Alaska State Legislature

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Representative Carl Gatto

Sponsor Statement HB 423

March 29, 2010

For over a year, this nation has been locked in a battle over health care. Roughly 55% of the public, and the entirety of Congressional Republicans, opposed the passage of so-called "health reform" *and* would like to see the recently-passed health care legislation overturned.[1] Opponents of the health care initiative point to the bill's hidden costs, special exemptions for certain states, and the nineteen point gap between those who strongly support the plan and the larger group that strongly opposes it. Accordingly, I am proposing the *Alaska Health Freedom Act*. The bill is modeled after Idaho HB 391 (and a similar package of legislation in Virginia), which became the first statute enacted by a state legislature to directly challenge the provisions of federal health care "reform."

The ***Alaska Health Freedom Act*** would:

- Argue that the power to regulate or require a person's health care delivery choices is not found in the U.S. Constitution and is therefore reserved to the people and the States by the 9th and 10th Amendments, respectively

- Establish that every Alaskan "has the right and is free to choose or decline any mode of securing health care services."

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[1] Rasmussen, Scott. "Health Care Reform." *Politics*. Rasmussen Reports, 21 Mar. 2010. <http://www.rasmussenreports.com/public_content/politics/current_events/healthcare/september_2009/health_care_reform>

Rasmussen, Scott. "55% Favor Repeal of Health Care Bill." *Politics*. Rasmussen Reports, 05 Mar. 2010. <http://www.rasmussenreports.com/public_content/politics/current_events/healthcare/march_2010/55_favor_repeal_of_health_care_bill>

- Require the Attorney General to actively protect the aforementioned right to choose a mode of health care services

- Bar public employees and officials from enforcing, imposing, implementing, or collecting any penalty for resisting government-run healthcare.

The four main tactics being employed among states that oppose the federal government's health care overreach are[2]:

- **Legislative Discontent Model**: under this plan, states would pass a resolution discouraging the federal government from implementing nationalized medicine; the recent passage of the federal *Patient Protection and Affordable Care Act* makes mere statements of the Alaska Legislature's disapproval fairly moot.

- **Constitutional Amendment Model**: following this model, state legislatures would offer a constitutional amendment to the voters that would enshrine the right of individuals to make their own health care determinations in the state's constitution; the constitutional amendment model, pursued through Alaska HJR 35, has not garnered sufficient support in the legislature, particularly given the time-sensitive nature of this issue.

- **Statutory Model**: in the statutory model, states enact statutes through the regular legislative process that either establish the freedom to make one's own health care decisions as a right or discount the so-called "right of universal healthcare;" these bills also prohibit state officials and agencies from enforcing, collecting, or implementing fees imposed under the new federal health care plan and direct the state's Attorney General to actively defend the provisions of the bill in court

- **Nullification Model:** finally, states following the nullification model to oppose nationalized health care would enact legislation declaring the *Patient Protection and Affordable Care Act* unconstitutional and null and void within the state's jurisdiction.

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[2] "Health Care Freedom Act." *Legislative Tracking*. The Tenth Amendment Center. 29 Mar. 2010. <http://www.tenthamendmentcenter.com/nullification/health-care/>.

The problems with the *legislative discontent model* now that Congress has actually passed health care "reform" are readily apparent. In addition to the issues mentioned above, the *constitutional amendment model* is problematic because of the Supreme Court's general hesitation to hear conflicts between the federal and state constitutions (i.e. gay marriage in MA, CA). The *nullification model* is the most popular alternative, but seems inherently flawed. There is little-to-no chance the federal courts would rule that states can pass legislation with a simple majority and overturn duly enacted federal law. Unlike the nullification model, the *statutory model* challenges the constitutionality of the new federal health care statute without limiting our attorney general to a nullification argument. The Alaska Health Freedom Act does not presume to overturn federal legislation, but instead adopts a distinct public policy for Alaska under the reasoning that the *Patient Protection and Affordable Care Act* misinterprets the Constitution. If universal health care is a "right," shouldn't the freedom to make one's own health care decisions be protected from government intrusion? Also, is there no limit on Congress' power under the Commerce and General Welfare clauses? If Congress can mandate the purchase of any private commodity it so chooses, then what control does an individual really have over their own "pursuit of happiness?"

I hope that this sponsor statement effectively communicates the urgency and practicality of the *Alaska Health Freedom Act*. Questions or concerns can be directed to my staffer, Thomas Reiker, at 465-3163 or Thomas.Reiker@legis.state.ak.us. I thank you for your time and respectfully request a hearing for HB 423.

Sincerely,

Representative Carl Gatto
Alaska House of Representatives
District 13

HOUSE BILL NO. 423

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced: 3/31/10
Referred: Health and Social Services, Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act stating a public policy that allows a person to choose or decline any mode of securing health care services, and providing for enforcement of that policy by the attorney general."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SHORT TITLE. This Act may be known as the Alaska Health Freedom Act.

