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REFLECTIONS ON 6TH CIRCUIT ORAL ARGUMENTS ON THE INDIIDUAL MANDATE

Yesterday Cincinnati welcomed the most advanced dispute on Obamacare thus far, as the 6th Circuit Court of Appeals entertained arguments on the constitutionality of the individual mandate. A three-judge panel consisting of judges Sutton, Martin, and Graham peppered the litigants on some routine and not-so-routine issues surrounding the case.

Some initial notes: this challenge is rightfully looked upon as one of the least serious of the challenges to the individual mandate. The reason? This lawsuit was filed by a Michigan-based Christian conservative legal center just one day after the passage of Obamacare, making it the first lawsuit filed, it was filed in a Detroit-based federal district court, naming "Barack Hussein Obama" as the initial Defendant, and features a lead plaintiff who swears opposition to purchasing health insurance, and then purchased health insurance during the pendency of the case. The specter of a fundraising campaign seems to surround the litigation.

Nevertheless, both counsel performed admirably, and the panel actively probed in the essential of the matter, while making some surprising observations. The argument, well-known by now, is that Congress cannot use its Commerce Clause power, even when bolstered by the Necessary and Proper Clause, to regulate inactivity and compel activity, i.e the purchase of minimum essential coverage, as prescribed by government.

The following is a synopsis of key issues broached during the oral arguments:

1. **Shooting oneself in the foot on the facts? Thomas More does not do service to the other mandate challenges or its own by parading forth a plaintiff that has acquired health insurance during the pendency of the litigation. In fact, this seems to play right into the Government's argument that Congress may regulate health care inactivity because it is a form of activity, i.e. we all must participate in health care markets at some point, it's simply a matter of how we do so.**

2. Is *saving money* economic activity? Judge Martin asked the shrewdest question favoring the mandate: "Isn't abstention from buying health insurance 'activity' because it results in an accession of wealth, i.e. the activity of saving money?" However, counsel for Thomas More responded with an equally adept response: saving money is not a clearly realized accession of wealth that constitutes a taxable event under the Internal Revenue Code. Indeed, if saving money were activity, and thus a taxable event, Congress could tax the act of not buying, or the difference between a good bargain and a bad.

3. Is health care just different? Judge Sutton, expressed skepticism on whether the activity-inactivity distinction works with health care: "I'm just not sure this activity-inactivity thing works with insurance. . . I just can't figure out how it works with insurance . . . the odds are high that some of us will have 25k plus in health care expenses at some point. . . you don't eat 25k in food. . ." Counsel responded that "Congress, if they can regulate health insurance, could regulate anything that's *intrastate* and *non-activity*. . . this turns the Constitution on its head." Treating health care different would seem to be a slippery slope: many parts of life can be viewed as necessary, and can be expensive. The absence of a logical end to this argument should doom it.

4. Does the distinction between taxing power and Commerce Clause power matter? Judge Sutton also noted that arithmetically, perhaps refusing to buy health insurance and paying the tax penalty for such a refusal was no different than compulsion, through Congressional taxing power, which all concede is constitutional, to pay for health insurance. ("Just pay the penalty, and you're not forced to get insurance; a credit-penalty system is equivalent. . .") Judge Graham openly wondered why Congress didn't simply use its taxing power, to which counsel responded that it was politically impractical, and "they're stuck with it now, because they chose an unconstitutional method." This certainly seems correct: the Courts have left citizens with no constitutional means of checking congressional taxing power other than political accountability; when the President of the United States is insisting "this isn't a tax," how are citizens to stop their representatives' use of the taxing power?

5. Solving, *or creating,* a free rider problem? The Government argued "People without insurance are costing everyone's premiums to rise by $1,000 per family. These people are not 'inactive in the market'. . . The real question is can Congress regulate in a market in which it knows that everyone is participating. . . as a fact of our mortality, people are going to need health care. . . [as opposed to food and transportation markets], Providers can't opt out of it." Judge Sutton responded "it's hard to swallow that you created a free-rider problem with part of this bill, and are now using the problem that you created to justify is necessity, and thus, its constitutionality." Judge Sutton is onto something here, though it may ultimately be more of a policy argument than a legal one: Congress requires hospitals to treat all-comers, irrespective of ability to

pay, and now, through Obamacare, requires insurers to insure those with preexisting conditions, creating the previously inexistent risk that some may wait until some conditions materialize to purchase health insurance.

6. Are states still "laboratories for expirementation?" Judge Martin asked why state effots in regulating health care weren't permitted to run their course. Counsel responded that this is a national problem, and further, when states provide guaranteed insurance for those with preexisting conditions without a mandate, the system collapses, while "the only state that worked was Massachusetts, because it used an individual mandate;" however, those with preexisting conditions would flock to such states in the absence of a mandate and national regulation. The view that Massachusetts has "worked" is a dubious policy conclusion: health care costs have grown faster there than anywhere in the nation since initiation of the mandate in 2006. Moreover, the government's argument seems to be that no function is reserved to the states, as Congress can simply designate anything a "national problem."

