Pub. L. Misc.

Volume 1, Number 1, 2011

PUB. L. MISC.

James C. Ho & *Trevor W. Morrison*, editors

TABLE OF CONTENTS

Pub. L. Misc. operates on the same terms as the *Journal of Law*. Please write to us at jho@gibsondunn.com and tmorri@law.columbia.edu, and visit us at www.journaloflaw.us. The cover of this issue shows the inauguration of President Abraham Lincoln (Article II) at the U.S. Capitol, which housed both Congress (Article I) and the Supreme Court (Article III). Library of Congress, Prints & Photo. Div., repro. no. LC-USZ62-22734 (Mar. 4, 1861).

INTRODUCING *PUB. L. MISC.*

James C. Ho[†] *& Trevor W. Morrison*[*]

Two years before his death, David P. Currie completed work on what would become the last of his four-volume masterpiece, *The Constitution in Congress*. The series offers an extensive and rich treatment of constitutional debates in the political branches from the First Congress through the beginning of the Civil War. Coming on the heels of his acclaimed two-volume series on *The Constitution in the Supreme Court*, the later series was inspired by one central and profoundly important, yet too often unappreciated, insight: American constitutional law is practiced not just in courts of law by lawyers and judges, but also in the political branches by elected and appointed government officials.

To be sure, the idea that constitutional law exists outside as well as within the courts is not especially provocative today. But it still remains that too little attention is paid to extra-judicial constitutional analysis.

Part of the problem is a lack of visibility. For all their progress in recent years, our standard published reporters and databases still focus disproportionately on the collection and organization of judicial materials. Significant non-judicial materials are often far less readily accessible.[1]

This should not be. Scholars routinely study correspondence by our Founding generation, including Presidents and leading members of Congress and the Constitutional Convention. For the same reason, modern correspondence between high-level executive and leg-

[†] Partner, Gibson, Dunn & Crutcher LLP.
[*] Professor of Law, Columbia Law School.

[1] For some notable examples, see memory.loc.gov/ammem/amlaw/lwdg.html; www.gpoaccess.gov/pubpapers/index.html; www.gutenberg.org/ebooks/11314; www.archivists.org/saagroups/cpr/.

islative officials and other similar documents are valuable sources of information and insight into our constitutional law and values. They deserve more sustained attention and study than they have received.

Introducing *Pub. L. Misc*. As students of the law – and especially of constitutional law as practiced in all three branches of government – we are pleased to announce a new forum for the publication of significant constitutional documents generated by the Article I and II branches of our nation's government (and, where appropriate, their counterparts in states and localities).

We are particularly pleased to publish the inaugural edition of *Pub. L. Misc*. in the inaugural issue of the *Journal of Law*. And we are hopeful that *Pub. L. Misc*. will prove valuable (or least interesting) to legal scholars and commentators – as well as to the officials who practice constitutional law in the political branches.

We think providing this forum for examining the practice of constitutional law in the political branches can be helpful to a range of audiences. Government officials and their advisors might find the materials published herein relevant and helpful as they generate more of the same kind of materials themselves. Academic and journalistic commentators, on the other hand, might find these materials helpful when placing modern debates between the political branches in a larger context.

Even the casual political observer knows that participants in the political arena often incorporate constitutional arguments into their political rhetoric. The materials presented in *Pub. L. Misc*. might help provide a basis for scrutinizing such arguments for methodological consistency and intellectual integrity – that is, for "umpiring" constitutional rhetoric in the political branches. Hardly a day passes in our politics when one official or another doesn't accuse a political adversary of somehow violating our cherished founding document. Rather than dismiss such rhetoric as purely political – fodder for political scientists, perhaps, but not for serious legal inquiry – we choose to take it seriously as constitutional argument. And we aim to do so in a scrupulously nonpartisan fashion.

Furthermore, it is our hope (you might even say, ambition) that this series will quickly become self-perpetuating – and that materials

potentially eligible for *Pub. L. Misc.* publication will begin to appear spontaneously at our electronic doorsteps for our editorial consideration.

There are countless lawyers of great skill and talent who populate the political branches of federal and state government across the country – and who craft *Pub. L. Misc.*-type materials on a routine basis. Based on our own experiences, as well as the experiences of our friends and colleagues who have practiced law at the highest levels of the political branches of government, we are confident that a rich treasure trove of materials exists, waiting to be discovered – and waiting to be compiled in an accessible and friendly forum such as this.

Debates about our Constitution and its enduring impact on our nation and our people are everywhere. You just have to look. We hope you will join us in the hunt.[2]

• • •

Editorial responsibility for any given edition of *Pub. L. Misc.* will rest with either one or sometimes both of us. Ho has sole responsibility for this first edition, and his introduction follows.

[2] We would like to acknowledge one important additional source of inspiration for *Pub. L. Misc.*, in addition to Professor Currie. The *Green Bag* has from time to time published precisely the kind of non-judicial material – both past and present – that we hope will become a regular staple of *Pub. L. Misc.* *See, e.g., Applying the War Powers Resolution to the War on Terrorism*, 6 Green Bag 2d 175 (2003) (publishing Congressional testimony by Deputy Assistant Attorney General John C. Yoo during the United States response to the 9/11 attacks); *Anticipatory Self-Defense*, 6 Green Bag 2d 195 (2003) (publishing an oft-cited but heretofore unpublished 1962 OLC opinion, authored by Assistant Attorney General Norbert A. Schlei during the Cuban Missile Crisis); *Irrecusable & Unconfirmable*, 7 Green Bag 2d 277 (2004) (publishing correspondence by Patrick Leahy, Joseph Lieberman, William Rehnquist, Edward Kennedy, and John Cornyn).

"TAKE CARE" AND HEALTH CARE

James C. Ho[†]

We begin our inaugural edition of *Pub. L. Misc.* with the Obama Administration's recent decision not to defend the Defense of Marriage Act against constitutional attack. Given the sensitive and emotional nature of the issue, it is no surprise that the announcement has attracted strong reaction in various quarters, both positive and negative.

Some critics have claimed President Obama has exceeded the bounds of his role as President in interpreting the Constitution. Some have even taken to criticizing the President for violating his constitutional duty under Article II to "take Care that the Laws be faithfully executed."

The Justice Department is often said to have a general "duty to defend" federal statutes against constitutional attack. But there is also significant historical evidence that the duty is not absolute – and includes room for executive discretion.

Some scholars may also recall discussions during the previous Presidential Administration regarding the use of Presidential signing statements to opine on the validity of federal statutes and to refuse enforcement of provisions deemed unconstitutional. We invite scholars to consider whether the Presidential decision to opine on the constitutionality of a federal statutory provision in an Executive Branch document is similar to or different from a Presidential directive not to defend such a provision in court documents.

In light of the current controversy, we publish in *Pub. L. Misc.* two documents from the U.S. Department of Justice – one during

[†] Partner, Gibson, Dunn & Crutcher LLP.

the Clinton Administration concerning the duty to defend, and another during the Bush Administration concerning Presidential signing statements.

• • •

Of course, just because something can be done doesn't necessarily mean it *should* be done. While some have criticized the President for refusing to defend DOMA, others have suggested that the shoe may someday be on the other foot – and that a future President might abandon the defense of any number of laws favored by the current one.

If there is higher profile constitutional litigation pending anywhere in the nation today, it may be the litigation surrounding the Patient Protection and Affordable Care Act. And there is, to be sure, no shortage of government officials who have stated quite emphatically their belief that the Act is unconstitutional – especially its so-called individual mandate provision.

But does that mean a future President would be within his or her right not to defend it? And even if it would fall within his or her constitutional authority to do so, would it be a proper exercise of good judgment? We look forward to scholarly discussion on that point as well.

To stir this particular pot, we publish in *Pub. L. Misc.* a series of documents from both sides of the debate from the community of state attorneys general – another potentially rich source of legal analysis that we hope will regularly add to the treasure trove of materials to be featured by *Pub. L. Misc.* We begin with two letters to Congress, authored by state attorneys general who argued that the legislation was unconstitutional months before it was even signed into law. And we end with an amicus brief later filed by other state attorneys general in support of the Act.

Professor Currie never got the chance to publish a series on *The Constitution in the States*. Perhaps he never would have. Even so, we are heartened to imagine him, somewhere, smiling – and perhaps even willing to endorse these efforts, if he could.

DUTY TO DEFEND – NATIONAL DEFENSE AUTHORIZATION ACT, 110 STAT. 186

Letter from Andrew Fois to Orrin G. Hatch

March 22, 1996

U.S. Department of Justice

Office of Legislative Affairs

FILE

Office of the Assistant Attorney General *Washington, D.C. 20530*

MAR 22, 1996

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Mr. Chairman:

In your letter of February 21, 1996, you made several inquiries regarding the President's directive that the Department of Justice decline to defend section 567 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 328-29 (1996), in the event of a constitutional challenge to that provision in court. Section 567 amends 10 U.S.C. § 1177 to require the Department of Defense to separate from the armed services most members of the armed forces who are HIV-positive. The President instructed the Secretary of Defense and other executive branch officials to implement section 567, but further instructed the Attorney General not to defend the constitutionality of section 567 in litigation.

You have asked me to provide "any Justice Department legal opinions relied upon in deciding not to defend the constitutionality

of the H.I.V. provision," as well as "any guidelines or criteria that the Justice Department used in reaching this decision." Although the Department of Justice orally advised the President of the applicable legal standards to apply in evaluating the constitutionality of section 567, it did not provide the President any written advice.

After consulting with the Department of Justice, the President asked the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to assess the effect of section 567 on the needs and purposes of the armed services. As the President subsequently indicated in his Signing Statement, the Secretary and the Chairman advised the President that

> the arbitrary discharge of these men and women would be both unwarranted and unwise; that such discharge is unnecessary as a matter of sound military policy; and that discharging service members deemed fit for duty would waste the Government's investment in the training of these people and would be disruptive to the military programs in which they play an integral role.

Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 32 Weekly Comp. Pres. Doc. 260, 261 (Feb. 10, 1996) (enclosed). [*2]

In his Signing Statement, the President stated that he agreed with the assessment of the Secretary of Defense and the Chairman of the Joint Chiefs of Staff. Based on that assessment, the President "concluded that this discriminatory provision [section 567] is unconstitutional," in that it "violates equal protection by requiring the discharge of qualified service members living with HIV who are medically able to serve, without furthering any legitimate governmental purpose." Id. The President further stated that, "[i]n accordance with my constitutional determination, the Attorney General will decline to defend this provision." Id.[1] In addition, the President in-

[1] For another case in which the Department declined to defend the constitutionality of a statute as a direct result of a Presidential determination that the enactment was unconstitutional, see Letter from Assistant Attorney General Stuart M. Gerson to President of the Senate Dan Quayle (Nov. 4, 1992) (Senate Legal Counsel document No. 38) (notifying Congress that because President Bush had determined that the "must-carry" provisions of

structed the Secretaries of Defense, Veterans Affairs and Transportation to implement the Act in a manner that "ensure[s] that these [involuntarily discharged] service members receive the full benefits to which they are entitled." Id.