* **Sec. 2.** AS 44.23.020 is amended by adding a new subsection to read:

(h) The attorney general shall take appropriate action to defend the policy stated in AS 44.99.130.

* **Sec. 3.** AS 44.99 is amended by adding a new section to article 2 to read:

Sec. 44.99.130. Declaration of policy for securing health care services. (a) It is the policy of the State of Alaska, consistent with the right of liberty, that a person has the right and is free to choose or decline any mode of securing health care

services.

(b) The policy stated in (a) of this section may not impair a contract right that provides health care services.

(c) A public official, employee, or agent of the state or its political subdivisions may not impose, collect, enforce, or implement a penalty contrary to the policy stated in (a) of this section.

(d) The attorney general shall expeditiously seek injunctive and other appropriate relief to preserve the rights of the residents of the state and defend the state and its officials, employees, and agents if a law is enacted or a regulation adopted violating the declaration of the policy for securing health care services under this section.

(e) In this section,

(1) "health care services" means a service or treatment, or provision of a product, for the care of a physical or mental disease, illness, injury, defect, or condition, or to maintain or improve physical or mental health;

(2) "mode of securing" means directly purchasing health care services from a health care provider, purchasing insurance covering health care services, participating in an employer or government sponsored health benefit plan, or other means of obtaining health care services;

(3) "penalty" means a fine, tax, salary or wage withholding, surcharge, fee, or other consequence.

GOLDWATER
INSTITUTE

The Health Care Freedom Act:
Questions & Answers

by Clint Bolick, Litigation Director, Goldwater Institute

The Health Care Freedom Act will appear as a proposed constitutional amendment on Arizona's 2010 election ballot, and similar measures are under consideration in more than 30 other states. With the possibility that Congress will enact some sort of national health insurance legislation, questions are being raised about the scope of the Health Care Freedom Act and its effect should a federal bill become law. In the following pages, Clint Bolick, who helped to author the Health Care Freedom Act, answers frequently asked questions.

Q: What is the Health Care Freedom Act?

A: The Health Care Freedom Act is a proposed amendment to the Arizona Constitution that would preserve certain existing rights that individuals have regarding health care. It was initially proposed by two Arizona physicians, Dr. Eric Novack and Dr. Jeffrey Singer, with drafting assistance from the Goldwater Institute. The measure qualified as a voter initiative on the 2008 ballot, and despite a well-financed opposition campaign, it was defeated by less than one-half of 1 percent of the vote. Changes were made to address concerns raised by the opponents, and the Arizona Legislature voted to refer the revised version to the 2010 ballot.

The American Legislative Exchange Council adopted model legislation based on the Arizona measure, and activists and legislators in at least 35 additional states are pursuing constitutional amendments or statutes based on the Arizona model.

Q: What are the key provisions?

A: Although the precise language varies from state to state, the Health Care Freedom Act seeks to protect two essential rights. First, it protects a person's right to participate or not in any health care system, and prohibits the government from imposing fines or penalties on that person's decision. Second, it protects the right of individuals to purchase—and the right of doctors to provide—lawful medical services without government fine or penalty. The Health Care Freedom Act would place these essential rights in the state constitution (or, in some states, it would protect them by statute).

Q: What motivated the Health Care Freedom Act?

A: No one questions the need for serious health care reform. However, the proponents of the Health Care Freedom Act believe that regardless of how such reform is fashioned, either at the state or federal level, the essential rights protected by the Health Care Freedom Act should be preserved. Many advocates of a larger government role in regulating or providing health insurance support a mandate that would compel individuals to join a government-approved health insurance plan, whether or not they can afford it and whether or not the system best fits their needs. In some countries in which government plays a large role in providing health insurance, medical services are rationed and individuals are prevented or discouraged from obtaining otherwise lawful medical services. Supporters of the Health Care Freedom Act have a variety of perspectives on the form that health care reform should take. But they agree that no matter what legislation is passed, it should not take from Americans their precious right to control their own medical affairs.

Q: By what authority can states pass the Health Care Freedom Act?

A: It is well-established that the U.S. Constitution provides a baseline for the protection of individual rights, and that state constitutions may provide additional protections—and all of them do. For instance, some states provide greater protections of freedom of speech or due process rights. Because the Health Care Freedom Act offers greater protection than the federal constitution, states are allowed to enact it.

Q: Does it matter whether the Health Care Freedom Act is passed as a statute or as a constitutional amendment?

A: A state constitution is the organic law of the state, reflecting the most fundamental values shared by the citizens of the state. Moreover, a state constitutional amendment will ensure the state legislature can never infringe upon the protected rights. So a constitutional amendment is preferable, especially to protect against legislative tinkering. However, for purposes of a federalism defense against excessive federal legislation, it should not matter whether the people of the state have acted through their constitution or by statute.

Q: Does the Health Care Freedom Act attempt to "nullify" federal health insurance legislation?

A: Absolutely not. If federal legislation is enacted, individuals would still have the option to participate in federal health insurance programs. This act simply protects a person's right not to participate.

