STATE OF FLORIDA

BILL McCOLLUM
ATTORNEY GENERAL

January 19, 2010

The Honorable Harry Reid
Majority Leader
United States Senate
S-221, The Capitol
Washington, DC 20510

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
H-232, The Capitol
Washington, DC 20515

The Honorable Mitch McConnell
Minority Leader
United States Senate
S-231, The Capitol
Washington, DC 20510

The Honorable John A. Boehner
Minority Leader
United States House of Representatives
H-204, The Capitol
Washington, DC 20515

Dear Majority Leader Reid, Speaker Pelosi, and Minority Leaders McConnell and Boehner:

Please find my analysis of the constitutionality of the individual mandate provisions being considered in the federal health care legislation attached. I call your attention to these legal concerns so that constitutional issues may be remedied before a final bill is negotiated.

I will continue to work with my Attorney General colleagues in order to pursue appropriate legal action should these provisions be in a bill that becomes law.

Sincerely,

Bill McCollum

Attachment

STATE OF FLORIDA

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ATTORNEY GENERAL

January 19, 2010

Constitutional Analysis of the Individual Mandate in the Federal Health Care Legislation
Florida Attorney General Bill McCollum

This legal analysis is of the constitutionality of the individual mandate provisions contained in the health care legislation as passed by the U.S. Senate (H.R. 3590 as amended) and the U.S. House (H.R. 3962). Congress's unprecedented mandate on every citizen to purchase health insurance coverage or to face a penalty raises serious constitutional concerns. The U.S. Constitution enshrines a form of limited government to protect the rights of the states under a system of federalism and to protect the individual freedom of our citizens. The health care individual mandate provisions as currently drafted violate constitutional principles and lack constitutional authority for Congress to enact.

I. The U.S. Constitution grants no authority to Congress to compel citizens to purchase health insurance when those citizens choose not to enter the health care market.

Never before has Congress compelled Americans, under threat of government fines or taxes, to purchase an unwanted product or service simply as a condition of existing in this country (a "living tax"). Congress does not possess the constitutional authority to enact such a requirement. The U.S. Supreme Court long ago recognized that the "powers of the legislature are defined and limited; and those limits may not be mistaken, or forgotten." *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803) (Marshall, C.J.). "Every law enacted by Congress must be based in one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000).

A. Congress lacks Commerce Clause authority to enact the individual mandate.

The Senate bill (H.R. 3590 as amended, Sec. 1501) lodges federal authority for the individual mandate within interstate commerce. Congress may "regulate" insurance-related interstate commerce and those engaging in such commerce pursuant to the U.S. Constitution's Commerce Clause (Article I, section 8), yet compelling Americans with threat of sanctions to

affirmatively enter commerce and buy insurance is altogether different.[1] The Commerce Clause gives no authority for Congress to transform a citizen's individual choice to be *inactive* in the marketplace into a compulsion to purchase apparently unwanted insurance or be penalized.

Indeed, the U.S. Supreme Court has twice in the last 15 years invalidated laws that attempted to regulate non-economic activity under the Commerce Clause, and it is unlikely the Court would permit Congress to reach even further to regulate inactivity. Congress may only regulate under its commerce power (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce (persons or things in commerce), and (3) activities that substantially affect interstate commerce. *United States v. Lopez,* 514 U.S. 549, 558-59 (1995). In *Lopez,* the Court invalidated a law making it a crime to possess guns near a school because the commerce power could not be stretched to regulate gun possession, which "is in no sense" activity that might substantially affect interstate commerce. *Id.* at 567. Similarly, in *Morrison,* the Court invalidated a law that provided civil remedies for victims of gender-motivated crimes, because such crimes "are not, in any sense of the phrase, economic activity" that may be subject to Commerce Clause regulation. 529 U.S. at 613.

Here, as in *Lopez* and *Morrison,* Congress would be regulating and penalizing not only non-economic activity, but inactivity itself. A citizen's choice *not* to buy health insurance cannot rationally be construed as economic activity, or even "activity," to subject that inactivity to regulation under the Commerce Clause. While Congress might prefer that all citizens enter the marketplace and purchase health insurance coverage, an individual's choice not to do so simply may not be regulated under the enumerated powers of Congress.[2]

A number of constitutional scholars have analyzed the individual mandate and reached the same conclusion. In addition, Congress's own non-partisan Congressional Research Service raised these concerns months ago, stating that "[d]espite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance." Jennifer Staman & Cynthia Brougher, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis,* Cong. Research Serv. Report, July 24, 2009, at 3; *see also* Robert Hartman & Paul van de Water, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance,* Cong. Budget Office Mem., August 1994 ("A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The

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[1] The Senate bill requires that individuals and families without "qualifying" health coverage pay a "penalty" with their tax return of $750 per adult and $375 per child to be phased in beginning in 2014.

[2] Proponents of the individual mandate cite the altogether different scenarios raised by *Gonzalez v. Raich,* 545 U.S. 1, 25-26 (2005) and *Wickard v. Filburn,* 317 U.S. 111 (1942), as validating Congress's Commerce Clause power here. In those cases, the Court approved restrictions on cultivation of marijuana and wheat, respectively, for personal use deeming the act of cultivating to be economic activity. The Court in *Raich,* for example, concluded that a person's cultivation of marijuana affected broader established and lucrative interstate markets for the commodity, and therefore was a "quintessentially economic" activity subject to Congress's regulation. *Raich,* 545 U.S. at 25. Thus, the individuals in *Raich* and *Wickard* undertook both "economic" activity and "activity" itself, whereas the individual mandate attempts to regulate a non-purchase and to transform that inactivity into a commercial act that Congress can lawfully regulate.

government has never required people to buy any good or service as a condition of lawful residence in the United States").

