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CONSTITUTIONALLY TERMINAL: MANDATING HEALTH INSURANCE EXCEEDS CONGRESSIONAL AUTHORITY

by

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Over the past months some members of Congress have released a bewildering array of proposals for national health care reform, one of which, HB 3962, recently passed the House of Representatives. Those proposals have run the gamut of “public options,” state and/or private health insurance purchasing “exchanges,” new bureaucracies to oversee health care delivery, and mandates that individuals purchase health insurance or be subject to fines or even imprisonment.

Such proposals, if enacted, will spawn an equally vast number of constitutional challenges – and by all means they should. One of those proposals – the mandate that individuals purchase health insurance or be subject to fines or even imprisonment – is particularly onerous. Some members of Congress have gone so far as to inform the Congressional Budget Office that they expect the Internal Revenue Service to collect so many fines – or, what they refer to as “excise taxes” – as a result of the mandate that it is, in reality, a deficit-reducing mechanism.

Congress has never, in its two hundred twenty years of existence, enacted such a mandate. When asked to justify it constitutionally, some members of Congress point to Article I, Section 8 of the Constitution which, among other things, grants to Congress the power to tax, borrow and spend money for the common defense and general welfare, raise and support armies, declare war, establish post offices and “regulate commerce.... among the several States.”

But, Alexander Hamilton, arguing in favor of the ratification of the Constitution, wrote that the object of the Constitution was “to regulate the general political interests of the nation,” not “every sphere of personal and private action.”¹ James Madison too argued that “the general powers [of Congress] are limited and that [Congress’] jurisdiction extends to certain enumerated objects only....” In that sense,

¹*Federalist* No. 84.

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Madison wrote, the federal “government cannot be deemed a national one;” rather, with respect to the *extent* of its powers, it is a federal one.² But Thomas Jefferson put it best. Article I, Section 8, was not “a distinct and independent power to do any act they please, which might be for the good of the Union.” If it were, it would render “all preceding and subsequent enumerations of powers completely worthless,” as it would, in effect, “reduce the whole [Constitution] to a single phrase” of empowering Congress to do whatever it pleased.³

The powers of Congress are limited by multiple constitutional forces. First, Congress’ powers were “enumerated” in Article I, Section 8 of the Constitution. Second, those powers not expressly given to Congress by the States (which drafted and ratified the Constitution), were reserved by the States implicitly in Article I, Section 8 and explicitly by the Tenth Amendment. The Supreme Court has very recently underscored the critical importance of that relationship – tension, if you will – between Congress and the States in our constitutional order.⁴ Third, certain enumerated and fundamental rights were expressly retained by the people in the first eight amendments to the Constitution and, beyond that, those enumerated rights were not meant to disparage other rights that were retained by the people in the Ninth Amendment. An individual’s “privacy” has been held by the Supreme Court to be one of those otherwise retained rights.⁵ As well, individuals have been protected against legislation criminalizing the use of contraceptive devices,⁶ criminalizing abortions,⁷ mandating sterilization,⁸ and proscribing attendance at private schools.⁹ Although all of those cases involved States seeking to infringe upon individual “liberties,” the liberties defined by the Court are equally immune from interference by Congress because they were deemed “basic” by the Court. It was this delicate balance that made the *extent* of powers of Congress *federal*, not *national*. Its legislation could not undermine the reserved powers of the States, nor could it invade the rights retained by the people.

Chief Justice John Marshall asserted that when Congress exercises its powers, the ends must be “legitimate” and “within the scope of the Constitution,” and, it must exercise means which are “appropriate.”¹⁰ Legislation that is arbitrary and unreasonable will be struck down as contrary to Congress’ enumerated powers under Article I, Section 8 of the Constitution. Likewise, legislation will be struck down if it invades powers retained by the States or rights retained by the people.

²*Federalist* No. 39.

³Thomas Jefferson, “Opinion on the Constitutionality of the Bill for Establishing a National Bank,” Feb. 15, 1791.

⁴*New York v. United States*, 505 U.S. 144 (1992), where the Supreme Court prevented Congress from requiring a state legislature to take care of the disposal of low-level radioactive wastes or take title to those wastes and be responsible for their safe disposal.

⁵*Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁶*Id.*

⁷*Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

⁸*Skinner v. Oklahoma, ex rel Williamson*, 316 U.S. 535 (1942).

⁹*Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

¹⁰*McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 4 L.Ed 579 (1819).

These mandates do nothing more than force individuals to buy a product from a private vendor. What is particularly egregious about a mandate is that it forces the individual to purchase something he or she may not be able to afford or does not want for a host of personal reasons. It puts the individual at the economic mercy of those whose products must be purchased. Arguably, individual purchases of health insurance may affect interstate commerce in some negligible way, but mandates are nothing more than directives that the individual spend his or her own money on some product or service whether they want it or not, or can even afford it. Nothing is actually being regulated. Indeed, how does forcing everyone to purchase health insurance address the stated problem of providing insurance to the so-called uninsured? How does it serve to control the costs of health care?¹¹ A mandate also makes health insurance the *only* means by which health care services may be purchased, an arbitrary and unreasonable requirement in and of itself, as many individuals would rather use their own resources to pay for such services, and an ever-increasing numbers of providers prefer that form of exchange. A mandate to purchase health insurance is patently arbitrary and unreasonable.

The Constitution by its very terms grants Congress the power to “regulate commerce among the several states.” Requiring individuals to purchase health insurance most certainly does not “regulate” any commercial activity at all. For a similar reason the Supreme Court struck down the Gun Free School Zones Act that made it a crime to simply possess a gun near a school.¹² Purchasing a gun may have a negligible impact on commerce, but possessing it near a school is nothing more than non-commercial activity. For Congress to legislate at such a level invaded the States’ reserved “police powers,” the Court reasoned. Similarly, the purchase of insurance by an individual may have a negligible impact upon interstate commerce, but a mandate is nothing more than a requirement that the individual purchase health insurance because he or she happens to live in the United States, an unconstitutional exercise of power under Article I, Section 8.

Plainly, Congress does not enjoy unlimited power; it cannot exercise powers that render the States meaningless. Furthermore, it cannot exercise powers that turn individuals into “subjects.” We fought a revolution to rid ourselves of that. If Congress were able to force individuals to purchase health insurance, would it not have the power to force individuals to spend their money on other things that, arguably, affect interstate commerce? How about forcing individuals to purchase only American-made automobiles or automobiles made only by specific U.S. auto makers? What meaningful rights would the individual have left if Congress dictated how he or she spent all of his or her after-tax earnings? The individual would have no rights left at all, and the States would be rendered impotent.

The courts would strike down any mandate Congress enacts that directs individuals to purchase health insurance or be subject to fines or imprisonment. Such a mandate is an unconstitutional exercise of congressional power under Article I, Section 8, and an invasion of those express and implied powers retained by the States and those rights otherwise retained by the people. To do otherwise would allow Congress to undo more than two hundred and twenty years of Constitutional jurisprudence.

¹¹In the mid-1970’s there existed a crisis in the availability of medical malpractice insurance. Some states, like Kentucky, enacted legislation forcing physicians to purchase medical malpractice insurance as a condition of licensure, believe it or not. The Supreme Court of Kentucky struck the act down as unconstitutional because it was “arbitrary and unreasonable.” Opined the Court, how could the legislature force physicians to purchase insurance that was unavailable? *McGuffey v. Hall*, 557 S.W.2d 401 (1977).

¹²*United States v. Lopez*, 514 U.S. 549 (1995).