Q: To the extent that the Health Care Freedom Act conflicts with provisions of federal legislation, isn't the state law automatically preempted by the Supremacy Clause of the U.S. Constitution?

A: No. In any clash between state and federal provisions, at least four federal constitutional provisions are relevant. The Supremacy Clause establishes the Constitution as the supreme law of the land and provides that federal laws prevail over conflicting state laws where Congress has the legitimate authority to enact the legislation and where it does not impermissibly tread upon state sovereignty. The federal government will have to demonstrate that its legislation legitimately is derived from congressional authority to regulate interstate commerce. It will also have to show the legislation does not violate the 10th Amendment, which reserves to the states all government power not expressly delegated to the national government; and the 11th Amendment, which protects states from being used as mere instrumentalities of the national government. This constitutional construct is known as federalism.

Q: Are certain provisions of proposed federal health care legislation vulnerable to constitutional challenge even without the Health Care Freedom Act?

A: Yes, in at least three ways. First, to the extent that the legislation purports to regulate transactions that do not directly affect interstate commerce, such as mandating insurance for individuals, Congress may lack authority to do so under the Commerce Clause. Several relatively recent decisions by the U.S. Supreme Court have invalidated federal legislation on this basis. In *U.S. v. Lopez* (1995), the Court struck down federal laws that restricted guns in school zones; and in *U.S. v. Morrison*, it struck down a federal statute involving violence against women. In both cases, the Court found the subject matter of the federal laws did not "substantially affect" interstate commerce, so Congress had no power to regulate it under the circumstances presented.

Second, to the extent the legislation interferes with the individual's right to choose health insurance providers, doctors, or lawful medical services, it may violate the right to medical self-determination recognized under the U.S. Constitution. As the Court declared in *Griswold v. Connecticut* (1965), "We have recognized that the special relationship between patient and physician will often be encompassed within the domain of private life protected by the Due Process Clause." Several of the early abortion cases involved what Justice William O. Douglas, concurring in *Doe v. Bolton* (1973), described as the "right to seek advice on one's health and the right to place reliance on the physician of one's choice." Whether or not one agrees with those abortion rulings, they establish a strong basis for challenging certain federal and state intrusions.

Third, several recent decisions have invalidated federal laws that "commandeer" state governments to do their bidding. In *New York v. United States* (1992), for instance, the Court struck down federal rules requiring states to take ownership of certain radioactive waste and to expose themselves to liability. Speaking for the Court, Justice Sandra Day O'Connor ruled that

"no matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." Tellingly, she added "the Constitution protects us from our own best intentions: It divides power among sovereigns . . . precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." To the extent that federal health insurance legislation forces states to implement its provisions, it could be subject to robust constitutional challenge.

Q: Could the Health Care Freedom Act provide additional protection against federal health insurance legislation that violates protected rights?

A: Yes. Although the federal government usually prevails in federalism clashes, the current U.S. Supreme Court is the most pro-federalism Court in decades. There are no cases precisely on point, but the Court under Chief Justice John Roberts has sided with the states in at least three major recent federalism clashes. In the case most closely on point, *Gonzales v. Oregon* (2006), the Court upheld the state's "right-to-die" law, which was enacted by Oregon voters, over the objections of the U.S. Attorney General, who argued that federal law pre-empted the state law. Applying "the structure and limitations of federalism," the Court observed that states have great latitude in regulating health and safety, including medical standards, which are primarily and historically a matter of local concern. Holding that the attorney general's reading of the federal statute would mark "a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality," the Court interpreted the statute to allow Oregon to protect the rights of its citizens.

Horne v. Flores (2009) considered a measure adopted by Arizona voters to require English immersion as the state's educational policy for students for whom English is a second language. Lower federal courts had imposed an injunction based on a finding that Arizona was failing to comply with federal bilingual education requirements. The Supreme Court held that injunctions affecting "areas of core state responsibility, such as public education," should be lifted as quickly as circumstances warrant. It observed that "federalism concerns are heightened when . . . a federal court decree has the effect of dictating state or local budget priorities." The Court remanded the case to lower courts to reconsider the injunction.

In *Northwest Austin Municipal Utility District No. 1 v. Holder* (2009), the Court examined a challenge to section 5 of the Voting Rights Act, which places certain states and localities in a penalty box, requiring them to obtain "pre-clearance" by the U.S. Department of Justice for any changes that impact voting. The Court was sharply critical of the "federalism costs" imposed upon the covered jurisdictions. It avoided the constitutional question by applying the federal law in a way that allowed the utility district to "bail out" from pre-clearance requirements under section 5.

In each of these cases, the Court sided with states in federalism disputes with the federal government.

Q: Will the Health Care Freedom Act affect future state legislation regarding health insurance?

A: Yes. If it is passed as a constitutional amendment, it would prevent any future legislation that infringes upon the rights protected by the amendment.

Q: Won't this be really expensive for the states to defend in court?

