

Is the Health Care Reform Law Constitutional?

Attorneys General Challenge the Insurance Coverage Mandate for U.S. Citizens

Article I, section 8 of the U.S. Constitution, also known as the Commerce Clause, specifically grants Congress the power to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” The power enumerated by the Commerce Clause is at the heart of two lawsuits filed by the attorneys general of 13 states, including Pennsylvania Attorney General Tom Corbett, seeking to overturn the Patient Protection and Affordable Care Act signed by President Obama on March 23. The legal issues raised by the complaints include whether the federal government has the constitutional power to mandate that nearly all U.S. citizens and legal residents maintain health care coverage, or be required to pay tax penalties for non-compliance.

Under the new law, almost all citizens and legal residents will be required to have qualifying health insurance coverage or face a phased-in tax penalty beginning at \$95 in 2014 and rising to \$695 for individuals in 2016, or \$285 in 2014 and rising to \$2,085 in 2016 for families. After 2016, penalties increase annually based on a cost-of-living adjustment.

The attorneys general argue that the insurance coverage mandate is an unprecedented encroachment on the liberty of their state citizens and, if allowed to stand, essentially grants Congress unfettered authority to regulate all activities. They assert the law is not an authorized exercise of power under the Commerce Clause because it is directed at an individual citizens’ choice not to engage in certain activity. Such inactivity, the complaints allege, by its very nature cannot be deemed to be

in commerce or to have any effect on commerce, interstate or otherwise. The complaints further assert that the health care reform package unlawfully compels the purchase of goods and services in violation of the states’ sovereignty.

Proponents of the new law argue that Congress can regulate economic activity, even if that “activity” results from inactivity, if it has a substantial effect



on interstate commerce. They further contend that the new law is permissible under Congress’ constitutional power to tax in order to provide for the “general welfare” of the country.

It is well-settled that Congress’ commerce authority includes the power to regulate those intrastate activities that substantially affect interstate commerce. The U.S. Supreme Court has upheld a wide variety of congressional acts for this reason. Examples include the regulation of debt restructuring agreements secured by goods assembled from out-of-state parts and raw materials, intrastate coal mining, intrastate extortionate credit

transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and the production and consumption of homegrown wheat.

Prior to the Health Care Reform Law’s passage, the Congressional Research Service was asked to weigh in on the insurance mandate’s constitutionality, and opined in part that “whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use the Clause to require an individual to purchase a good or a service.”

Although the precise constitutional issue raised by the law may be novel, the Commerce Clause has been closely examined by the U.S. Supreme Court several times in recent history with mixed outcomes.

In *United States v. Lopez*, 514 U.S. 549 (1995), Chief Justice Rehnquist wrote the majority-of-five opinion holding that the Gun-Free School Zones Act, which made

it a federal offense for any individual to knowingly possess a firearm in a school zone, exceeded Congress’ Commerce Clause authority because possession of a gun in a local school zone is in no sense an economic activity that substantially affects interstate commerce.

Similarly, in *United States v. Morrison*, 529 U.S. 598 (2000), the same slim majority concluded that the Violence Against Women Act, which provided civil remedies for gender-motivated crimes of violence, was not within Congress’ authority under the Commerce Clause because such crimes do not substantially affect interstate commerce.

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Most recently, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court confirmed Congress' authority to criminalize the manufacture, distribution or possession of marijuana as it applies to intrastate growers and users of marijuana for medical purposes. The court reasoned that the law falls squarely within the Commerce Clause because production of a commodity meant for home consumption has a substantial effect on supply and demand in the national market for that commodity.

Supporters of the Health Care Reform law argue that unlike the criminal acts of possessing a gun in a school zone or battering a woman, purchasing health insurance is an

inherently commercial activity, and the lack of purchasing health insurance has economic consequences to national health care systems, including Medicaid, and insurance companies that transact business across state lines. In contrast, critics of the new law challenge the application of those cases that deal with the economic impact of commodity production, being clearly distinguishable from an individual's refusal to purchase health insurance.

The composition of the Supreme Court has changed, with only three each of the Lopez and Morrison majority and minority remaining. The court's three newest additions, Justices Roberts, Alito and Sotomayer, have yet to cast their votes on this Commerce Clause debate.

Notably, however, Justices Roberts and Alito were part of the majority that recently overturned legislation backed by the Obama administration seeking to limit corporate and union spending for political campaigns.

While legal analysts are split on the merits of the attorneys general's legal actions, most agree the issue will ultimately be decided by an unpredictable Supreme Court. ■

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in the future. Traditionally, the board has used its rulemaking power very sparingly, and only to issue narrow rules. Liebman has promised to be far more aggressive. The NLRB could use its rulemaking power to make it easier for unions to organize workers by:

1. Limiting the period for election campaigns.
2. Requiring employers to turn over employee names, addresses and phone numbers to a union earlier in the union organizing campaign.

3. Requiring equal access to both workers and the workplace for unions during union organizing campaigns.

4. Requiring employers to post notices in the workplace that inform employees of their rights under the NLRA. The posting is already required for federal contractors pursuant to President Obama's Executive Order.

The common thread among all of these expected changes in the law is

to remove barriers to unions and their organizing efforts. In short, significant union-friendly changes are on the horizon, despite the failure of EFCA in Congress. ■

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in which the horse carriage industry is threatening animal and public welfare, to pass a law that would ban horse-drawn carriages in Philadelphia. The law should further require that horses be officially retired and transferred to authorized sanctuaries where they can try to heal from their injuries and live the rest of their lives engaging in

natural horse behaviors.

Councilman DiCicco's contact information is Room 332, City Hall, Philadelphia, (215) 686-3458, (215) 686-3459, Frank.DiCicco@phila.gov. For more information on Philadelphia activists' efforts to ban horse-drawn carriages, please e-mail banhdcp Philly@peaceadvocacynetwork.org. ■

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