You also have asked me to list "all previous instances when the Justice Department has refused to defend the constitutionality of a statute." As far as we are aware, the most comprehensive catalogue of such cases is one previously compiled by the Senate Legal Counsel. The Senate Legal Counsel list, which is enclosed, indexes 45 communications and memoranda between Congress and the Department of Justice covering the years 1975-1993, detailing, inter alia, virtually all instances in that period in which either the Department has represented that it will decline to defend the constitutionality of a statute, or where the executive branch has determined that it will not enforce or implement a statute that it believes to be unconstitutional.[2] [*3]

As the documents compiled by the Senate Legal Counsel indicate, the Department has declared that it will decline to defend the constitutionality of a statute in a wide variety of circumstances. For example, in several of the cases listed by the Senate Legal Counsel,

---

the Cable Television Consumer Protection and Competition Act of 1992 were unconstitutional, the Department of Justice could not defend the constitutionality of those provisions in court). See also Drew S. Days III, In Search of the Solicitor General's Clients: A Drama with Many Characters, 83 Ky. L.J. 485, 489-94 (1994-95) (discussing instances in which the President has instructed the Department of Justice to adopt certain legal positions).

[2] In recent correspondence postdating the Senate Legal Counsel's list, the Attorney General notified the President of the Senate and the Speaker of the House (i) that the Department of Justice has had a longstanding policy to decline to enforce the abortion-related speech prohibitions in 18 U.S.C. § 1462 and related statutes because such prohibitions plainly violate the First Amendment, and (ii) that, in light of this policy, the Department will not enforce the abortion-related speech prohibition in § 1462, as amended by section 507(a)(1) of the Telecommunications Act of 1996, and will not defend the constitutionality of that prohibition in two recently filed district court cases, See Letters from Attorney General Janet Reno to President of the Senate Albert Gore, Jr. and Speaker of the House Newt Gingrich (Feb. 9, 1996) (discussing Sanger v. Reno, Civ. No. 96-0526 (E.D.N.Y.), and American Civil Liberties Union v. Reno, Civ. No. 96-963 (E.D. Pa.)). This notification was based upon, and consistent with, a similar notification to Congress made by Attorney General Civiletti in 1981. See Letter from Attorney General Benjamin R. Civiletti to President of the Senate Walter F. Mondale (Jan. 13. 1981) (Senate Legal Counsel document No. 10).

the Department defended the constitutionality of a statute in district court, but declined to appeal an adverse decision because of dispositive precedent, the risk of producing damaging appellate precedent, or ocher litigation considerations. In a smaller group of cases, such as those described in footnote 2, supra, the President or the Department of Justice declined to enforce or implement a statute in the first instance, and the Department thereafter declined to defend the constitutionality of the statute in court.[3]

We are aware of several instances (some of which are reflected in the Senate Legal Counsel's list) analogous to the President's decision to enforce, but not defend the constitutionality of, section 567 of the Defense Authorization Act. In these instances, the executive branch enforced a statute in the first instance but the Department of Justice challenged, or explicitly declined to defend, the constitutionality of that statute in court. Such cases include the following:

(a) United States v. Lovett, 328 U.S. 303 (1946). As required by statute, the President withheld the salaries of certain federal officials. The Solicitor General, representing the United States as defendant, nonetheless joined those officials in arguing that the statute was an unconstitutional bill of attainder. Id. at 306. The Attorney General suggested that Congress employ its own attorney to argue in support of the validity of the statute. Congress did so, id., and the Court of Claims and the Supreme Court gave Congress's counsel leave to appear as amicus curiae on behalf of the enactment. The Supreme Court held that the statute was an unconstitutional bill of attainder.

(b) INS v. Chadha, 462 U.S. 919 (1983). Pursuant to a provision of the Immigration and Nationality Act, the INS implemented a "one-house veto" of the House of Representatives that ordered the INS to overturn its suspension of Chadha's deportation. Id. at 928.[4] Nonetheless, when Chadha petitioned for review of the

[3] In this category, see also, for example, Myers v. United States, 272 U.S. 52 (1926), and Humphrey's Executor v. United States, 295 U.S. 602 (1935)

[4] See also Reply Brief for the Appellant [INS] in No. 80-1832. at 11-14 (explaining that the INS issued an order deporting Chadha, and "intended to enforce the law by subjecting Chadha to deportation" unless and until the court of appeals held the law unconstitutional).

INS's deportation order, the INS -- represented by the Solicitor General in the Supreme Court -- joined Chadha in arguing that the one-house veto provision was unconstitutional. Id. at 928, 939. Senate Legal Counsel intervened on behalf of the Senate and the House to defend the validity of the statute. Id. at 930 & n.5, 939-40. The Supreme Court invalidated the statutory one-house "veto" as a violation of the separation of powers. [*4]

(c) Morrison v. Olson, 487 U.S. 654 (1988). Pursuant to the Ethics in Government Act of 1978, the Attorney General requested appointment of an independent counsel to investigate possible wrongdoing of a Department official. Id. at 666-67. Despite the fact that the Department thus had "implemented the Act faithfully while it has been in effect,"[5] the Solicitor General nevertheless appeared in the Supreme Court on behalf of the United States as amicus curiae to argue, unsuccessfully, that the independent counsel provisions of the Act violated the constitutional separation of powers.

(d) Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). The FCC had a longstanding policy of awarding preferences in licensing to broadcast stations with a certain level of minority ownership or participation. After the FCC initiated a review of this policy, id. at 559, a statute was enacted forbidding the FCC from spending any appropriated funds to examine or change its minority ownership policies, id. at 560, 578 & n.29. The FCC "[c]ompl[ied] with this directive": it terminated its policy review and reaffirmed license grants in accord with the minority preference policy. Id. at 560. Nonetheless, the Acting Solicitor General, appearing on behalf of the United States as amicus curiae, argued that, insofar as the statute required the FCC to continue its preference policy, it worked an unconstitutional denial of equal protection. See Brief for the United States as Amicus Curiae Supporting Petitioner in No. 89-453, at 26-27. The Acting Solicitor General authorized the FCC to appear before the Court

[5] Letter from Acting Attorney General Arnold I. Burns to President of the Senate George Bush at 2 (Aug. 31, 1987) (Senate Legal Counsel document No. 26).

through its own attorneys, ''in order for the Court to have the benefit of the views of the administrative agency involved." Id. at 1 n.2. FCC's counsel, representing the Commission as Respondent, urged the Court to uphold the constitutionality of the FCC policy and the statutory enactment. Senate Legal Counsel also appeared on behalf of the Senate as amicus curiae to defend the constitutionality of the statute. The Court held that the statutorily mandated FCC policy was constitutional.

(e) Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) (en banc), cert. denied, 376 U.S. 938 (1964). A federal statute permitted the Surgeon General to condition federal funding for hospital construction on assurance by an applying State that the hospital facilities in question did not discriminate on account of race; but the statute explicitly instructed the Surgeon General to make an exception to this requirement where discrimination was accompanied by so-called "separate but equal" hospital facilities for all races. The Surgeon General issued a regulation that included such a "separate but equal" exception, id. at 961 & n.2 (quoting 42 C.F.R. § 53.112 (1960)), and subsequently approved federal funding to defendant hospitals, which were openly discriminatory, id. at 962-63, 966. The Department intervened on behalf of the United States in a private class action brought by black physicians, dentists and patients against the hospitals, and joined the plaintiffs in a constitutional "attack on the congressional Act and the regulation made pursuant thereto." Id. at 962. The en banc court of appeals held [*5] that the statute and regulation violated the equal protection component of the Fifth Amendment's Due Process Clause. Id. at 969-70.

(f) Gavett v. Alexander, 477 F. Supp. 1035 (D.D.C. 1979). In this case, a statute created a program pursuant to which the Army could sell surplus rifles at cost, but only to members of the National Rifle Association. The Army, in compliance with the statute, denied plaintiff an opportunity to purchase a rifle at cost because he was not an NRA member. Id. at 1040. Nonetheless,

the Department of Justice concluded -- and informed the court -- that the NRA membership requirement violated the equal protection component of the Fifth Amendment's Due Process Clause because the discrimination against non-NRA members "does not bear a rational relationship to any legitimate governmental interest and is therefore unconstitutional." Id. at 1044. The Department reached this conclusion on the basis of advice from the Army that the membership requirement "serves no valid purpose" that was not otherwise met. Id.[6] The district court afforded Congress an opportunity to "file its own defense of the statute should it choose to do so," id., but Congress declined to act on this invitation. Id. The court permitted the NRA itself to intervene and argue on behalf of the statute's constitutionality. The district court concluded that the statute was subject to strict scrutiny (because it discriminated on the basis of the fundamental right of association) and invalidated the enactment. Id. at 1044-49.

(g) League of Women Voters of California v. FCC, 489 F. Supp. 517 (C.D. Cal. 1980). The Public Broadcasting Act of 1967, as amended, prohibited noncommercial television licensees from editorializing or endorsing or opposing candidates for public office. The Attorney General concluded that this prohibition violated the First Amendment and that reasonable arguments could not be advanced to defend the statute against constitutional challenge.[7] The defendant FCC, through the Department of Justice, represented to the court that it would seek to impose sanctions on a licensee who violated the statute, if only for the purposes of "test litigation," 489 F. Supp. at 519-20; nevertheless, the FCC informed the court that it would not defend the statute's constitutionality, id. at 518. Senate Legal Counsel appeared in the case on behalf of the Senate as amicus curiae, id., and successfully

[6] See also Letter from Assistant Attorney General Barbara Alien Babcock to President of the Senate Walter F. Mondale (May 8. 1979) (Senate Legal Counsel document No. 3).