A: The Goldwater Institute has offered to defend the constitutionality of the Health Care Freedom Act at no cost to any state. Because legal challenges would involve purely constitutional issues and would not require expensive trials, to the extent that states become involved in litigation, they should be able to do so within existing Attorney General litigation budgets. Moreover, depending on the details of national health insurance legislation, the cost of federal mandates is likely to far exceed the cost of litigation.

Q: Even if the states and individuals did not prevail in a challenge to intrusive federal health insurance legislation, would there be reasons to support the Health Care Freedom Act?

A: Yes. First, if these rights are given additional protection under state constitutions, they will create an absolute barrier to future state legislation that violates those rights. Moreover, efforts to enact the Health Care Freedom Act send a powerful message to our nation's capitol that people at the grassroots take these rights very seriously and intend to protect them.

Q: Does the Health Care Freedom Act impair drug laws?

A: Absolutely not. It protects the right to purchase or provide "lawful" medical services. It does not limit the power of any government to determine what constitutes lawful medical services.

Q: Does the Health Care Freedom Act affect the issue of abortion?

A: No. Again, to the extent that states may regulate abortion under applicable constitutional doctrine and state or federal law, this measure would not alter that power in any way. The Health Care Freedom Act does, however, prevent the government from forcing individuals into health care systems against their will, and matters of conscience may influence such individual decisions.

Q: Does the Health Care Freedom Act affect Veterans' Administration programs, workers' compensation, Medicare, Medicaid, or state health-care systems?

A: Generally, no. The Health Care Freedom Act leaves intact any rules and regulations that were in place as of January 1, 2009. The only way such programs could be affected is if they are changed in the future in ways that violate the freedom of choice protected by the Health Care Freedom Act.

Q: Will this restrict the government from limiting the choice of providers or imposing other limits for the people who do opt-in to a government health care system?

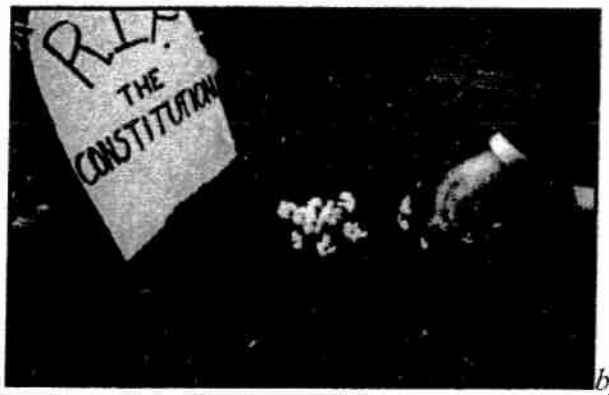
A: No and yes, respectively. If a person voluntarily joins a government health care system, the government may set the terms and conditions, including choice of providers. However, the government cannot prevent a person from purchasing, or a health care professional from providing, lawful medical services outside that system.

Q: Is the Health Care Freedom Act supported financially by insurance companies?

A: No. Many insurance companies support an individual mandate (requiring individuals to buy health insurance or face government fines), which the Health Care Freedom Act would prohibit. An individual mandate guarantees a customer base to the insurance industry. It is present in some legislative proposals as a means to subsidize health insurance for others. If insurance companies play a role in the battle over the Health Care Freedom Act, we expect they will oppose it, possibly with significant resources.

Q: Are there other ways in which freedom advocates can use state constitutions to protect their liberties?

A: Absolutely. State constitutions are full of provisions unknown to the U.S. Constitution that are designed to protect individual liberty and limit the power of government, such as the line-item veto, anti-monopoly provisions, prohibitions against corporate subsidies ("gift clauses"), constraints against earmarks ("special law clauses"), and the like. Citizens and legislatures can amend their state constitutions to add additional protections; and taxpayers can enforce their state constitutional rights in state courts. State constitutions were intended to be the first line of defense in protecting the freedoms of the people. As the power of government grows at every level, we need to use whatever tools are available to us to safeguard our rights. For more on how state constitutions can protect liberty, see the recent Goldwater Institute report, **"50 Bright Stars: An Assessment of Each State's Constitutional Commitment to Limited Government."**



by Brion McClanahan

When Idaho Governor C.L. "Butch" Otter signed HO391 into law on 17 March 2010, the "national" news media circled the wagons and began another assault on State sovereignty. The bill required the Idaho attorney general to sue the federal government over insurance mandates in the event national healthcare legislation passed. The lead AP reporter on the story, John Miller, quoted constitutional "scholar" David Freeman Engstrom of Stanford Law School as stating that the Idaho law would be irrelevant because of the "supremacy clause" of the United States Constitution.

In his words, "That language is clear that federal law is supreme over state law, so it really doesn't matter what a state legislature says on this." Now that Barack Obama has signed healthcare legislation into law, almost a dozen States have filed suit against the federal government, with Idaho in the lead. Battle lines have been drawn. Unfortunately, the question of State sovereignty and the true meaning of the "supremacy clause" may be swallowed up in the ensuing debate.

