But inactivity? That's a different story.

If you don't want to pay the minimum wage, you can refuse to start a business. If you don't want to buy car insurance, you can take the bus. But if you don't want to buy health insurance, your only options are to leave the country or depart this vale of tears.

The question in this case is not just whether this part of the health care reform will stand. It's whether there are any limits on the powers of the federal government in matters economic.

If it can force people to buy insurance, it can presumably force them to buy cars (to help General Motors) or homes (to alleviate the housing bust) or fruits and vegetables (to improve health and reduce medical outlays) or pet rocks (just because).

The mandate had a simple purpose. Under the new law, insurance companies were required to take all comers, without denying coverage or charging high rates for pre-existing conditions. Those rules, however, would encourage customers to avoid buying policies until they were sick. So Congress and the president agreed to make everyone get insurance.

This makes some sense, and if the mandate were eliminated, the whole scheme would be in jeopardy. Still, there are other ways to address the problem.

One is to grant more generous subsidies to consumers to induce participation. Another is to pay insurance companies to compensate them for their new and unprofitable policyholders.

Princeton sociologist Paul Starr has proposed that anyone who declines to get coverage be barred for five years from guaranteed access. That would be a strong incentive for even young, healthy people to opt in right away, rather than risk a financially catastrophic illness.

A government with unlimited power, of course, would not have to trouble itself with accommodating citizens who prefer to make their own choices. But that is not the kind of government we have. Not yet, anyway.

schapman@tribune.com