[7] See Letter from Attorney General Benjamin R. Civiletti to Senate Legal Counsel Michael Davidson (Oct. 11, 1979) (Senate Legal Counsel document No. 6). See also FCC v League of Women Voters of California, 468 U. S. 364, 370-71 & n.8 (1984).

urged the trial court to dismiss the case as not ripe for adjudication in light of the unlikelihood that any enforcement action would transpire. While appeal of that decision was pending, a successor Attorney General reconsidered the Department's previous position and decided that the [*6] Department could defend the statute's constitutionality.[8] The court of appeals accordingly remanded the case to the district court for consideration of the merits of the case. The Supreme Court ultimately held that the statute violated the First Amendment. FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

(h) Turner Broadcasting Sys., Inc. v. FCC, Civ. No. 92-2247 (D.D.C.). Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (the "must carry" provisions) require cable operators to carry on their systems a prescribed number of signals of local commercial and qualified noncommercial television stations. The Act was enacted over President Bush's veto. In his veto message, the President stated that one of the reasons for his veto was that the must-carry provisions were unconstitutional. See Message to the Senate Returning Without Approval the Cable Television Consumer Protection and Competition Act of 1992, Pub. Papers of George Bush 1751 (Oct. 3, 1992). Despite the President's conclusion, the FCC took steps toward implementing the must-carry provisions "in order to comply with the 1992 Act." 57 Fed. Reg. 56,298-99 (1992).[9] However, in the litigation challenging the constitutionality of the must-carry provisions, the Department of Justice,

---

[8] See Letter from Attorney General William French Smith to Senate Judiciary Committee Chairman Strom Thurmond and Ranking Minority Member Joseph R. Biden, Jr. (Apr. 6, 1981) (Senate Legal Counsel document No. 12) (reprinted as The Attorney General's Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25 (1981)).

[9] See also Standstill Order in Turner Broadcasting Sys., Inc. v. FCC, Civ. No. 92-2247 (D.D.C.), at 2 ¶ 4 (Dec. 9. 1992) (FCC will take remedial action to address violations of section 5, albeit 120 days after filing of complaints); Defendants' Motion and Memorandum in Support Thereof for the Issuance of a Revised Briefing Schedule in this Case and its Related Cases in Turner Broadcasting Sys., Inc. v. FCC, Civ. No. 92-2247 (D.D.C.), at 10-11 (Nov. 10, 1992) (representing that FCC would implement section 4 regulations in April 1993 and that FCC will take remedial action to address violations of section 5, albeit 120 days after filing of complaints).

> appearing on behalf of defendant FCC, informed the district court that it declined to defend the constitutionality of the must-carry provisions, "consistent with President Bush's veto message to Congress."[10] The Department urged the court to permit adequate [*7] time to provide Congress the opportunity to defend the validity of the statute.[11] While preliminary proceedings were ongoing in the district court, the Clinton Administration reconsidered President Bush's previous position and decided that the Department should defend the constitutionality of the must-carry provisions. The three-judge district court subsequently held that the must-carry provisions were constitutional. 819 F. Supp. 32 (D.D.C. 1993). The Supreme Coda vacated and remanded that decision so that the district court could resolve genuine issues of material fact and apply its findings to the constitutional test articulated by the Court. 114 S. Ct. 2445 (1994). The three-judge panel resolved the factual disputes and once again concluded that the must-carry provisions pass constitutional muster. 910 F. Supp. 734 (D.D.C. 1995). The Supreme Court recently noted probable jurisdiction to review that decision. 116 S. Ct. 907 (1996).

In addition, it is worth noting several other cases in which the Department of Justice argued against the constitutionality of a statute in court, either where there was no occasion for the executive branch to enforce or implement the statute prior to litigation, or where the statute did not provide for any executive branch implementation.[12]

---

[10] Defendants' Motion and Memorandum in Support Thereof for the Issuance of a Revised Briefing Schedule in this Case and its Related Cases in Turner Broadcasting Sys., Inc. v. FCC, Civ. No. 92-2247 (D.D.C.), at 2 (Nov. 10, 1992). See also id. at 4; Letter from Assistant Attorney General Stuart M. Gerson to President of the Senate Dan Quayle (Nov. 4, 1992) (Senate Legal Counsel document No. 38) (notifying Congress that because President Bush had determined that the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 were unconstitutional, the Department of Justice could not defend the constitutionality of those provisions in court).

[11] Defendants' Motion and Memorandum in Support Thereof for the Issuance of a Revised Briefing Schedule in this Case and its Related Cases in Turner Broadcasting Sys., Inc v. FCC, Civ. No. 92-2247 (D.D.C.), at 5-8 (Nov. 10, 1992).

[12] See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (Attorney General and Solicitor General,

You also have asked me to provide "the guidelines used by the Justice Department to decide when it will defend the constitutionality of a statute and when it will not." There exist no formal guidelines that the Attorney General, the Solicitor General and other Department officials consult in making such decisions. As indicated by the cases on the Senate Legal Counsel's list, [*8] including those discussed above, different cases can raise very different issues with respect to statutes of doubtful constitutional validity; accordingly, there are a variety of factors that bear on whether the Department will defend the constitutionality of a statute.[13]

---

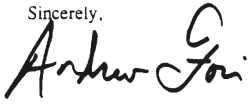
though representing the Attorney General and FEC in defending constitutionality of most parts of the Federal Election Campaign Act of 1971, also appeared for defendant Attorney General and for the United States as amicus curiae in declaratory judgment action, arguing against the constitutionality of the appointment of FEC members by members of Congress); In re Benny, 44 B.R. 581 (N.D. Cal. 1984), aff'd, 812 F.2d 1133 (9th Cir. 1987) (Department of Justice represented United States as intervenor in arguing that statute violated Appointments Clause by permitting Congress to appoint to new judgeships bankruptcy judges whose terms already had expired) (see Senate Legal Counsel document No. 15); Synar v. United States, 626 F. Supp. 1374, 1379 (D.D.C.), aff'd sub nom. Bowsher v. Synar, 478 U.S. 714 (1986) (Department of Justice appeared on behalf of defendant United States in declaratory judgment action to argue against the constitutionality of Gramm-Rudman-Hollings Act provision that gave Comptroller General a role in exercising executive functions under the Act) (see Senate Legal Counsel document No. 23); Hechinger v. Metropolitan Washington Airports Auth., 845 F. Supp. 902, 904 (D.D.C.), aff'd, 36 F.3d 97 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 934 (1995) (Department of Justice appeared on behalf of United States as intervenor to argue that statute providing certain powers to Airport Authority violated separation of powers) (see Senate Legal Counsel document No. 37).

[13] From time to time, various Attorneys General, Solicitors General, and Assistant Attorneys General have written or testified concerning the various factors and rules of thumb that they consider in deciding whether to defend the constitutionality of statutes. See, e.g., Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 9-10 (1975) (Statement of Assistant Attorney General Rex Lee) (Senate Legal Counsel document No. 1). Memorandum from Assistant Attorney General John M. Harmon to Assistant Attorney General Barbara A. Babcock and Deputy Assistant Attorney General James P. Turner, re: Section 208 -- Applicable Standards for Determining Whether or Not to Defend the Constitutionality of a Congressional Enactment (Feb. 2. 1978) (Senate Legal Counsel document No. 2); The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55 (1980) (Letter from Attorney General Benjamin R. Civiletti to the Chairman of the Senate Subcommittee on Limitations of Contracted and Delegated Authority). The most recent example is an article by the current Solicitor General: Days, In Search of the Solicitor General's Clients, supra note 1, 83 Ky. L.J. at 499-503.

Finally, pursuant to discussions between our respective staff counsel, I am enclosing a copy of a recent Opinion of the Assistant Attorney General for the Office of Legal Counsel.[14] The OLC Opinion concerns a related matter that is not directly at issue in this case -- namely, the circumstances under which a President can and should decline to execute statutory provisions that he believes are unconstitutional. As noted above, the President in the instant matter instructed the relevant agencies to implement section 567 of the Defense Authorization Act.

I hope you find this letter helpful. Please let me know if I can be of further assistance.

Sincerely,



Andrew Fois
Assistant Attorney General

Enclosures

[14] That Opinion has been published as Walter Dellinger, Legal Opinion from the Office of Legal Counsel to the Honorable Abner J. Mikva, 48 Ark. L. Rev. 313 (1995).

DUTY TO DEFEND – DEPARTMENT OF JUSTICE OVERSIGHT

Letter from Richard A. Hertling to Patrick J. Leahy

January 18, 2007

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

January 18, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

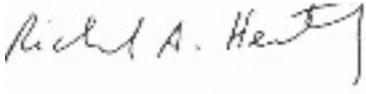
Dear Mr. Chairman:

Enclosed please find responses to questions for the record, which were posed to Attorney General Alberto Gonzales following his appearance before the Committee on July 18, 2006. The hearing concerned Department of Justice Oversight.

Several of the questions relate to the Terrorist Surveillance Program described by the President. Please consider each answer to those questions to be supplemented by the enclosed letter, dated January 17, 2007, from the Attorney General to Chairman Leahy and Senator Specter.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to submission of this letter.

Sincerely,



Richard A. Hertling
Acting Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

* * * *

[*100]

Presidential Signing Statements and Executive Nonenforcement

103. On June 27th, 2006, Deputy Assistant Attorney General Michelle Boardman testified before this committee on the disturbing frequency with which President Bush has disregarded portions of duly enacted laws through his use of signing statements. The American Bar Association convened a special Task Force on Presidential Signing Statements and the Separation of Powers Doctrine made up of respected legal scholars and professionals from across the ideological spectrum. The Task Force recently issued its report, indicating that the President's use of signing statements fundamentally flaunts the basic constitutional structure of our government. The President of the ABA, Michael Greco, has said that the report "raises serious concerns crucial to the survival of our democracy."

In light of the ABA report, do you still maintain that there are no differences between this President's practice with regard to signing statements and the practices of prior Presidents in this area? If so, please indicate the flaws in the ABA's methodology that led it to an erroneous conclusion.

ANSWER: The ABA Report did not accurately report either the history of signing statements or the signing statement practice of the current President. To give but one example, the Task Force sug-

gests that the Clinton Administration's position was that the President could decline to enforce an unconstitutional provision only in cases in which "there is a judgment that the Supreme Court has resolved the issue." ABA Task Force Report at 13-14 (quoting from February 1996 White House press briefing). But President Clinton consistently issued signing statements even when there was not a Supreme Court decision that had clearly resolved the issue. *See, e.g.*, *Statement on Signing the Global AIDS and Tuberculosis Relief Act of 2000* (Aug. 19, 2000) ("While I strongly support this legislation, certain provisions seem to direct the Administration on how to proceed in negotiations related to the development of the World Bank AIDS Trust Fund. Because these provisions appear to require the Administration to take certain positions in the international arena, they raise constitutional concerns. As such, I will treat them as precatory."). Indeed, Assistant Attorney General Dellinger made clear early in the Clinton Administration that if "the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994).

