

Opinion: The absurdity of high court's health care ruling

JULY 28, 2014, 3:34 PM LAST UPDATED: MONDAY, JULY 28, 2014, 3:34 PM
BY FRANK ASKIN
THE RECORD

Frank Askin is distinguished professor of law and director of the Constitutional Rights Clinic at Rutgers School of Law-Newark. His memoir, "Defending Rights: A Life in Law and Politics," is distributed by Prometheus Books.

SIX Federal Judges ruled recently on the legality of subsidies being provided for low-income subscribers under Obamacare. The two with solid Republican credentials found the program illegal.

With all due respect to these members of the esteemed federal bench, I have to question whether they really went to law school — or, if they did, whether they ever attended a class in legislation. Because if they did, they should have been aware of two fundamental principles of legislative interpretation: 1) courts should defer to the obvious intent of the legislature and 2) they should also defer to the interpretation of legislation provided by the administrative agency charged with its enforcement.

The statute provides for health exchanges in the states to run the program, and provides a backup for federal exchanges to administer them when the states decline to participate. The statute includes a provision that allows the Internal Revenue Service to provide tax subsidies to those enrolled in the state exchanges.

It is clear that Congress never expected 36 states (mostly those controlled by Republican governors or legislatures) to opt out. It should be equally clear that Congress never intended to deny subsidies to those citizens living in opt-out states.

But the two Republican judges sitting on the U.S. Court of Appeals for the District of Columbia blindly adopted the bizarre argument of the law's challengers that under a literal reading of the statute only state enrollees were entitled to the subsidies.

On the same day, another federal appeals court sitting in Virginia unanimously ruled the other way. In that decision, Judge Andre Davis ridiculed the argument adopted by the two majority judges in D.C. He wrote that “[Plaintiffs want to] deny to millions of Americans desperately needed health insurance through a tortured, nonsensical construction of a federal statute whose manifest purpose ... could not be more clear.”

But that was precisely the “tortured, nonsensical” position taken by the D.C. duo to the dismay of their colleague, the senior judge on the D.C. Circuit, Harry Edwards.

Deference to interpretation

Then comes the Chevron doctrine. Chevron is a long-standing doctrine established by the Supreme Court that it was the obligation of courts when interpreting statutes to give deference to the interpretation of the statute by the administrative agency entrusted by Congress with its implementation.

In this instance, it was the Internal Revenue Service that had primary responsibility for implementing the health care subsidies. But the D.C. majority ignored the IRS interpretation.

To be fair to the D.C. majority, there is another doctrine that they chose to follow. It is called “textualism,” and its primary exponent is Justice Anton Scalia, the legal guru of conservatism. And this principle seems to say implement the clear terms of the statute no matter how absurd — or “nonsensical” — the result.

Selective application

But as Scalia’s critics like to point out, he generally invokes that principle only when it brings about a result he is ideologically comfortable with.

Obviously, these cases will have to be reconciled by the Supreme Court. And, fortunately for the millions of persons entitled to health care subsidies in the 36 states with federal health exchanges, Scalia’s “textualism” does not have a lot of adherents, even among his conservative colleagues on the high court.