Finally, expansion of the current understanding of the Commerce Clause to include the unprecedented power to regulate and penalize private decisions *not* to engage in commerce would leave no private sphere of individual decision-making beyond the reach of federal powers. This result would make meaningless the Tenth Amendment, which reserves powers to the states and people, and it would turn the Commerce Clause into a limitless, rather than a limited, source of federal power over the choices of every citizen.

B. The individual mandate does not comport with Congress' Taxing Power.

Beyond Commerce Clause concerns, the individual mandate, whether levied as a tax or as a tax penalty, is a capitation or direct tax that is not apportioned evenly among the states as is constitutionally required.[3] In contrast to indirect taxes on the manufacture, sale, or use of a commodity, license, or property which Congress can levy without apportionment restrictions,[4] the individual mandate levies a fixed per person tax directly on uninsured citizens unrelated to any taxable event or activity. Indeed, this tax applies to a citizen's *inactivity*. Because it applies "without regard to property, profession, or any other circumstances" (*see Hylton v. United States,* 3 U.S. (3 Dall.) 171, 175 (1796)), it is a direct, capitation tax that must be apportioned by the population of each state. *Bromley v. McCaughn*, 280 U.S. 124, 136 (1929) (direct taxes are "forbidden" if not apportioned). Because the individual mandate fails to provide for proper apportionment, it is a constitutionally impermissible tax.

Moreover, the individual mandate wields Congress's taxing powers in an unconstitutional manner for the purpose of penalizing in order to require the purchase of government-approved health insurance. Congress may not compel action by passing laws "so coercive as to pass the point at which pressure turns into compulsion" in areas it cannot otherwise regulate. *South*

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[3] The House bill, H.R. 3962 Sec. 501, amends the IRS code to levy a 2.5% tax on individuals' adjusted gross income in a taxable year (capped at the cost of a national average health insurance premium) if individuals or families lack "acceptable coverage."

Article I, section 2 provides that "direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers. . . ." Article I, Section 9 provides that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

Taxes on income are the only direct taxes exempted from the apportionment requirement per the Sixteenth Amendment. While the House Bill proposes to use income to calculate tax amounts owed for purposes of the individual mandate, the Sixteenth Amendment does not validate it because the tax is triggered not by the existence of income, but on the basis of whether one has acceptable health coverage. *See Eisner v. Macomber*, 252 U.S. 189, 206 (1920) ("this [Sixteenth] amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions ... that require an apportionment according to population for direct taxes. ... This limitation ... is not to be overridden by Congress or disregarded by the courts.").

[4] *See, e.g., Helvering v. Davis*, 301 U.S. 619, 645 (1937) & *Steward Machine Co. v. Davis*, 301 U.S. 548, 583 (1937) (holding that the Social Security Act imposes an excise tax on employers).

Dakota v. Dole, 483 U.S. 203, 211 (1987) (citing *Steward Machine Co.*, 301 U.S. at 590). In *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 39 (1922), for instance, the Court invalidated a child labor tax law that used a tax penalty "to coerce people of a state to act as Congress wishes them to act." In *United States v. Butler*, 297 U.S. 1 (1936), the Court struck down a tax on processors of farm products that was coupled with payments to induce farmers not to produce. In upholding a tax on firearms dealers, the Court in *Sozinsky v. United States*, 300 U.S. 506, 513 (1937), found a firearms tax not to be a penalty used as a means of enforcing an "offensive regulation." *See also Steward Machine Co.*, 301 U.S. at 591-93 (finding the Social Security Act not unlawfully coercive)); *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) (construing a labor act not to compel employment agreements or to interfere with employers' "right" to select and discharge employees). In these cases the Court recognized a limit on Congress's use of its taxing powers to compel prescribed behavior.

In this case the individual mandate would likely fail the Court's coercion analysis. The mandate aims to shape and control individual behavior akin to earlier invalidated schemes (1) by conditioning the tax on whether a person fails to take prescribed action that Congress could not otherwise lawfully regulate, and (2) by admitting its goal to compel new premium payments into the private insurance system by "healthy" uninsured persons so that others can benefit from lower prices (similar to the coercive tax/benefit-shifting scheme invalidated in *Butler*). Thus, the individual mandate raises additional constitutional concerns because it uses the taxing power to coerce uninsured Americans into purchasing insurance coverage.

II. State challenges to the constitutionality of the individual mandate.

While affected citizens of every state may pursue judicial relief from the individual mandate provisions, states have standing to sue the federal government to protect their sovereign and quasi-sovereign interests. *Massachusetts v. EPA*, 549 U. S. 497, 520 & n.17 (2007) (noting that Massachusetts' stake in protecting its quasi-sovereign interests "is entitled to special solicitude in our standing analysis"). The decision in *Massachusetts v. EPA* makes clear that only one party in a federal lawsuit needs to demonstrate standing. *Id.* at 518 (citing *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 52, n.2 (2006) ("the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement")). Thus a state would have standing to challenge a tax that violated a provision of the federal constitution that is intended to protect or benefit the states, such as those involving direct taxes and apportionment. Further, states may join in suits brought by individuals who have standing to challenge a mandate to purchase insurance or be subject to a tax or penalty for not doing so.