The conclusions of the ABA Task Force Report have been publicly rejected by legal scholars across the political spectrum, including Dellinger, the former Assistant Attorney General for the Office of Legal Counsel during the Clinton Administration, and Professor Laurence Tribe of Harvard University. In addition, the Congressional Research Service ("CRS") recently reviewed the ABA Report and concluded that "in analyzing the constitutional basis for, and legal effect of, presidential signing statements, it becomes apparent that no constitutional or [*101] legal deficiencies adhere to the issuance of such statements in and of themselves." *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-1 (Sept. 20, 2006). Moreover, the CRS found that while there is controversy over the number of statements, "it is important to note that the substance of [President George W. Bush's] statements do not appear to differ substantively from those issued by either

Presidents Reagan or Clinton." *Id.* at CRS-9; *accord* Prof. Curtis Bradley and Prof. Eric Posner, "Signing statements: It's a president's right," The Boston Globe, Aug. 3, 2006 ("The constitutional arguments made in President Bush's signing statements are similar—indeed, often almost identical in wording—to those made in Bill Clinton's statements.").

The ABA Report was also mistaken in suggesting that the President has issued significantly more constitutional signing statements than his predecessors. Indeed, the ABA Report claimed that the President had "produced signing statements containing . . . challenges" to more provisions than all other Presidents in history combined. See ABA Task Force Report at 14-15 & n. 52. That was done by separately counting each provision mentioned in a signing statement rather than by counting only the number of bills on which the President had commented. We believe that the number of individual provisions referenced in signing statements is a misleading statistic, because President Bush's signing statements tend to be more specific in identifying provisions than those of his predecessors. As noted in response to question 78 above, President Clinton, for example, routinely referred in signing statements to "several provisions" that raised constitutional concerns without enumerating the particular provisions in question. *See, e.g.*, *Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000* (Nov. 29, 1999) ("to the extent *these provisions* could be read to prevent the United States from negotiating with foreign governments about climate change, it would be inconsistent with my constitutional authority"; "This legislation includes *a number of provisions* in the various Acts incorporated in it regarding the conduct of foreign affairs that raise serious constitutional concerns. *These provisions* would direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations. Similarly, *some provisions* would constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy. *Other provisions* raise concerns under the Appointments and Recommendation Clauses. My Administration's

objections to most of *these and other provisions* have been made clear in previous statements of Administration policy and other communications to the Congress. Wherever possible, I will construe *these provisions* to be consistent with my constitutional prerogatives and responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities." "Finally, there are *several provisions* in the bill that purport to require congressional approval before Executive Branch execution of aspects of the bill. I will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS* vs. *Chadha*.") (emphases added). Accordingly, we think the only accurate comparison is to count the number of bills concerning which the President has issued constitutional signing statements. As of September 20, 2006, the Congressional Research Service calculated that the President "has issued 128 signing statements, 110 (86%) [of which] contain some type of constitutional challenge or objection, as compared to 105 (27%) during the Clinton Administration." *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-9 (Sept. 20, 2006). The number of bills for which President Bush has issued signing statements is comparable to the number issued by Presidents Reagan and [*102] Clinton, and fewer than the number issued by President George H.W. Bush during a single term in office.

Because the ABA report did not present any new factual information or constitutional analysis, the oral and written testimony of Deputy Assistant Attorney General Michelle Boardman continues to represent the position of the Administration on signing statements.

104. In 2002, Congress passed a law that requires the Attorney General to "submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice" either formally or informally refrains from "enforcing, applying, or administering any provision of any Federal statute, rule, regulation, program, policy, or other law whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional." 28 U.S.C. § 530D. This law requires

the Attorney General to inform Congress both in the case of a signing statement for a new law and in situations where the President declines to enforce existing laws.

At the hearing before the Senate Judiciary Committee on June 27, 2006, Ms. Boardman committed to providing the Committee with a full accounting of the Justice Department's compliance with this provision over the last four years. We have yet to receive a follow-up from Ms. Boardman consistent with that commitment, and have not received any response to our written questions highlighting and restating this request. As the Attorney General, you are specifically charged with fulfilling statutory reporting requirements outlined in 28 U.S.C. § 530D.

Please provide a full and complete list of any existing statutes, rules, regulations, programs, policies or other laws that the President has declined to enforce on constitutional grounds since January 20, 2001.

ANSWER: For a full accounting, please see our response to question 79. As set forth in our response to question 106, below, we disagree that section 530D "requires the Attorney General to inform Congress . . . in the case of a signing statement for a new law."

105. As the Attorney General, have you complied with the reporting requirements of 28 U.S.C. § 530D? Please provide a full accounting of all of the times that you have complied with this statute, along with copies of any transmittals to Congress that have been issued thus far.

ANSWER: Section 530D comprises three basic reporting provisions for the Department: a provision stating that the Attorney General or any officer of the Department shall report any formal or informal policy to refrain from enforcing or applying any Federal statute, rule, regulation, program, policy or other law within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional, or a policy to refrain from adhering to, enforcing, applying, or complying with a binding rule of decision of a jurisdiction respecting the interpretation, construction, or application of the Constitution, any statute, rule, regu-

lation, [*103] program, policy, or other law, *see* 28 U.S.C. § 530D(a)(1)(A); shall report determinations to contest affirmatively in a judicial proceeding the constitutionality of any provision of any Federal statute, rule, regulation, program, policy, or other law, or a decision to refrain on the grounds that the provision is unconstitutional from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of such a provision of law, *see id.* § 530D(a)(1)(B); and shall report certain settlements against the United States involving more than $2 million or injunctive or nonmonetary relief that exceeds 3 years in duration, *id.* § 530D(a)(1)(C).

The Department takes the reporting provisions of section 530D very seriously. It is the practice of the Department to provide Congress with quarterly reports under 28 U.S.C. § 530D(a)(1)(C). Copies of those reports are attached; note that we have not yet located a copy of the report for the first quarter of 2004, but will provide a copy of that report when we do. The original of that report is in the possession of several Members of Congress, the Senate Legal Counsel, and the General Counsel of the House of Representatives.

To ensure compliance with the reporting provisions of section 530D(a)(1)(A), the Department periodically sends to components a reminder of the reporting provisions of section 530D(a)(1)(A) and a solicitation of relevant information. We are not aware of any Department policy adopted since January 20, 2001, that implicates section 530D(a)(1)(A)(I). See our response to question 79. We do not understand your question to ask us to identify such policies adopted by previous Administrations that were the subject of formal congressional notice or public notice at the time of adoption and that this Administration has continued to implement.

Finally, the Solicitor General has sent reports to Congress pursuant to section 530D(a)(1)(B) with respect to the following provisions of law.

11 U.S.C. § 106. In *In re: Robert J. Gosselin*, No. 00-2255 (1st Cir.), the Solicitor General declined to intervene to defend the constitutionality of this provision, and notified Congress about it in a letter dated October 25, 2001. A copy of that letter is at-

tached. Section 106 abrogates state sovereign immunity in certain bankruptcy matters, and, at the time of the Solicitor General's letter, the Third, Fourth, and Fifth Circuits each had held that section 106(a) violated the Eleventh Amendment because Congress lacked the power validly to abrogate state sovereign immunity under the Bankruptcy Clause of the Constitution, U.S. Const., art. I, § 8, cl. 4. *See generally Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings*, 527 U.S. 627, 636 (1999) ("*Seminole Tribe* [*v. Florida*, 517 U.S. 44 (1996)] makes clear that Congress may not abrogate state sovereign immunity pursuant to Article I powers."). In the letter, the Solicitor General noted that in 1997 and 1998, his predecessor had declined to file a petition for certiorari in the Fourth and Fifth Circuit cases and notified Congress of that decision.

In *Tennessee Student Assistance Corp. v. Hood*, No. 02-1606, the Supreme Court granted certiorari in a case presenting the question whether 11 U.S.C. § 106 violated the Eleventh Amendment of the Constitution. In a letter dated November 26, 2003, the Solicitor General notified Congress that he had decided against [*104] intervening to defend the challenged provision, on the ground that no valid basis existed on which the provision could legitimately be defended. We are seeking to obtain a copy of that letter. The Court did not reach the question in *Hood* because it concluded that the facts of that case did not implicate the State's Eleventh Amendment immunity. *See Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004). The Court again granted certiorari to address that question in *Central Virginia Community College v. Katz*, No. 04-885 (S. Ct.). In a letter dated August 3, 2005, the Solicitor General again notified Congress that he had decided against intervening in the case to defend the constitutionality of 11 U.S.C. § 106(c). A copy of that letter is attached. *See also Central Virginia Community College v. Katz*, 126 S. Ct. 990 (2006).

18 U.S.C. 2257. In *Free Speech Coalition v. Gonzales*, 406 F. Supp. 2d 1196 (D. Colo. 2005), the district court largely declined to

enjoin a federal record-keeping statute (18 U.S.C. § 2257) and implementing regulations requiring the producers of sexually explicit material to keep records showing that depicted sexual performers are adults. The court, however, preliminarily enjoined a particular regulatory provision, 28 C.F.R. § 75.2(a)(1), requiring producers to keep a copy of the depictions of live Internet "chat rooms," reasoning that such a requirement would likely be unduly burdensome in light of applicable First Amendment considerations. The Solicitor General notified Congress of his determination not to appeal the adverse portion of the district court's ruling. We are seeking to obtain a copy of that letter. Note that after the decision of the district court, Congress amended the law in the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. v, and the Department is preparing a proposed revision to the regulation to reflect the amendments made to the statute.

29 U.S.C. § 2612(a)(1)(D). Following the Supreme Court's 2001 decision in *Bd. of Trustees of Univ. of Alabama v. Garrett*, and a series of adverse decisions from the courts of appeals for the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits, the Solicitor General notified Congress on December 20, 2001, in connection with *Bates v. Indiana Department of Corrections*, No. IP01-1159-C-H/G (S.D. Ind.), that he would no longer intervene in cases to defend the abrogation of Eleventh Amendment immunity effected by the individual medical leave provision of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2612(a)(1)(D), as "appropriate legislation" within the meaning of section 5 of the Fourteenth Amendment. The letter noted that "[t]he Supreme Court's analysis and holding in *Garrett* have left the Department with no sound basis to continue defending the abrogation of Eleventh Amendment Immunity" in cases of this sort. At the same time, the Solicitor General stated that the Department would continue to defend the constitutionality of the *substantive* medical leave provision, and that "no corresponding decision has been made to discontinue defense of the abrogation of Eleventh Amendment immunity for cases arising

under the parental and family leave provisions of the Act." Indeed, the Department later successfully defended the abrogation of Eleventh Amendment immunity in the family care provisions of the FMLA. *See Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003). A copy of that letter is attached. [*105]

42 U.S.C. § 14011(b). Section 14011(b), which was enacted as part of the Violence Against Women Act ("VAWA"), states that a victim of a sexual assault that was criminally prosecuted in state court may apply to a federal court for an order requiring the criminal defendant to undergo a test for HIV infection. In *In re Jane Doe*, 02-Misc.-168 (E.D.N.Y), the victim of an alleged sexual assault sought an order under section 14011 requiring the criminal defendant to be tested for HIV infection. In light of *United States v. Lopez*, 514 U.S. 549 (1995), and the Supreme Court's more recent decision in *United States v. Morrison*, 529 U.S. 598 (2000), which held that Congress lacked authority under the Commerce Clause to enact another provision of VAWA that provided a federal civil remedy for victims of gender-motivated violence, 42 U.S.C. § 13981, the Solicitor General determined not to defend the provision. We are seeking to obtain a copy of the letter notifying Congress.