Engstrom's opinion is held by a majority of constitutional law "scholars," but he is far from correct, and Idaho and the thirty seven other States considering similar legislation have a strong case based on the original intent of the powers of the federal government vis-à-vis the States.

The so-called "supremacy clause" of the Constitution, found in Article 6, states, "This Constitution, and the Laws of the United States *which shall be made in Pursuance thereof;* and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding [emphasis added]."

The key, of course, is the italicized phrase. All laws made in pursuance of the Constitution, or those clearly enumerated in the document, were supreme, State laws notwithstanding. In other words, the federal government was supreme in all items clearly listed in the document.

A quick reading of the Constitution illustrates that national healthcare is not one of the enumerated powers of the federal government, so obviously Engstrom's blanket and simplistic statement is blatantly incorrect, but his distortion of the supremacy clause goes further.

The inclusion of such a clause in the Constitution was first debated at the Constitutional Convention on 31 May 1787. In Edmund Randolph's initial proposal, called the Virginia Plan, the "national" legislature had the ability to "legislate in all cases to which the separate states are incompetent..." and "to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union...." John Rutledge, Pierce Butler, and Charles Pinckney of South Carolina challenged the word "incompetent" and demanded that Randolph define the term. Butler thought that the delegates "were running into an extreme, in taking away the powers of the states..." through such language.

Randolph replied that he "disclaimed any intention *to give indefinite powers to the national legislature*, declaring that he was entirely opposed to such an inroad on the state jurisdictions, and that he did not think any considerations whatever could ever change his determination [emphasis added]." James Madison, the author of the Virginia Plan, was not as forthcoming as to his sentiment. Ultimately, Madison preferred a negative over State law and wished the national legislature to be supreme in call cases. But he was not in the majority.

The Convention again broached a federal negative on State law on 8 June 1787. Charles Pinckney, who presented a draft of a constitution shortly after Randolph offered the Virginia Plan, believed a national negative necessary to the security of the Union, and Madison, using imagery from the solar system and equating the sun to the national government, argued that without a national negative, the States "will continually fly out of their proper orbits, and destroy the order and harmony of the political system." Such symbolism made for a beautiful picture, but it belied reality.

To most of the assembled delegates, the national government was not the center of the political universe and the States retained their sovereignty. Hugh Williamson of North Carolina emphatically stated he "was against giving a power that might restrain the states from regulating their internal police."

Elbridge Gerry of Massachusetts was against an unlimited negative, and Gunning Bedford of Delaware believed a national negative was simply intended "to strip the small states of their equal right of suffrage." He asked, "Will not these large states crush the small ones, whenever they stand in the way of their ambitious or interested views?"

When the negative power was put to a vote, seven States voted against it and three for it, with Delaware divided (and Virginia only in the affirmative by one vote). Roger Sherman of Connecticut summarized the sentiment of the majority when he stated he "thought the cases in which the negative ought to be exercised might be defined." Since the negative did not pass, such a definition was unnecessary.

Thus, the federal government was supreme only in its enumerated powers and it did not have a negative over State law. Supremacy had limits.

By the time the Constitution was debated in the several State ratifying conventions in 1787 and 1788, the "supremacy clause" galvanized opponents of the document. The Constitution, they said, would destroy the States and render them impotent in their internal affairs. The response from *proponents* of ratification illuminates the true intent of the clause. William Davie, a delegate to the Constitutional Convention from North Carolina and proponent of the Constitution, responded to attacks levied on the "supremacy clause" by stating that:

> This Constitution, *as to the powers therein granted*, is constantly to be the supreme law of the land. Every power ceded by it must be executed without being counteracted by the laws or constitutions of the individual states. *Gentlemen should distinguish that it is not the supreme law in the exercise of power not granted. It can be supreme only in cases consistent with the powers specially granted, and not in usurpations* [emphasis added].

Davie wasn't alone in this opinion. Future Supreme Court justice James Iredell of North Carolina argued that, "This clause [the supremacy clause] is supposed to give too much power, when, in fact, it only provides for the execution of those powers which *are already given in the foregoing articles*....If Congress, under pretence of executing one power, should, in fact, usurp another, they will violate the Constitution [emphasis added]."

Furthermore, in a foreshadowing of nullification, Iredell argued that, "It appears to me merely a general clause, the amount of which is that, when they [Congress] pass an act, if it be in the execution of a power given by the Constitution, it shall be binding on the people, *otherwise not* [emphasis added]. Other ratifying conventions had similar debates, and proponents of the Constitution continually reassured wavering supporters that the Constitution would only be supreme within its delegated authority.

