POTENTIAL CONSTITUTIONAL PROBLEMS WITH H.R. 3590

Letter from Greg Abbott to Kay Bailey Hutchison and John Cornyn

January 5, 2010

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2010

The Honorable Kay Bailey Hutchison
United States Senate
284 Russell Senate Office Building
Washington, DC 20510-4304

The Honorable John Cornyn
United States Senate
517 Hart Senate Office Building
Washington, DC 20510

RE: Potential Constitutional Problems with H.R. 3590

Dear Senators Hutchison and Cornyn:

I write in response to your December 23, 2009, letter and our recent communications about potential constitutional problems with H.R. 3590, the so-called Patient Protection and Affordable Care Act. Like you, I am very concerned about the constitutionality of this legislation.

Last week, twelve state attorneys general and I authored a letter to Speaker Pelosi and Majority Leader Reid expressing our deep concern with the legality of H.R. 3590's so-called Nebraska Compromise. I write to expand upon the concerns presented in that let-

ter, and to address additional potential legal problems with H.R. 3590. The bill's supporters are moving quickly for passage. Because time is of the essence, I wanted to bring to your attention several constitutionally problematic aspects of the measure. One potential legal problem has been termed the Nebraska Compromise, while another concerns the constitutionality of the individual mandate imposed by the health care bill.

I. NEBRASKA COMPROMISE

If enacted, the Senate version of H.R. 3590 would impose billions of dollars of new Medicaid obligations on 49 states while singling out only one state for special treatment. The increased Medicaid expenses imposed on Nebraska—and all other states—by H.R. 3590 will be fully funded, in perpetuity, by taxpayers from all states except Nebraska.

By all accounts, the Nebraska Compromise serves no legitimate national interest. And neither Nebraska nor the Congress has justified the expenditure by articulating any unique need or problem in the Cornhusker State which this provision purports to redress. That is because it was added simply to purchase the vote of a single senator—to the detriment of the 49 other states.

Even by Washington D.C. standards, the Nebraska Compromise is a uniquely contemptible and corrupt bargain. Even the worst, most wasteful of pork barrel spending can typically find at least some attenuated connection to some broader national interest, such as economic development or to encourage interstate travel. But the Nebraska Compromise is nothing more than a pure political payoff—a naked transfer of wealth to one state from the 49 other states.

Not only does the Nebraska Compromise offend basic principles of fairness and equality, it violates fundamental principles of nondiscrimination that are at the heart of the U.S. Constitution. [*2]

A. Congress' Power to Tax & Spend for the General Welfare of the United States

Congress' power to tax and spend is not unlimited. Congress may spend federal taxpayer dollars only to "provide for the common

defense and general welfare of the United States." U.S. Const. art. I, § 8, cl. 1. This provision means what it says. As the U.S. Supreme Court has repeatedly observed, federal spending must be for the general national interest—not the specific interest of just one single state. For example, in *United States v. Butler,* 297 U.S. 1, 67 (1936), the Court, quoting President James Monroe, asked: "Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not." Instead, the *Butler* court wrote, "the powers of taxation and appropriation extend only to matters of national, as distinguished from local, welfare."

Similarly, in *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 738 (1950), the Court noted that "Congress has a substantive power to tax and appropriate for the general welfare," but that this power is "limited . . . by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose." Importantly, these principles are still applicable—and important—today. As the Court noted in *South Dakota v. Dole,* 483 U.S. 203, 207 (1987), "conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs."

The unique, localized and differentiated treatment of Nebraska runs counter to these principles.

B. Equal Sovereignty

If the Nebraska Compromise is indeed nothing more than a blatant transfer from federal taxpayers in 49 states to a single state, it plainly does not serve the "general Welfare." To the contrary, the compromise constitutes blatant discrimination against every other state.

Just months ago, eight Justices of the U.S. Supreme Court reaffirmed that federal legislation that "differentiates between the States" offends "our historic tradition that all the States enjoy 'equal sovereignty'—and that although "distinctions can be justified in some cases," any "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic

coverage is sufficiently related to the problem that it targets." *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 129 S. Ct. 2504, 2512 (2009).