Pub. L. No. 108-199, div. F, tit. II, § 177, 118 Stat. 3 (2004). In *ACLU v. Mineta*, 319 F. Supp. 2d 69 (D.D.C. 2004), the Solicitor General determined not to appeal, in light of First Amendment and Spending Clause concerns, a decision holding unconstitutional a congressional appropriations provision placing a condition on transportation grants that precluded local transport authorities from permitting display of advertising or other messages advocating the legalization or medical use of marijuana. By a letter dated December 23, 2004, a copy of which is attached, the Solicitor General notified Congress of that decision.

Regulations implementing 42 U.S.C. § 6971(a). *State of Florida v. United States*, No. 01-12380-HH (11th Cir.), involved Department of Labor regulations used to resolve certain whistle-

blower complaints. In that case, a state employee filed an administrative complaint alleging prohibited retaliation in employment. The State of Florida then filed suit in federal district court seeking an injunction against the administrative proceedings. The district court enjoined the administrative proceedings on the ground that the claimant's claims were barred by the Eleventh Amendment. The government filed an appeal and the Eleventh Circuit affirmed, relying on *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), which held that "state sovereign immunity bars [the federal agency involved in that case] from adjudicating complaints filed by a private party against a nonconsenting State." Similarly, *Ohio EPA v. United States*, No. 01-3237 (6th Cir.), involved a former employee of the Ohio EPA who claimed he had been retaliated against. The district court there granted the state partial relief from administrative proceedings, and held that future proceedings could go forward "only if" the federal Government itself joined the action, apparently to overcome Eleventh Amendment concerns. In light of the Supreme Court's decision in *South Carolina State Ports Authority*, the Solicitor General notified Congress in an August 21, 2002 letter that he had decided not to file a petition for a writ of certiorari in *State of Florida*, and to dismiss the Government's appeal in *Ohio EPA*. A copy of that letter is attached. [*106]

Other: Notification letters also were sent to Congress in the following instances, although the intervention and review decisions at issue did not reflect any judgment by the Department that provisions were constitutionally infirm.

2 U.S.C. § 441b. In *Federal Election Commission v. National Rifle Ass'n*, 254 F.3d 173 (D.C. Cir. 2001), the court of appeals held that, in light of *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), section 441b could not be constitutionally applied to the National Rifle Association with respect to payments made during one of the years in question. In a letter dated December 21, 2001, the Solicitor General notified Congress that he had decided against seeking certiorari in that case "primarily because I

do not believe that it meets the principal criteria that the Supreme Court applies in deciding whether to grant certiorari," because the decision "does not squarely conflict with the decision of other courts of appeals on an issue on which the FEC lost." The letter also detailed several other considerations counseling against seeking certiorari. The letter explicitly noted that the decision "[wa]s not based on any determination that Section 441b is constitutionally infirm."

8 U.S.C. § 1226(c). Section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c), prohibits the Attorney General, except in limited circumstances, from releasing aliens who have committed specified offenses and are removable from the United States. Two courts of appeals, and district courts in various circuits, held in habeas corpus proceedings that this provision violated due process because it does not provide for individualized bond hearings. *See Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001); *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002). The Department appealed some of the adverse district court decisions in cases that became moot for various reasons. In those mooted appeals, the Department requested that the appellate court vacate the adverse district court judgment and remand the case to the district court with instructions to dismiss the case as moot. The Department succeeded in obtaining such a vacatur and remand order in only a few cases; in the majority of cases, the courts of appeals simply dismissed the appeal. Because the filing of such appeals involved a significant expenditure of government resources and because the individual district court cases had no binding effect on other cases, the Solicitor General determined not to file a motion for vacatur and remand routinely in all section 1226(c) appeals that became moot. In a letter dated January 23, 2002, a copy of which is attached, the Solicitor General notified Congress of that decision, and of his decision not to pursue an appeal in two related district cases, one of which he determined was an unsuitable vehicle for appellate consideration of the constitutionality of section 1226(c) and the other of which had no continuing effect. The Solicitor General continued to de-

fend the constitutionality of the statute, and succeeded in persuading the Supreme Court that the statute was constitutional in *Demore v. Kim*, 538 U.S. 510 (2003).

8 U.S.C. § 1229b(b)(1)(A). The Solicitor General decided not to file a petition for a writ of certiorari in *Ramirez-Landeros v. Gonzales*, 148 Fed. Appx. 573 (9th Cir. 2005), in which the Ninth Circuit held, in an unpublished decision, that the [*107] Board of Immigration Appeals' denial of eligibility for cancellation of removal to an alien violated her constitutional right to equal protection. The Ninth Circuit's decision did not state that it was holding a provision of the statute unconstitutional, but rather that the BIA's application of its own adjudicatory precedent to the petitioner violated the alien's right to equal protection. The Solicitor General determined that the decision did not merit filing a petition for a writ of certiorari, because it was unpublished and did not create a conflict with any other court of appeals, and because the court had remanded to the BIA for further proceedings. Noting that "it is unclear whether the court's ruling is of the sort for which a report to Congress is contemplated by 28 U.S.C. 530D," the Solicitor General nevertheless submitted a letter informing Congress of his action on December 23, 2005, because he "thought it would be appropriate to bring this matter to [Congress's] attention." A copy of the letter is attached.

Pub. L. No. 108-21, § 401(*l*), 117 Stat. 650 (2003). The Solicitor General decided not to appeal the district court's opinion in *United States v. Robert Mendoza*, No. CR 03-730 DT, 2004 WL 1191118 (C.D. Cal. Jan. 12, 2004), holding that section 401(*l*) of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 unconstitutionally interfered with judicial independence and violated the constitutional separation of powers. In a letter dated May 11, 2004, the Solicitor General indicated that his decision was based on the unusual facts of that case: section 401(*l*) had never gone into effect (because the Department had implemented a statutory al-

ternative procedure instead), the district court had sentenced the defendant within the Sentencing Guideline range, and other cases appeared to be better vehicles for defending the constitutionality of section 401(*l*). The letter noted that the decision not to appeal "does not reflect a determination on the part of the Executive Branch that Section 401(*l*) is unconstitutional," and observed that "the government has vigorously defended the provision's constitutionality." A copy of the letter is attached.

106. At a minimum, this statute requires the submission of a report to Congress every time a signing statement is issued. If there have been no transmittals, please indicate why you believe you can ignore the plain meaning of duly enacted provisions of law.

ANSWER: Signing statements are publicly issued documents published in the *Federal Register*, but the statute, 28 U.S.C. § 530D, does not require a separate submission to Congress when the President issues a signing statement. The President's signing statements that raise points of constitutional law generally do not "establish[] or implement[] a formal or informal policy to refrain" from enforcing a statute on constitutional grounds. 28 U.S.C. § 530D(a)(1)(A). Instead, they typically state in general terms that a particular provision will be construed consistent with the President's duties under the Constitution. In addition, a signing statement is a statement of the President, not an Executive Order or a memorandum that might fall under 28 U.S.C. § 530D(e). Therefore, not until the Department of Justice or the Attorney General has occasion to make an enforcement decision would the requirements of 28 U.S.C. § 530D apply. If the time comes when a potential constitutional violation would be realized by a statute's enforcement, Congress then would receive a report under the statute. [*108]

107. When you testified before Congress on July 18, 2006, Senator Leahy referred to 750 distinct provisions of law that have been disclaimed by this President through the use of signing statements. At the time, you testified under oath that the statistic of more than 700 was incorrect and had been disclaimed by the Boston Globe. Specifically, you

said, "[t]hat's not true. That number is wrong", and later that "the Boston Globe retracted that number."

A follow-up article in the Boston Globe on July 19th entitled "Bush Blocked Probe, AG Testifies" disputes your claim, indicating that the Globe stands by its claim that the president has challenged more than 750 laws. Christopher Kelly, one of the foremost scholars on the topic, claims that 807 challenges have been issued to individual provisions of law by this President through July 11, 2006. The ABA Taskforce report indicates that the President has challenged over 800 provisions of law; more than the roughly 600 total challenges issued by every previous president combined. In addition, most estimates are likely to be on the low end since the vague and sweeping language in many of these statements could theoretically touch on a wide range of provisions in a given bill. The statement issued in conjunction with the Consolidated Appropriations Act of 2004 contains 116 specific constitutional challenges. Contrast this with the 95 total constitutional challenges issued by the Reagan Administration, which supposedly accelerated the pace of constitutional challenges in signing statement.

Why did you claim that the Boston Globe retracted its estimate?

ANSWER: On May 4, 2006, the Boston Globe issued a correction of its misleading use of phrases such as "750 laws." The correction, a copy of which is attached, reads: "Because of an editing error, the story misstated the number of bills in which Bush has challenged provisions. He has claimed the authority to bypass more than 750 statutes, which were provisions contained in about 125 bills." Although inartfully stated, this correction reveals that the Globe intends in these articles to refer to 750 individual provisions, as included in 125 bills, and does not intend to refer to 750 individual bills or "laws enacted since he took office." We believe that counting the number of *individual provisions* referenced in signing statements is a misleading statistic, because President Bush's signing statements tend to be more specific in identifying provisions than those of his

predecessors. As noted in response to questions 78 and 103 above, President Clinton, for example, routinely referred in signing statements to "several provisions" that raised constitutional concerns without enumerating the particular provisions in question.

Accordingly, we think the only accurate comparison is to count the number of bills concerning which the President has issued constitutional signing statements. As of September 20, 2006, the Congressional Research Service calculated that the President "has issued 128 signing statements, 110 (86%) [of which] contain some type of constitutional challenge or objection, as compared to 105 (27%) during the Clinton Administration." *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-9 (Sept. 20, 2006). The number of bills for which President Bush has issued signing statements is comparable to the number issued by Presidents Reagan and Clinton, and fewer than the number issued by President George H.W. Bush during a single term in office. [*109]

108. As you know, it is possible to issue multiple challenges to discrete provisions of law in a single signing statement. Aside from the question of how many physical statements have been issued, what is your best estimate of how many *discrete provisions of law* have been challenged by this President through his use of signing statements? Please also provide the source and methodology you have used to provide us with that number.