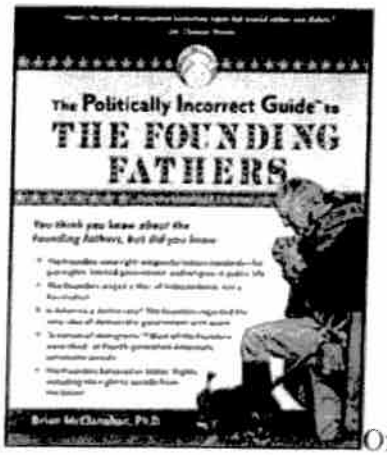
Most bought their assurances, though to staunch opponents, the Constitution still vested too much power in the central authority. The States would lose their sovereignty, they argued, and as a result, these men demanded an amendment to the Constitution that expressly maintained the sovereignty of the States and placed limits on federal power. Even several moderate supporters of the Constitution embraced this idea.

Ultimately, the three most powerful States in the Union, New York, Massachusetts, and Virginia, demanded that a bill of rights be immediately added to the Constitution; near the top of those recommended amendments on every list, a State sovereignty resolution. These ultimately became the Tenth Amendment to the Constitution, which reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Clearly the intent of this amendment was to mitigate any design the federal government had on enlarging its powers through the "supremacy clause." If the power was not enumerated in the Constitution and the States were not prohibited by the Constitution from exercising said power, then that power was reserved to the States.

Several other constitutional "scholars" have weighed in on the debate in the last week, and each has invoked the "supremacy clause" to defend their opposition to State action against healthcare. Duke Law Professor Neil Siegel went so far as to suggest that the States are not reading the Tenth Amendment correctly. In perhaps the most outlandish statement of the debate, he also said, "Any talk of nullification bothers me because it's talk of lawlessness."

I guess Mr. Siegel has failed to consider that Idaho bill HO391 was passed by a legitimate legislative body elected by the people of the State. That would make it lawful.



Of course, this debate ultimately boils down to loose interpretation verses strict construction. Thomas Jefferson had the best line on this issue. When asked to read between the lines to "find" implied powers, Jefferson responded that he had done that, and he "found only blank space."

The original intent of both the "supremacy clause" and the Tenth Amendment indicate that Idaho and the other States challenging Obamacare are justified and correct and that the legal profession is either in the tank for the federal government or has not read either the debates of the Constitutional Convention and/or the State ratifying debates. This should make people like Engstrom and Siegel, rather than legitimate State law directed at unconstitutional authority, irrelevant.

Brion McClanahan holds a Ph.D in American history from the University of South Carolina and is the author of ***The Politically Incorrect Guide to the Founding Fathers*** *(Regnery, 2009).*

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States Launch Legal Challenge to Health Care Law

At Least 14 States File Suit Challenging Constitutionality of Health Care Law


President Obama signs the Affordable Health Care for America Act during a ceremony with fellow... ▼
(Win McNamee/Getty Images)

State Legislatures to Challenge Health Care Law

In addition to constitutional challenges to the law, legislators in at least 36 states are attempting to limit, alter or oppose some of its provisions through state constitutional amendments or laws, according to the National Conference of State Legislatures.

Many of the proposals seek to keep health insurance coverage optional for individuals and exempt employers from penalties if they don't offer coverage for workers.

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Earlier this month, Virginia and Idaho became the first states to enact laws specifically stating that health insurance coverage is not required.

Still, many legal experts say these legislative efforts will ultimately be trumped by the so-called supremacy clause in the U.S. Constitution, which says federal laws "shall be the supreme law of the land."

"State law cannot nullify federal law," Timothy Stoltzfus Jost, a health law expert at Washington and Lee University School of Law, writes in the New England Journal of Medicine. "This principle is simply beyond debate, and state legislators, many of them lawyers, know that. The purpose of these laws, therefore, is not legal but rather political

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Indiana joins 13 states to challenge health reform

13 other states raise constitutional questions about the new legislation

By Bill Ruthhart

Posted: March 30, 2010

Indiana became the 14th state Monday to challenge the constitutionality of the federal health-care legislation, but legal e xperts warned the lawsuit faces an uphill climb against previous court rulings.

After reviewing the sweeping health-care reforms, Indiana Attorney General Greg Zoeller announced he would join a lawsuit already filed jointly by 13 other attorneys general in a Florida federal court.

At the core of Zoeller's decision to join the suit is the charge that Congress does not have the power to force Americans to buy health insurance coverage or require them to pay a fine if they fail to do so.

"It's really critical that we have these questions asked and answered," he said, "so that the Supreme Court's final word as to whether the new reach of the federal government in this statute meets constitutional muster."

Zoeller also argued that the new reforms impinge on states' sovereignty by requiring states to set up health insurance exchanges for their residents to purchase coverage.

Democrats immediately accused Zoeller of playing politics. Of the 13 other attorneys general who have joined the lawsuit, 12 are Republicans.

"This is purely politics, nothing but," said Indiana Democratic Party Chairman Dan Parker. "The legal argument is weak, the political argument is weak. It's all based on false information, and the opponents of this couldn't stop it, so they're grasping at straws and this is the final straw to grasp."

Zoeller's announcement came after Gov. Mitch Daniels said Friday he had encouraged Zoeller to join the suit, even though Daniels said he was skeptical of

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its chances for success. The attorney general said Monday he made the decision based on the case's merits and independent from any political input.