Similarly, Justice Powell wrote for a unanimous Court in *United States v. Ptasynski,* 462 U.S. 74, 81, 84-85 (1983), that Congress may not "use its power over commerce to the disadvantage of particular States" by imposing taxes on some states but not others—unless Congress is acting on the basis of "geographically isolated problems," and not "actual geographic discrimination." And as I noted above, the Nebraska Compromise was not based upon a particularized—or even articulated—need but rather an arbitrary and capricious backroom deal.

C. Due Process

Although some issues of grave constitutional concern to Texans may not be susceptible to challenge by the states—even if individuals can mount legal challenges—the states do have standing to challenge federal spending programs that impose unfair or discriminatory burdens on states, including the Nebraska Compromise. *See, e.g., South Dakota v. Dole,* 483 U.S. 203 (1987). Individual citizens, of course, also have the right to challenge federal laws that discriminate against them for no rational reason on the basis [*3] of geography—as well as laws that infringe upon the rights and protections they are guaranteed under the U.S. Constitution.

So unless the Congressional leadership can come up with some reason why some plausible national interest is served by forcing the other 49 states to pay for the Medicaid expenses of just a single state, the Nebraska Compromise presents serious constitutional concerns that can be raised by both states and individuals. Accordingly, the State of Texas is prepared to challenge the constitutionality of the Nebraska Compromise if H.R. 3590 is passed and this unconstitutionally arbitrary discriminatory provision is not removed.

II. INDIVIDUAL MANDATE

If passed, Section 1501 of H.R. 3590 would establish a federal government mandate that has never before been imposed on the

American people. It would require all citizens to buy something—in this case insurance—or face a tax penalty. According to the nonpartisan Congressional Budget Office: "the imposition of an individual mandate [to buy health insurance]…would be unprecedented. The government has never required people to buy any good or service as a condition of lawful residence in the United States." The CBO added that an individual mandate could "transform the purchase of health insurance from an essentially voluntary private transaction into a compulsory activity mandated by law."

For the first time Congress is attempting to regulate and tax Americans for doing absolutely nothing. H.R. 3590 attempts to tax and regulate each American's mere existence. This unprecedented congressional mandate threatens individual liberty and raises serious constitutional questions.

A. Federalism, Enumerated Powers and the Tenth Amendment

The framers of our constitution intended to limit the reach of a centralized national government. As James Madison wrote in Federalist #45: "The powers delegated by the proposed Constitution to the federal government are few and defined." In Federalist #46, Madison added reasoning to that principle: "Ambitious encroachments of the federal government…would be signals of general alarm."

Accordingly, the constitutional framers gave Congress only certain specifically enumerated powers—and then promptly added the Tenth Amendment to confirm that all other powers are reserved to the states or to the people.

B. Commerce Clause

The authors of H.R. 3590 seem aware that their constitutional authority for enacting the individual mandate has been seriously questioned. In response, they have crafted the bill to invoke the Commerce Clause as the constitutional authority for Congress to impose the individual mandate. This may expose the legislation to legal challenge.

Under Article I, Section 8, Congress clearly has the authority to regulate commerce. That would include regulations governing insurance and health care. But, the power to "regulate Commerce . . . among the several States" is of course not unlimited. Indeed, within the last fifteen years, the U.S. Supreme Court has struck down two federal statutes on the ground that they exceeded Congress' power under the Commerce Clause. *See United States v. Lopez,* 514 U.S. 549 (1995), and *United States v. Morrison,* 529 U.S. 598 (2000). [*4]

The *Lopez* Court sorted the commerce power into three categories, and asserted that Congress could not go beyond these three categories: (1) regulation of channels of commerce, (2) regulation of instrumentalities of commerce, and (3) regulation of economic activities that "affect" commerce. 514 U.S. at 559.