ANSWER: The Department has not counted the individual provisions mentioned by the President in his signing statements and it is not sensible to do so. In our extensive review of the statements of this and prior Presidents, it became apparent that this President is much more specific in detailing the provisions that could raise constitutional concern than other Presidents have been. Where other Presidents often referred generally to "several provisions" that raised constitutional concerns, this President specifically lists each provision. As noted in response to question 78 above, President Clinton, for example, routinely referred in signing statements to "several provisions" that raised constitutional concerns. *See, e.g.*, *Statement on*

Signing Consolidated Appropriations Legislation for Fiscal Year 2000 (Nov. 29, 1999) ("to the extent *these provisions* could be read to prevent the United States from negotiating with foreign governments about climate change, it would be inconsistent with my constitutional authority"; "This legislation includes *a number of provisions* in the various Acts incorporated in it regarding the conduct of foreign affairs that raise serious constitutional concerns. *These provisions* would direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations. Similarly, *some provisions* would constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy. *Other provisions* raise concerns under the Appointments and Recommendation Clauses. My Administration's objections to most of *these and other provisions* have been made clear in previous statements of Administration policy and other communications to the Congress. Wherever possible, I will construe *these provisions* to be consistent with my constitutional prerogatives and responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities." "Finally, there are *several provisions* in the bill that purport to require congressional approval before Executive Branch execution of aspects of the bill. I will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS* vs. *Chadha*.") (emphases added). The precision of President Bush's statements is a benefit, not a detriment, to Congress and the public. Thus, even if one wanted to count the number of specific provisions each President noted and compare them one to another, the statements of prior presidents do not allow for such a comparison, as discussed above.

* * * *

POTENTIAL CONSTITUTIONAL PROBLEMS WITH THE "NEBRASKA COMPROMISE"

Letter from Henry McMaster, Rob McKenna, Mike Cox, Greg Abbott, John Suthers, Troy King, Wayne Stenehjem, Bill Mims, Tom Corbett, Mark Shurtleff, Bill McCollum, Lawrence Wasden, and Marty Jackley to Nancy Pelosi and Harry Reid

December 30, 2009

December 30, 2009

The Honorable Nancy Pelosi
Speaker, United States House of Representatives
Washington, DC 20515

The Honorable Harry Reid
Majority Leader, United States Senate
Washington, DC 20510

The undersigned state attorneys general, in response to numerous inquiries, write to express our grave concern with the Senate version of the Patient Protection and Affordable Care Act ("H.R. 3590"). The current iteration of the bill contains a provision that affords special treatment to the state of Nebraska under the federal Medicaid program. We believe this provision is constitutionally flawed. As chief legal officers of our states we are contemplating a legal challenge to this provision and we ask you to take action to render this challenge unnecessary by striking that provision.

It has been reported that Nebraska Senator Ben Nelson's vote, for H.R. 3590, was secured only after striking a deal that the federal government would bear the cost of newly eligible Nebraska Medicaid enrollees. In marked contrast all other states would not be similarly treated, and instead would be required to allocate substantial sums, potentially totaling billions of dollars, to accommodate H.R. 3590's new Medicaid mandates. In addition to violating the most basic and universally held notions of what is fair and just, we also believe this provision of H.R. 3590 is inconsistent with protections afforded by the United States Constitution against arbitrary legislation.

In *Helvering v. Davis,* 301 U.S. 619, 640 (1937), the United States Supreme Court warned that Congress does not possess the right under the Spending Power to demonstrate a "display of arbitrary power." Congressional spending cannot be arbitrary and capricious. The spending power of Congress includes authority to accomplish policy objectives by conditioning receipt of federal funds on compliance with statutory directives, as in the Medicaid program. However, the power is not unlimited and "must be in pursuit of the 'general welfare.' " *South Dakota v. Dole,* 483 U.S. 203, 207 (1987). In *Dole* the Supreme Court stated, "that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs." *Id. at 207*. It seems axiomatic that the federal interest in H.R. 3590 is not simply requiring universal health care, but also ensuring that the states share with the federal government the cost of providing such care to their citizens. This federal interest is evident from the fact this [*2] legislation would require every state, except Nebraska, to shoulder its fair share of the increased Medicaid costs the bill will generate. The provision of the bill that relieves a single state from this cost-sharing program appears to be not only unrelated, but also antithetical to the legitimate federal interests in the bill.

The fundamental unfairness of H.R. 3590 may also give rise to claims under the due process, equal protection, privileges and immunities clauses and other provisions of the Constitution. As a practical matter, the deal struck by the United States Senate on the "Ne-

braska Compromise" is a disadvantage to the citizens of 49 states. Every state's tax dollars, except Nebraska's, will be devoted to cost-sharing required by the bill, and will be therefore unavailable for other essential state programs. Only the citizens of Nebraska will be freed from this diminution in state resources for critical state services. Since the only basis for the Nebraska preference is arbitrary and unrelated to the substance of the legislation, it is unlikely that the difference would survive even minimal scrutiny.

We ask that Congress delete the Nebraska provision from the pending legislation, as we prefer to avoid litigation. Because this provision has serious implications for the country and the future of our nation's legislative process, we urge you to take appropriate steps to protect the Constitution and the rights of the citizens of our nation. We believe this issue is readily resolved by removing the provision in question from the bill, and we ask that you do so.

By singling out the particular provision relating to special treatment of Nebraska, we do not suggest there are no other legal or constitutional issues in the proposed health care legislation.

Please let us know if we can be of assistance as you consider this matter.

Sincerely,

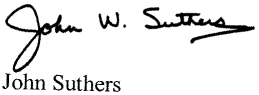
Henry McMaster
Attorney General, South Carolina

Rob McKenna
Attorney General, Washington

Mike Cox
Attorney General, Michigan

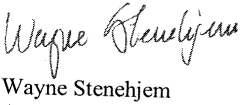
[*3]

Greg Abbott
Attorney General, Texas

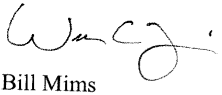


John Suthers
Attorney General, Colorado

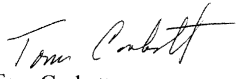
Troy King
Attorney General, Alabama



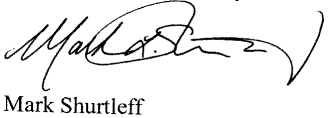
Wayne Stenehjem
Attorney General, North Dakota



Bill Mims
Attorney General, Virginia

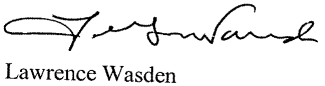


Tom Corbett
Attorney General, Pennsylvania



Mark Shurtleff
Attorney General, Utah

Bill McCollum
Attorney General, Florida



Lawrence Wasden
Attorney General, Idaho

Marty Jackley
Attorney General, South Dakota

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-

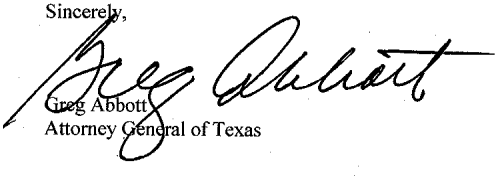
nately, the haste with which the legislation is proceeding, and its utter lack of transparency, may ultimately require litigation in order to ensure the legislation comports with constitutional protections.

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,



Greg Abbott
Attorney General of Texas

CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE

Brief by Kamala D. Harris (additional counsel listed in brief) before Henry E. Hudson

March 7, 2011

11-1057 & 11-1058
IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COMMONWEALTH OF VIRGINIA,
ex rel. Kenneth T. Cuccinelli, II,
in his Official Capacity as Attorney General of Virginia,
Plaintiff-Appellee/Cross-Appellant,

v.

KATHLEEN SEBELIUS,
Secretary of the Department of
Health and Human Services,
in her Official Capacity,
Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia
No. 3:10-cv-188
The Honorable Henry E. Hudson, Judge

AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, IOWA, MARYLAND, NEW YORK, OREGON, AND VERMONT IN SUPPORT OF APPELLANT

KAMALA D. HARRIS
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
TRAVIS LEBLANC
Special Assistant Attorney General
DANIEL J. POWELL
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102
Telephone: (415) 703-5830
Email: daniel.powell@doj.ca.gov
Attorneys for Amici Curiae
State of California

DOUGLAS F. GANSLER
Attorney General of Maryland
WILLIAM F. BROCKMAN
Deputy Solicitor General
JOSHUA N. AUERBACH
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
Telephone: (415) 703-5830
Email: jauerbach@oag.state.md.us
Attorneys for Amici Curiae
State of Maryland

(Other counsel listed on next page)

Additional Counsel:

GEORGE C. JESPEN
Attorney General of Connecticut
55 Elm Street
Hartford, Connecticut
(860) 808-5270
Attorneys for Amicus Curiae
State of Connecticut

ERIC T. SCHNEIDERMAN
Attorney General of New York
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-8020
Attorneys for Amicus Curiae
State of New York

JOSEPH R. BIDEN, III
Attorney General Of Delaware
820 N. French Street
Wilmington, DE 19801
(302) 577-8400
Attorneys for Amicus Curiae
State of Delaware

JOHN R. KROGER
Attorney General of Oregon
1162 Court Street NE
Salem, Oregon 97301
(503) 378-6002
Attorneys for Amicus Curiae
State of Oregon

DAVID M. LOUIE
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1500
Attorneys for Amicus Curiae
State of Hawaii

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609
(802) 828-3173
Attorneys for Amicus Curiae State of Vermont

TOM MILLER
Attorney General of Iowa
1303 East Walnut Street
Des Moines, Iowa 50319
(802) 828-3181
Attorneys for Amicus Curiae State of Iowa

[*Editors' note*: Table of Contents and Table of Authorities omitted.]

[*1] INTEREST OF THE AMICI STATES

Amici,[1] the States of California, Connecticut, Delaware, Hawaii, Iowa, Maryland, New York, Oregon, and Vermont[2] have a vested interest in protecting the health, safety, and welfare of their citizens, interests that are advanced through the Patient Protection and Affordable Care Act of 2010[3] ("ACA"). Moreover, as sovereign States, Amici have a vital interest in ensuring that constitutional principles of federalism are respected by the federal government, as they are here.

