Judge Vinson rules federal health control unconstitutional

David Kopel • January 31, 2011 3:53 pm

The decision from the Northern District of Florida is available here. In brief:

1. The 26 states lose on the argument that the mandate for drastically increased state spending under Medicaid is unconstitutional. State participation in Medicaid always has been voluntary, and remains so. The states did not argue that the revisions to the Medicaid grant program violate the 4-factor test in S.D. v. Dole as to when conditional federal grants to states are permissible.

2. The plaintiffs win on the individual mandate. The individuals plaintiffs, and the National Federation of Independent Businesses have standing to challenge the mandate. So do Utah and Idaho, at the least, because of state statutes forbidding health insurance mandates. According to original meaning, "commerce" was trade. Citation to Randy Barnett. Even the modern precedents require "activity" as a predicate for commerce clause regulation. Discussion of the pre-Revolution boycott of tea, in protest against the Stamp Act; surely the new Constitution did not empower Congress to mandate the consumption of tea. The decision not to purchase health insurance is not an "activity." Congress cannot use the commerce power to mandate the purchase of broccoli or General Moters automobiles. (Contra Chemerinsky's cited argument that Congress can mandate automobile purchases.) The health insurance mark does not possess unique characteristics to justify a mandate. Characterizing the refusal to purchase health insurance as a regulatable economic activity would violate "the non-infinity principle" (a Kopel/Reynolds term, not the court's) that the commerce clause does not give Congress the power over almost everything.

If it has the power to compelan otherwise passive individual into a commercial transaction with a third party merely by asserting — as was done in the Act — that compelling the actualtransaction is itself "commercial and economic in nature, and substantially affectsinterstate commerce" [see Act § 1501(a)(1)], it is not hyperbolizing to suggest thatCongress could do almost anything it wanted. It is difficult to imagine that a nationwhich began, at least in part, as the result of opposition to a British mandate givingthe East India Company a monopoly and imposing a nominal tax on all tea sold inAmerica would have set out to create a government with the power to force people to buy tea in the first place. If Congress can penalize a passive individual for failingto engage in commerce, the enumeration of powers in the Constitution would havebeen in vain for it would be "difficult to perceive any limitation on federal power" [Lopez, supra, 514 U.S. at 564], and we would have a Constitution in name only. Surely this is not what the Founding Fathers could have intended. See id. at 592 (quoting Hamilton at the New York Convention that there would be just cause to reject the Constitution if it would allow the federal government to "penetrate therecesses of domestic life, and control, in all respects, the private conduct ofindividuals") (Thomas, J., concurring).

3. Necessary & proper does not save the mandate. The mandate fails at least 2 of the 5 factors from Comstock. Necessary and proper is not an independent source of power, but rather an authorization of additional means for ends which are themselves among the enumerated powers.

Here, the “essential attributes” of the Commerce Clause limitations on the federalgovernment’s power would definitely be compromised by this assertion of federalpower via the Necessary and Proper Clause. If Congress is allowed to define the scope of its power merely by arguing that a provision is “necessary” to avoid thenegative consequences that will potentially flow from its own statutory enactments, the Necessary and Proper Clause runs the risk of ceasing to be the“perfectly harmless” part of the Constitution that Hamilton assured us it was, andmoves that much closer to becoming the “hideous monster [with] devouring jaws”that he assured us it was not.

4. The mandate is not severable from the health control act. Defendants themselves have argued forcefully that the mandate is absolutely essential to the entire regulatory scheme. There is no severability clause. The mandate is tightly integrated into the entire act.

5. No injunction. Declaratory relief is sufficient, especially since there is a presumption that the federal government will comply with judicial decisions.

6. The entire act is declared void. According to Cato’s Ilya Shapiro, this means that the federal government (presuming that it will obey the law) must immediately stop enforcing the entire health control law. Of course the 11th Circuit might grant a stay, and Judge Vinson might also do so, but as of right now, there is no stay.