Jurist

Health care ruling was 'constitutionally corrupt'

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Ilya Shapiro [Senior Fellow in Constitutional Studies, Cato Institute] & Trevor Burrus [Legal Associate, Cato Institute]: Last week, the US Court of Appeals for the Sixth Circuit became the first appellate court to rule on the constitutionality of the Patient Protection and Affordable Care Act. Upholding the district court's dismissal of the challenge, the court ruled 2-1 that the individual mandate is a valid exercise of Congress's power to regulate interstate commerce. Perhaps most surprising was Judge Jeffrey Sutton's concurrence upholding the mandate. A former clerk to Justice Antonin Scalia who was appointed to the bench by President George W. Bush, Sutton is considered one of the leading conservative jurists in the country. Many are hailing Sutton's opinion as an admirable example of non-partisan judicial reasoning because of this reputation.

In reality, Judge Sutton's opinion is an unfortunate blend of factual supposition and judicial abdication. While seeming to call out the Supreme Court for failing to articulate a significant and meaningful limit on federal power, Sutton simultaneously engages in a type of reasoning that would eviscerate any such limit. Sutton makes two crucial errors in what is otherwise a masterfully crafted opinion: he consistently reads the "substantial effects" doctrine (the outermost bound of federal power in this area) as solely requiring economic calculation, and he defends a hypothetical statute rather than the one Congress actually passed.

First, Sutton observes that all types of paying or not paying for health insurance—"self-insuring," assuming the risk, purchasing insurance when sick, not purchasing insurance at all, etc.—would have a substantial effect on the economy if aggregated. He thus concludes that every one of these decisions, and non-decisions, is subject to federal regulatory authority. This reasoning, which the government has pushed throughout the various health care lawsuits, cannot exist in a system of limited and enumerated federal powers. That is because the Commerce Clause, even under modern jurisprudence, does not base Congress's power on the object of the regulation's having surpassed some economic threshold.

As Judge James Graham observes in dissent, "Without question, forcing all individuals to purchase a product that not everyone would otherwise purchase will have an affect on commerce. But Congress cannot be tolerated to justify its exercise

of power by creating its own substantial effects. In determining whether the substantial effects test is satisfied, the focus must be on the existing economic activity Congress seeks to regulate, not on the impact that the regulation would have." In other words, the limits on Congress's power must be principled rather than circumstantial. They derive from an analysis of the kind of activity or status being regulated, not just the effects that activity or status may have on the economy. No one opposing the individual mandate on constitutional grounds has ever argued that the failure to purchase health care, in the aggregate, does not have substantial effects on the economy. Yet that is the straw-man that Judge Sutton knocks down.

Second, Sutton defends a hypothetical statute rather than the one Congress actually passed. The government has been using this bit of smoke and mirrors too, but again you should pay attention to the man behind the curtain. Sutton argues that the individual mandate only regulates the method and time at which health care is purchased. No part of health care reform, however, addresses that question. The law does not ask people to purchase insurance once they need care or seek to shift the cost of care onto others. Instead, the mandate compels individuals to engage in commerce regardless of whether they receive health care services. Moreover, it is insurance that is the object of regulation, not the provision of health care. As Judge Graham points out, "the mandate does not regulate the commercial activity of obtaining health care. It regulates the status of being uninsured."

Sutton's analysis obfuscates the unprecedented constitutional significance of the statute by characterizing it as just another insurance regulation. He treats differences in kind (e.g., not purchasing insurance or entering into commerce) as differences in degree (e.g. it is not whether you will purchase health care, but when). Making this subtle shift facilitates the constitutionally corrupt analysis of the substantial effects doctrine described above.

When Sutton dismisses the activity/inactivity distinction proposed by challengers to the individual mandate, he similarly addresses a hypothetical statute. He asks, for example, whether it is "inactivity" to require a person already holding insurance to maintain that coverage. Again, that is not the regulation at issue in this litigation. Because some individuals in the health care market may be subject to regulation by some narrower law does not affect the question of whether it is constitutional for others to be regulated by a broader law. To hold otherwise is to imperil all facial challenges to broadly sweeping laws.

Perhaps most upsetting, however, is how Judge Sutton's analysis purports to be following precedent while admitting that the individual mandate is unprecedented

and that no Supreme Court decision speaks directly to its constitutionality. Sutton curiously feels obliged to "respect the language and direction of the Court's precedents" rather than enforce a principled limit on federal power that already exists in the case law.

The best that can be said about Sutton's deciding vote is that it essentially asks the Supreme Court put up or shut up: "the Court either should stop saying that a meaningful limit on Congress's commerce powers exists or prove that it is so." Unfortunately, Sutton himself had the ball on this question and an open field in front of him, yet decided to punt.

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