As part of their responsibility to help provide access to affordable care for their citizens, Amici have engaged in varied, creative, and determined state-by-state efforts to expand and improve health insurance coverage in their States and to contain healthcare costs. Despite some successes, these state-by-state efforts have fallen short. As a consequence, Amici have concluded that a national solution, embracing principles of cooperative federalism, is necessary. [*2]

California's dire situation illustrates the problems facing Amici. In 2009, more than 7.2 million Californians—nearly one in four people under the age of 65—lacked insurance for all or part of the year. More than 5.5 million Californians who could not afford private insurance were enrolled in government-sponsored health plans, which will cost the State a projected $42 billion in the next fiscal year. Of those funds, $27.1 billion comes from the General Fund, which faces a $25 billion deficit.

Oregon and Maryland too are grappling with the spiraling cost of medical care and health insurance. Despite a variety of legislative efforts to increase access to insurance coverage, 21.8% of Oregonians and 16.1% of Marylanders lack health insurance. The Urban Institute has predicted that without comprehensive healthcare re-

---

[1] Amici file this brief pursuant to Federal Rule of Appellate Procedure 29(a).

[2] Although Massachusetts has filed a brief detailing its unique experience with its health care reform, it agrees with the arguments set forth in this brief.

[3] The ACA refers to the Patient Protection and Affordable Care Act, Public Law 111–148 and the Healthcare and Education Reconciliation Act of 2010, Public Law 111–152.

form, 27.4% of Oregonians and 20.2% of Marylanders will lack health insurance by 2019. In 2009, Oregon spent $2.6 billion on Medicaid and the Children's Health Insurance Program. Without comprehensive healthcare reform, the cost is expected to double to $5.5 billion by 2019.

The ACA provides important tools for the States, in partnership with the federal government, to provide their citizens needed access to affordable and reliable healthcare. The law strikes an appropriate—and constitutional—balance between national requirements that will expand [*3] access to affordable healthcare while providing States with flexibility to design programs that achieve that goal for their citizens. Amici urge this Court to reverse the decision of the district court and uphold this necessary law.

STATUTORY BACKGROUND

The ACA represents a reasonable means of grappling with the United States' healthcare crisis. The minimum coverage provision, which requires non-exempt adults to maintain adequate health coverage, is but one part of a comprehensive healthcare reform law intended to increase Americans' access to affordable healthcare. The ACA relies in large part on an expansion of the current market for health insurance, building upon existing state and federal partnerships to improve access to and the quality of healthcare in the United States.

Although the minimum coverage provision requires individuals to purchase health insurance, most people will continue to receive coverage through their employer or through expanded access to Medicaid. The ACA expands the number of employers who offer insurance to their workers by requiring businesses with more than fifty employees to begin providing health insurance in 2014. ACA § 1513. Small businesses have already started taking advantage of the significant tax breaks intended to encourage [*4] such expansion, including some of the 333,000 businesses eligible in the Fourth Circuit. ACA § 1421.[4] The ACA also expands access to Medicaid to

[4] http://www.irs.gov/pub/newsroom/count per_state_for_special_post_card_notice.

individuals who earn less than 133 percent of the federal poverty level, and funds 100 percent of the cost until 2017. ACA § 2001(a). California was one of the first States to obtain a waiver from the federal government that allows it to offer this expanded coverage to Californians prior to 2014.[5]

Finally, for those individuals who do not obtain health insurance from their employer or from government-run plans, the ACA makes affordable coverage more readily available. It eliminates annual and lifetime caps on health insurance benefits so that individuals maintain coverage during a catastrophic illness. 42 U.S.C. § 300gg-11. The ACA authorizes States to create health insurance exchanges that will allow individuals, families, and small businesses to leverage their collective bargaining power to obtain more competitive prices and benefits. 42 U.S.C. § 18031. Maryland, for instance, has already received two grants totaling $7.2 million to support its [*5] implementation of this provision.[6] The ACA provides tax incentives for low-income individuals to purchase their own insurance through insurance exchanges. ACA § 1401. Starting in 2014, the ACA prohibits insurance companies from refusing to cover individuals with preexisting conditions. 42 U.S.C. § 300gg-3. A significant number of individuals who are uninsured are unable to purchase insurance or are required to pay higher premiums due to a preexisting condition, which can include common illnesses such as heart disease, cancer, asthma, or even pregnancy.[7] The ACA will thus dramatically increase the availability of insurance for previously uninsurable individuals.

One component of these comprehensive reforms is the minimum coverage provision, which requires that an applicable individual maintain "minimum essential coverage" each month. ACA § 1501. Minimum essential coverage includes Medicare or Medicaid, an employer-sponsored plan, or a plan offered through a health in-

---

pdf (last accessed Feb. 27, 2011).

[5] California Department of Healthcare Services, *California Bridge to Reform: A Section 1105 Waiver* (Nov. 2010).

[6] http://www.healthcare.gov/center/states/md.html (last accessed Feb. 27, 2011).

[7] Karen Pollitz, Richard Sorian, and Kathy Thomas, *How Accessible is Individual Health Insurance for Consumers in Less-Than-Perfect Health?* (Report to the Kaiser Family Foundation June 2001).

surance exchange. *Id*. As discussed below, the minimum coverage provision is important for two [*6] reasons. First, it ensures that individuals take responsibility for their own care rather than shifting those costs to society. Second, the elimination of caps on benefits and the requirement that insurance companies insure individuals with preexisting conditions are unsustainable if participants in the healthcare market are allowed to postpone purchasing insurance until an acute need arises.

SUMMARY OF ARGUMENT

Under the Commerce Clause, Congress has the authority to enact the minimum coverage provision, as it substantially affects interstate commerce and is essential to the proper application of the ACA. The Supreme Court has recognized three broad categories of activities Congress may regulate consistent with its authority "to regulate commerce," including (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce," and (3) "activities having a substantial relation to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). Although the Supreme Court has in the past addressed the scope of "activities" that Congress may regulate, it has never suggested that a distinction between activity and inactivity exists or that it is a relevant inquiry for purposes of the Commerce Clause. [*7]

Rather, the minimum coverage provision is included in Congress's power to regulate activities that substantially affect interstate commerce. Exercising this power, Congress may regulate economic activities that, in the aggregate, have a substantial effect on interstate commerce. *See Gonzalez v. Raich*, 545 U.S. 1, 17 (2005). In addition, Congress may regulate noneconomic activity so long as the regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. The minimum coverage provision is a justifiable exercise of Congress's Commerce Clause authority because (1) the aggregate effect of maintaining a minimum level of insurance coverage has a substantial effect on commerce, and (2) the comprehensive solution to health

insurance reform would be undercut without the minimum coverage provision.

Moreover, the minimum coverage provision is also justified by the Necessary and Proper Clause. Not only is the minimum coverage provision necessary, it is a proper exercise of federal authority that does not alter the essential attributes of state sovereignty. Indeed, identical arguments were made and rejected when Congress first began regulating conditions of labor and when it passed the Social Security Act. [*8]

ARGUMENT

I. CONGRESS POSSESSES THE AUTHORITY UNDER THE COMMERCE CLAUSE TO ENACT THE MINIMUM COVERAGE PROVISION

A. As a Threshold Matter, the Distinction between Activity and Inactivity is Illusory and Has No Basis in Commerce Clause Precedent.

Regardless of whether the minimum coverage provision is seen to regulate activity or "inactivity," it is within Congress's power to regulate interstate commerce. In arguing that the minimum coverage provision is outside the bounds of the Commerce Clause, Virginia does not question the substantial effects that the failure to purchase insurance has on interstate commerce, but rather argues that the decision not to purchase health insurance is "inactivity" that could not be regulated by Congress. (Dist. Ct. Paper No. 89 at 16.) The supposed distinction between "activity" and "inactivity," however, is illusory, and has no basis in Supreme Court jurisprudence.

Many regulated activities could conceivably be characterized as "inactivity," illustrating the false distinction between the two. For instance, the failure to comply with draft registration requirements, 50 U.S.C. App. 451 *et seq.,* can be viewed as inaction or as an affirmative act of disobedience. The failure to appear for federal jury duty as required by 28 U.S.C. § 1854(b) can likewise be characterized as "inactivity" rather than as [*9] an affirmative action to evade jury service. As Justice Scalia has observed, "[e]ven as a legislative matter…the intelligent line does not fall between action and inac-

tion." *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 296 (1990) (Scalia, J., concurring). Judge Kessler of the United States District Court for the District of Columbia reached a similar conclusion in granting the government's motion to dismiss a related suit:

> It is pure semantics to argue that an individual who makes a choice to forego health insurance is not "acting," especially given the serious economic and health-related consequences to every individual of that choice. Making a choice is an affirmative action, whether one decides to do something or not do something. To pretend otherwise is to ignore reality.

Mead v. Holder, 2011 WL 61139, *18 (D.D.C. Feb. 22, 2011). The distinction between activity and inactivity carries no analytical weight and does not furnish a proper basis for determining the scope of congressional power.

The distinction between activity and inactivity also has no basis in Commerce Clause jurisprudence. Virginia notes that Supreme Court cases construing the limits of the Commerce Clause power refer to economic *activity*, and concludes from this observation that Congress can regulate only activity, not inactivity. (Dist. Ct. Paper No. 89 at 5, 13, 16.) That argument improperly elevates descriptive statements into a holding. The Court's [*10] discussions of "economic activity" in those cases were not focused on whether the law at issue regulated activity rather than inactivity, but on whether the activity was economic or noneconomic in nature.[8] *See, e.g., United States v. Morrison*, 529 U.S. 598, 610 (2000) ("Both petitioners and Justice Souter's dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. But a fair reading of *Lopez* shows that the noneconomic, criminal nature

[8] Similarly, some argued that Congress could not regulate local manufacture prior to transit because Supreme Court decisions discussing the Commerce Clause had, prior to that point, addressed only the regulation of goods in transit. The Court ultimately rejected the distinction between the two. As Robert Stern observed, "'the Court talked about movement because that was all that was needed to talk about to decide the cases before it,' and not because it meant to limit the scope of federal power." Mark A. Hall, *Commerce Clause Challenges to Healthcare Reform*, 159 U. Penn. L. Rev. at ___ (forthcoming June 2011), available at: http://ssrn.com/abstract=1747189 (quoting Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 Harv. L. Rev. 1335, 1361 (1934)).

of the conduct at issue was central to our decision in that case."). Thus, the proper question is not whether the decision refusing to purchase health insurance is "action" or "inaction," but rather whether, in the aggregate, such decisions substantially affect interstate commerce. There can be no doubt that they do. [*11]

B. Decisions Whether to Purchase Health Insurance Have a Substantial Effect on Interstate Commerce That Congress May Directly Regulate.