"It's unfortunate that the entire subject matter has been politicized," Zoeller said, "but that was done in Washington before we ever joined (the lawsuit)."

Parker declared the suit a waste of taxpayer dollars.

Zoeller said he could not give an estimate of how much the lawsuit would cost but said he has no plans to hire outside counsel. He said the state's initial cost would be its undetermined share of a contract capped at $50,000 with a Washington, D.C., law firm hired to handle the case.

Indiana Republican Party Chairman Murray Clark said the lawsuit has merit.

"I think it's the right decision," he said. "Clearly, there's some constitutional questions that need to be asked and answered in light of one of the largest federal government overreaches we've seen in a long time."

The key question the lawsuit raises is whether the new law's requirement that all Americans carry health insurance coverage or be forced to pay a penalty should serve as a new test to the Constitution's commerce clause, which gives Congress the power to regulate business.

Over the past several decades -- starting in the 1930s -- constitutional law experts say, the courts and lawmakers have broadly interpreted that clause, giving Congress wide-ranging regulatory power.

Most legal scholars think those precedents would make it difficult for the Supreme Court, or any other, to rule that Congress does not have the power to add the new insurance regulations, said Carl Tobias, a constitutional law expert at the University of Richmond in Virginia.

Furthermore, he said, backers of the bill will defend the prospective fine for those who don't buy insurance under the taxing power that the Constitution gives Congress.

"The precedents all favor constitutionality," Tobias said. "There's nothing exactly the same as this challenge, but the relevant precedents, if

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you analogize from them, lead you to the conclusion that this challenge won't succeed."

But that's not to say the lawsuit isn't a worthy one, he said.

"I think it might have merit, but I just don't think it's going to win," Tobias said. "I think the best argument is about the individual mandates, but I think a fair number of constitutional scholars, and I agree, think that it's probably going to withstand the challenge."

Charles Rice, a constitutional law expert at the University of Notre Dame, said the case certainly is worth litigating.

"I think it's a legitimate thing to do. The outcome is not certain," Rice said. "It's really interesting, because it brings in precedents from a lot of the cases involving the Social Security Act and things like that, and it could provide the opportunity, if it gets to the Supreme Court, for the case to go either way."

Key to its outcome could be how the American public views the new law in the future, said Gerard Magliocca, a constitutional law professor at Indiana University School of Law-Indianapolis.

"This likely wouldn't be decided for two years, and a lot will depend on what people think of the health-care bill," Magliocca said. "If it's very unpopular, the courts are more likely to find a reason to declare it unconstitutional than if it turns out to be popular."

Parker, the state Democratic Party chairman, said Zoeller's decision would cost the attorney general in his next election in 2012, when he will have to explain why he fought against a bill that reformed the insurance industry to the benefit of so many Hoosiers. "Greg Zoeller is going to be on the wrong side of history on this one," Parker said.

Zoeller countered that almost everyone agrees the new law has raised fresh constitutional issues that the courts need to resolve.

"There aren't many people who say there isn't a new question here, because this is the first time the federal government has required people to purchase a commercial good, a commercial product," he said. "This is an insurance product that everyone, as a condition of being a citizen of the United States, will be required to purchase under the threat of penalty."

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In the end, Magliocca said, he gives the lawsuit a 25 percent chance of success.

"There is a plausible argument for saying this is unprecedented," he said. "It has a chance, but I think most everybody, most legal scholars, think it's unlikely this suit will succeed."

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Daily Policy Digest

Health Issues

March 24, 2010

HEALTH CARE REFORM: WHO WINS AND WHO LOSES

While the health care bill is not as sweeping as many had once hoped (or others had feared), make no mistake: The new legislation will dramatically change the nation's health care system.

So who wins and who loses? "The people who gain the most are low-income people who do not get health insurance from an employer," says John Goodman, president, CEO and the Kellye Wright Fellow of the National Center for Policy Analysis. "Just about everybody else loses."

Groups that will especially bear the burden include:

- Generation Y: Most of the 19 million uninsured Americans between the ages of 18 and 34 will be forced to buy coverage -- coverage likely more expensive than they might have otherwise chosen.
- Anyone who earns more than $200,000: Workers earning more than $200,000 a year or couples with a combined income over $250,000 will pay an additional 0.9 percent in federal income tax to help fund Medicaid expansion starting in 2013, and will likely pay a new 3.8 percent Medicare tax on all investment income.
- Individuals with so-called Cadillac health insurance: A 40 percent tax will be levied on plans with premiums of $10,200 or more per person.

Goodman also notes that "as many as 8.5 million seniors could lose their Medicare Advantage coverage altogether" under government plans to reduce benefits offered under the program.

Advocates of the legislation argue that winners include anyone with a preexisting condition, recent college graduates who can now get coverage through their parents, small businesses who will have access to insurance pools and doctors who will get paid for seeing uninsured patients they were treating for free.