The individual mandate is constitutionally suspect because it does not fall within any of these categories. The mandate provision of H.R. 3590 attempts to regulate a non-activity. The legislation actually imposes a financial penalty upon Americans who choose *not* to engage in interstate commerce—because they choose *not* to enter into a contract for health insurance.

In other words, the proposed mandate would compel nearly every American to engage in commerce by forcing them to purchase insurance, and then use that coerced transaction as the basis for claiming authority under the Commerce Clause.

Congress' own independent, non-partisan research agency, the Congressional Research Service, expressed doubts about the Commerce Clause applicability in a report that was issued last July: "Despite 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…It may be argued that the mandate goes beyond the bounds of the Commerce Clause."

If there are to be *any* limitations on the federal government, then "Commerce" cannot be construed to cover every possible human activity under the sun—including mere human existence. The act of doing absolutely nothing does not constitute an act of "Commerce" that Congress is authorized to regulate.

III. STATE EMPLOYEES HEALTH INSURANCE PLANS

In Senator Hutchison's December 23, 2009, letter, concerns were raised about H.R. 3590's potential interference with the State's ability to regulate its own workforces. The senator raises a valid and important concern under the Tenth Amendment, which states that "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." As then-Justice Rehnquist made clear in his opinion for the Court in *National League of Cities v. Usery,* 426 U.S. 833, 845 (1976), "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress. One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions."

Unfortunately, Chief Justice Rehnquist's opinion is no longer good law because the Court overruled *National League of Cities* by a 5-4 vote in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985). But depending upon the level of intrusion imposed by whatever bill, if any, is ultimately enacted into law, there may be an opportunity to revisit *National League of Cities.* The O'Neill Institute for National and Global Health Law at Georgetown University, which supports the congressional health care legislation, has acknowledged that a "federal employer mandate covering state and local government workers appears consistent with existing Constitutional decisions but still might be susceptible to challenge under the Tenth Amendment."

Consistent with the O'Neill Institute's conclusion, Justice O'Connor's dissent in *Garcia* expressed her "belief that this Court will in time again assume its constitutional responsibility." That time may be now, under the current structure of the health care legislation. [*5]

IV. TRANSPARENCY CAN REDUCE LITIGATION

Although litigation has been mentioned in this letter, it should always be a last best option rather than an initial impulse. Unfortu-

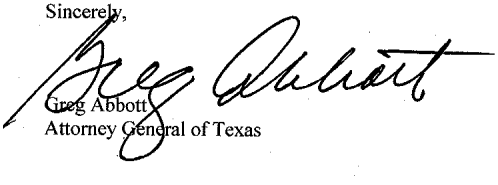
nately, the haste with which the legislation is proceeding, and its utter lack of transparency, may ultimately require litigation in order to ensure the legislation comports with constitutional protections.

Given the serious legal questions surrounding the health care legislation, American taxpayers are disserved by the congressional leadership's plan to eschew publicly accessible conference committee hearings in favor of closed meetings in the Capitol's backrooms. Although basic prudence dictates the bill's proponents should take additional time to thoroughly consider any constitutional issues in a transparent and open forum, the Capitol Hill newspaper *Roll Call* reported yesterday that congressional leaders do not plan to use the ordinary conference committee process to resolve differences between the House and Senate versions of the bill.

President Obama previously acknowledged the importance of this transparency when he said he was committed to "not negotiating behind closed doors, but bringing all parties together, and broadcasting those negotiations on C-SPAN so that the American people can see what the choices are." Holding conference committee hearings would ensure the public is properly informed about the legislation's impact and would allow constitutional experts on both sides to weigh in throughout the legislative reconciliation process.

But because H.R. 3590 will not be reconciled in the open—where it would be subjected to additional constitutional scrutiny—we will continue to monitor this legislation for developments that unlawfully discriminate against the State of Texas or are inconsistent with the U.S. Constitution and the principles of federalism. Additionally, we will continue working with the bipartisan coalition of state attorneys general—including the group recently convened by Florida Attorney General Bill McCollum—that has coalesced to monitor and review the constitutional issues associated with this legislation.

Sincerely,



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