7. Can some already doing *something* be compelled to do *anything* under the Commerce Clause? Judge Sutton adeptly asked the government's counsel "can Congress force Wal-Mart to offer insurance to the general public?" Counsel sidestepped the issue. However, this is a powerful argument going forward: Can it be the case that the Commerce Clause permits Congress to order Wal-Mart to sell health insurance, against its will, the notion being that it can go out of business if it disapproves of having to do so? An affirmative answer would seem to be the government's strongest argument, because it blurs the lines between activity and inactivity by implicating the *type of activity and inactivity*. Judge Martin pile on this point: "isn't this similar to the requirement that hospitals must take patients; can't refuse them?" This latter argument is easier to handle - - hospitals are already serving patients, and the regulation cited simply implicates the manner in which it is done. Justice Sutton further noted the distinction between this matter and *Heart of Atlanta Motel* (upholding Commerce Clause authority to force southern restaurants to serve African-American patrons), noting [in that case] "they're in that business already, and they can avoid the mandate there by exiting that business; here, there's no opportunity to exit." The Government's response seemed particularly disingenuous: "if we're going to play that 'game' . . . the minimum essential coverage requirement only kicks in if you earn a certain amount of income [so you can simply earn poverty-level income and avoid the mandate]." Judge Sutton seemed astounded: "so the solution is 'make a little less money?'" Thomas More seized on this in rebuttal: "you can't force someone to open a hotel, become a farmer, run a restaurant, etc."

8. Is there *any limit* on federal power? Judge Graham indicated "I'm having difficulty seeing how there is any limit to the power, as you define it. . . How can the Courts begin to restrain Congress?" The Government was hasty to agree, noting the

Lopez and *Morrison,* but those cases only, should provide limits on Commerce Clause power, i.e. the regulated subject must be "economic in nature." However, this seems to raise a gap in the government's argument: both cases reference "economic activity," rather than just anything related to economics, since, under the Court's broad interpretation of "economics" in *Gonzales v. Racih,* anything could be economic in nature. Thus the issue is still this: (1) is abstaining from buying a private produce inactivity; and (2) if so, may Congress regulate inactivity to bolster its regulatory scheme?

9. Are the best arguments yet to come? Judge Sutton exclaimed "Isn't it strange that . . . I haven't heard anyone come up with an argument as to why the Bill of Rights or 14th Amendment prohibits [this]. . . instead we're looking for something that is a grant of power, as a limit on power." Indeed, this case raised, but did not pursue on appeal, the argument that the Fifth Amendment, through substantive due process, protects a fundamental right to determine one's own direction in health care, just as the United States Supreme Court has affirmed a liberty interest in refusing medical treatment, and choosing the direction of one's education. To this end, Sutton: what about the large number of people that are not free riders, and are responsible people that can afford to pay for health insurance. . . it seems to me that's the most compelling case. . ." The Governent simply responded "*if that person exists*, these plaintiffs aren't them." Sutton added "how about all of the 20-30 year olds in the country who are relatively healthy and would prefer to not buy health insurance? The more extravagant you make the class, the easier it is for you to defend this 'it's too big to fail' argument. Judge Sutton seemed, thought the arguments, to be advocating for an as-applied challenge to the mandate, a feature seemingly not evident in this litigation.

Ultimately, issues 7 and 8 will govern this matter: the government is hard-pressed to identify a "limiting principle," i.e. anything that Congress may *not* do under the Commerce Clause if it may compel the purchase of a private product. The Court appears to view the activity-inactivity distinction separately, and seems poised to tackle whether abstention from purchasing health insurance is a type of activity, rather than inactivity.

Ultimately, the most telling moment of oral arguments may have been Judge Sutton's exclamation "it's just not proper."

The Supreme Court is clear that an exercise of federal authority is not "proper" under the Necessary and Proper Clause where it "results in a commerce clause power that "knows no limit," or converts it to a "general police power," requires the Court to ignore "the significance of federalism in the whole structure of the Constitution," "effectively obliterates[s] the distinction between what is national and what is local and create[s] a completely centralized government, regulates health, a field "where states historically have been sovereign," undermines our "dual system of government," which "secures to citizens the liberties that derive from the diffusion of sovereign power," or converts the central government from one of limited and

defined powers to one of unlimited powers, and our republic to one of centralized government, thus contravening "the spirit of the constitution," and rendering states "political non-entities."

The burden now falls upon the 6th Circuit to put these words into action.