In addition, individuals aged 60 to 64 - the oldest age demographic not eligible for Medicare - will pay no more than three times the cost of the premium paid by a healthy 20-something. But as Goodman notes, "People who are 60 to 64 are going to pay lower premiums than they otherwise would because people who are 20 to 24 are going to pay higher premiums."

Source: Catherine Holahan, "Health Care Reform: Who Wins and Who Loses," CBS MoneyWatch, March 22, 2010.

Link to text:

http://moneywatch.bnet.com/economic-news/article/health-care-reform-summary-who-wins-and-who-loses/406279/

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8 WAYS THAT HEALTH REFORM WILL AFFECT YOU

The health care legislation could "have an effect on almost every citizen," according to Kaiser Health News. So what should you expect?

Within six months after the bill is signed into law:

- Health insurers will no longer be allowed to impose lifetime caps on coverage.
- Parents who have insurance through their employers will be allowed to continue coverage for their unmarried dependents up to age 26.
- Health insurers will be required to cover certain preventive services like osteoporosis screening for women over 65, smoking cessation counseling and interventions, and screenings for diabetes and sexually transmitted diseases.
- And later this year, people with serious health conditions that have prevented them from obtaining coverage will be eligible to purchase a policy from a high-risk pool in a government-subsidized exchange at a cost similar to healthy individuals' premiums.

Individuals will also be required to obtain health insurance or face a fine. Government subsidies will be available on a sliding scale for people making up to $43,000 per year (or nearly $90,000 per year for a family of four), but those who don't qualify for government subsidies should expect to pay about $5,000 a year for a policy on the exchange, while families should expect to pay about $15,000, says John Goodman, president, CEO and Kellye Wright Fellow of the National Center for Policy Analysis.

The penalty starts in 2014 at $95 or up to 1 percent of income for individuals, whichever is greater, and rises to $695 by 2016 or 2.5 percent of income, whichever is greater. Families pay heftier fines - $2,085 or 2.5 percent of income by 2016

Other changes:

- Insurers won't be able to deny coverage based on preexisting conditions.
- Maternity support will be increased for women in the workplace.
- Additional, less expensive insurance options will be available when you lose or quit your job.

Increasing the number of insured individuals, however, will also mean longer waits to see a new doctor. In Massachusetts, for example, where health insurance is universal, Boston residents have to wait about twice as long to see a doctor as people in any other U.S. city, says Goodman.

Source: Deborah Kotz, "8 Ways Health Reform Will Affect You," U.S. News and World Report, March 22, 2010

For text:

http://www.usnews.com/health/managing-your-healthcare/insurance/articles/2010/03/22/8-ways-health-reform-will-affect-you.html

For more on Health Issues:

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20 WAYS OBAMACARE WILL TAKE AWAY OUR FREEDOMS

It is worthwhile to take a comprehensive look at the freedoms we will lose under ObamaCare, says blogger David Hogberg. Among them:

- You are young and don't want health insurance? You are starting up a small business and need to minimize expenses, and one way to do that is to forgo health insurance? Tough. You have to pay $750 annually for the "privilege." (Section 1501).
- You are young and healthy and want to pay for insurance that reflects that status? Tough. You'll have to pay for premiums that cover not only you, but also the guy who smokes three packs a day, drinks a gallon of whiskey and eats chicken fat off the floor. That's because insurance companies will no longer be able to underwrite on the basis of a person's health status. (Section 2701).
- You're a single guy without children? Tough, your policy must cover pediatric services. You're a woman who can't have children? Tough, your policy must cover maternity services. You're a teetotaler? Tough, your policy must cover substance abuse treatment. (Add your own violation of personal freedom here.) (Section 1302).
- You are an employer in the small-group insurance market and you'd like to offer policies with deductibles higher than $2,000 for individuals and $4,000 for families? Tough. (Section 1302 (c) (2) (A)).
- If you are a physician and you don't want the government looking over your shoulder? Tough. The Secretary of Health and Human Services is authorized to use your claims data to issue reports that measure the resources you use, provide information on the quality of care you provide, and compare the resources you use to those used by other physicians. Of course, this will all be just for informational purposes. It's not like the government will ever use it to intervene in your practice and patients' care. Of course not. (Section 3003 (i)).
- You will have to pay an additional 0.5 percent payroll tax on any dollar you make over $250,000 if you file a joint return and $200,000 if you file an individual return. What? You think you know how to spend the money you earned better than the government? Tough. (Section 9015). That amount will rise to a 3.8 percent tax in 2013 and will also apply to investment income, estates, and trusts. You think you know how to spend the money you earned better than the government? Like you need to ask. (Section 1402).

Source: David Hogberg, "20 Ways ObamaCare Will Take Away our Freedoms," Investors Business Daily, March 22, 2010.

For text:

http://blogs.investors.com/capitalhill/index.php/home/35-politicsinvesting/1563-20-ways-obamacare-will-take-away-our-freedoms

For more on Health Issues:

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