Legal Battle Over Health Care 'Reform' Quickens

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By **Ilya Shapiro**

Last week, a federal judge in Michigan dismissed part of a lawsuit challenging the constitutionality of this year's health care reform. Specifically, the Clinton-appointed Judge George Steeh ruled that Congress's power to regulate interstate commerce—the Commerce Clause—provided the constitutional warrant for the requirement that everybody buy health insurance (the "individual mandate").

And yet, even as Judge Steeh explained that Supreme Court precedent swept into federal regulatory purvey local activities that have a "substantial effect on interstate commerce," he admitted that the Supreme Court "has never needed to address the activity/inactivity distinction advanced by plaintiffs because in every Commerce Clause case presented thus far, there has been some sort of activity."

Because the individual mandate concerns something other than activity—what Judge Steeh characterizes as an "economic decision"—the case "arguably presents an issue of first impression."

Indeed, never before has the federal government tried to force every man, woman, and child to buy a particular good or service. Never before has it said that people face a civil penalty for declining to participate in the marketplace.

And never before have courts had to consider such a breathtaking assertion of raw power under the Commerce Clause—not even during the height of the New Deal, when the Supreme Court ratified Congress's regulation of what people grew in their backyards in the infamous case of *Wickard v. Filburn*.

As the Court has reiterated, Congress cannot regulate non-economic activities just because those activities have some indirect effect on the economy.

To be sure, there are situations in which the government may force individuals to engage in business. Most notably, it can require hotels and restaurants to serve all patrons. But nobody has to operate a hotel or restaurant, or purchase lodging or food—and individuals are not commercial enterprises.

This precedent may arguably support requiring insurers to cover people without regard to preexisting conditions, but they do not support forcing individuals to buy insurance.

Looking at it another way, there's a difference between regulating or even bailing out the auto industry and making everyone buy a Chevy. As Georgetown law professor Randy Barnett has noted, even during World War II, the federal government did not mandate that individual citizens purchase war bonds.

As for the oft-invoked car insurance analogy, being required to buy insurance *if you choose to drive* is different than having to buy it *because you are alive*. And it is states that impose

car-insurance requirements, under the general police powers—which the federal government lacks as a matter of constitutional first principle.

Now, given that there is no precedent recognizing such federal power, one would think that a district court judge would simply follow existing doctrine and leave to the Supreme Court the decision on whether and how to expand that doctrine.

Judge Steeh instead invented the novel holding that Congress can regulate people's "economic decisions," as well as do anything that is part of a "broader regulatory scheme."

If the Supreme Court eventually upholds Judge Steeh's reasoning—scant as it is compared to the hundreds of pages of briefs filed by leading advocates and scholars in lawsuits across the country—nobody would ever be able to plausibly claim that the Constitution limits federal power.

Finding the individual mandate constitutional would be the first interpretation of the Commerce Clause to permit mandates commanding people to engage in economic activity. The federal government would then have wide authority to require that Americans engage in activities ranging from eating spinach and joining gyms (in the health care realm) to buying GM cars. Or, under Judge Steeh's "economic decisions" theory, Congress could tell people what to study in school or what job to take.

That could be the unfortunate state of the law in a few years—once the Supreme Court weighs in—but it is not up to district courts to extend constitutional doctrine on their own.

Moreover, disappointing as the Michigan ruling is to those of us who believe that the government lacks the power to commandeer people for economic purposes, it is but one of many legal decisions we can expect before the Supreme Court ultimate resolves this important issue.

Indeed, this summer we saw a ruling by a federal judge in Virginia allowing that state's legal challenge to the individual mandate and other aspects of the health care legislation to proceed. And last month, a Florida judge hinted that he was inclined to rule in a similar way in a lawsuit brought by 20 other states.

Other serious cases continue in Arizona, Missouri, Ohio, the District of Columbia, and elsewhere.

In short, the Michigan ruling is a blip on the radar screen. Nobody should either cheer or cry.

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