The decision whether to maintain health insurance coverage has a "substantial relation to interstate commerce," *Lopez*, 514 U.S. at 558, and is a permissible exercise of Congress's Commerce Clause authority. In deciding to regulate activities that have a substantial effect on interstate commerce, Congress may consider the aggregate effects of those activities. "When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Raich*, 545 U.S. at 17. This Court need not determine whether the decision to purchase health insurance substantially affects interstate commerce when considered in the aggregate, but "only whether a 'rational basis' exists for so concluding." *Id.* at 22 (quoting *Lopez*, 514 U.S. at 557). Here, Congress had a rational basis for concluding that individuals' decisions not to purchase health insurance, but rather to pay (or attempt to pay) for their medical care only at the time such care is delivered has a substantial effect on interstate commerce.

As Secretary Sebelius demonstrates in her brief (p. 31-33), the minimum coverage provision has a substantial effect on interstate commerce. Everyone requires healthcare at some point. Individuals who [*12] lack health insurance, however, shift two-thirds of the cost of their care to state and local officials, amounting to $43 billion nationally in 2008 at a cost of $455 per individual or $1,186 per family each year in California.[9] Maryland has developed a unique regulatory framework that seeks to ensure that such cost-shifting

[9] 42 U.S.C. § 18091(a)(2)(F); Peter Harbage and Len Nichols, *A Premium Price: The Hidden Costs All Californians Pay in Our Fragmented Healthcare System* (New America Foundation, Dec. 2006).

occurs as equitably as possible. The State's Health Services Cost Review Commission, a hospital rate-setting body, authorizes the State's hospitals to impose a fee on all patients to reimburse hospitals for the costs associated with providing care to the uninsured. In 2009, when Maryland hospitals provided a total of $999 million in uncompensated care, 6.91% of the charge for any visit to a Maryland hospital reflected a Commission-approved add-on charge to reimburse the hospital for the cost of providing uncompensated care. In other words, a fixed and substantial portion of every Maryland hospital-patient's bill reflects the shifting of costs from supposedly "inactive" individuals to the patient population as a whole.

Requiring individuals to possess health insurance ends this cost-shifting, lowering the costs of healthcare for everyone and reducing the costs to the States of providing such care. The minimum coverage provision will greatly reduce the need to compensate hospitals for uncompensated care, [*13] either directly as Maryland does, or indirectly as is the case in California and most States. The direct impact on interstate commerce described in the Secretary's brief is sufficient to justify Congress's exercise of its Commerce Clause authority.

C. The Minimum Coverage Provision Regulates an Essential Part of a Larger Economic Activity.

The minimum coverage provision is also justified as "an essential part of a larger regulation" of the health insurance industry. *Lopez*, 514 U.S. at 561. It cannot be doubted that Congress has the constitutional authority to regulate the health insurance industry. *See United States v. South-Eastern Underwriters*, 322 U.S. 533 (1944) (Congress possesses Commerce Clause authority to regulate insurance). Indeed, Congress has regulated the health insurance market for decades. *See* Employee Retirement Income Security Act of 1974 (ERISA) (Pub. L. 93-406); Consolidated Omnibus Budget Reconciliation Act (COBRA) (Pub. L. 99-272); Health Insurance Portability and Accountability Act (HIPAA) (Pub. L. 104-191).

The market for medical services is national in scope, and accounts for 17 percent of the United States's gross domestic product,

or $2.5 trillion.[10] [*14] Congress found that spending for health insurance exceeded $850 billion in 2009. 42 U.S.C. § 18091(a)(2). As Congress recognized, medical supplies, drugs, and equipment used in the provision of healthcare routinely cross state lines. 42 U.S.C. § 18091(a)(2)(B). Many hospital corporations operate in numerous states: the Hospital Corporation of America, for instance, operates 164 hospitals and 106 freestanding surgery centers in 20 states.[11] Moreover, Congress found that the majority of health insurance is sold by national or regional companies. 42 U.S.C. § 18091(a)(2)(B).

As Secretary Sebelius explains in her brief (p. 34–39), the minimum coverage provision is an essential part of the ACA's attempt to provide healthcare access to individuals with preexisting conditions, a group that is among the hardest of the uninsured to cover. The requirement that companies insure individuals with preexisting conditions creates a moral hazard: individuals could simply wait until they are sick to purchase health insurance. Left unmitigated, this "adverse selection" creates an insurance pool that poses an extremely high risk from an insurer's perspective, since individuals who are ill or at high risk of becoming ill will disproportionally purchase health insurance while healthy individuals will remain outside the system. To prevent insurance companies from being forced to raise [*15] premiums to account for this risk, Congress enacted the minimum coverage provision, which prevents freeloaders from refusing to pay for insurance when they know they can buy it when it is needed.

This provision has the additional effect of reducing the need to shift the cost of uncompensated care given to those without insurance onto the States and responsible individuals who have health insurance. *See supra* at 12–13. As a result of the minimum coverage provision, California will no longer be forced to pay the 5-7 percent of public hospitals' operating expenses that resulted from treating uninsured individuals.[12] Nor will Maryland be forced to add a 7 per-

[10] Center for Medicare & Medicaid Services, 2009 National Health Expenditure Data, table 3.
[11] http://www.hcahealthcare.com/about/ (last accessed March 5, 2011).
[12] California HealthCare Foundation, *California's Healthcare Safety Net: Facts and Figures* at 19

cent surcharge to all hospital bills to cover such uncompensated care. The minimum coverage provision will help reduce the almost $43 billion spent nationally on uncompensated care, 42 U.S.C. § 18091(a)(2)(F), and is necessary to the proper functioning of the requirement that insurance companies insure those with preexisting conditions. It is the sort of noneconomic regulation that is essential to a larger regulation of economic activity (the health insurance market generally) that Congress may regulate. *Lopez*, 514 U.S. at 561. [*16]

D. The Minimum Coverage Provision is a Necessary and Proper Means to Regulate the Health Insurance Market.

Congress's authority under the Commerce Clause is augmented by the Necessary and Proper Clause, which allows Congress to "make all laws which shall be necessary and proper for carrying into execution" the powers enumerated in the Constitution. U.S. Const., Art. I, § 8. As Justice Scalia has explained, the Necessary and Proper Clause authorizes Congress to "regulate even those intrastate activities that do not substantially affect interstate commerce" as well as "noneconomic local activity" where necessary to make a regulation of interstate commerce effective. *Raich*, 545 U.S. at 35, 37 (Scalia, J., concurring). Thus, even if the requirement that an individual maintain a minimum level of coverage were not considered economic, it is still within Congress's power since it is necessary to lower the cost of health insurance and to effectuate the ban on denying coverage based on preexisting conditions. In rejecting application of the Necessary and Proper Clause, the district court concluded that the minimum coverage provision was not "tethered to a lawful exercise of an enumerated power" and that the provision "is neither within the letter nor the spirit of the Constitution." (Dist. Ct. Paper No. 161 at 24.) This conclusion reflects a [*17] misunderstanding of the purpose and function of the Necessary and Proper Clause.

(Oct. 2010).

1. The Minimum Coverage Provision Furthers Congress's Exercise of Its Commerce Clause Authority.

The minimum coverage provision is in fact tethered to a valid exercise of congressional authority: Congress's power to regulate commerce. It is beyond dispute that the ACA *as a whole*, which regulates the $2.5 trillion national healthcare market, is within Congress's Commerce Clause power. Under the Necessary and Proper Clause, Congress "possesses every power needed to make that regulation effective." *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 118–19 (1942). Such power is necessarily *in addition to* whatever enumerated power Congress possesses. It is axiomatic that Congress possesses the authority to use all appropriate means adapted to legitimate ends. *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819). To suggest that Congress must possess some enumerated power to justify the exercise of authority under the Necessary and Proper Clause would render that clause meaningless.

Rather, the appropriate inquiry is whether "the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." *United States v. Comstock*, 130 S. Ct. 1949, 1957 [*18] (2010). In making this determination, courts must give Congress "a large discretion as to the means that may be employed in executing a given power." *Lottery Case*, 188 U.S. 321, 355 (1903). The end here is clearly legitimate: to reduce the expense of healthcare, which in 2008 accounted for approximately $2.5 trillion, or 17.6%, of the nation's economy, and to expand access to health insurance as the federal government has been doing since the passage of the Social Security Act in 1965. So too are the means reasonably adapted to this legitimate end. As explained above, *supra* at 14-15, the minimum coverage provision helps eliminate the problem of adverse selection created by expanding the insurance pool and results in reduced insurance premiums and lower costs of healthcare.

2. The Minimum Coverage Provision is a "Proper" Exercise of Congressional Authority

In addition to being necessary, the minimum coverage provision is also proper. Virginia's primary argument as to why the Necessary and Proper Clause does not apply is that the power to enact the minimum coverage provision "would alter the federal structure of the Constitution by creating an unlimited federal power indistinguishable from a national police power." (Dist. Ct. Paper No. 89, at 5–6.) This concern dramatically overstates the authority being claimed by the federal government, and [*19] dramatically understates the extent to which the federal government already regulates a significant portion of the health insurance market.

In *Comstock*, the Supreme Court rejected a Tenth Amendment limitation on the Necessary and Proper Clause much along the lines of what Virginia urges here. The Supreme Court concluded that the "powers 'delegated to the United States by the Constitution' include those specifically enumerated powers listed in Article I along with the implementation authority granted by the Necessary and Proper Clause. Virtually by definition, these powers are not powers that the Constitution 'reserved to the States.'" *Comstock*, 130 S. Ct. at 1962.

Justice Kennedy concurred, expressing his view that "whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause" should be a consideration in determining whether a power is properly within the federal government's reach. *Id*. at 1967–68. Justice Kennedy identified three examples where the Necessary and Proper Clause should be limited: instances "in which the National Government demands that a State use its own governmental system to implement federal commands"; "in which the National Government relieves the States of their own primary responsibility to enact laws and policies for the safety and well being of their citizens"; or [*20] "in which the exercise of national power intrudes upon functions and duties traditionally committed to the State." *Id*. at 1968. None of these apply here.

a. The Minimum Coverage Provision Does Not Require States to Implement Federal Commands.

First, the Act does not commandeer the States to implement a federal program. To the contrary, the ACA provides States substantial ability to experiment with their own methods of improving their citizens' access to affordable healthcare. Indeed, the ACA is a prime example of cooperative federalism that the Supreme Court has concluded is within Congressional authority. *New York v. United States*, 505 U.S. 144, 167 (1992). For instance, the ACA gives States broad latitude to establish health insurance exchanges in a manner that States determine best meet the needs of their citizens, subject to minimum federal standards. 42 U.S.C. § 18041(b). Even those standards may be waived if a State wishes to provide access to health insurance in a different way. *Id.* § 18052. Or a State may decline to establish an exchange at all. *Id.* § 18041(c).

Similarly, the ACA allows States great latitude in establishing basic health programs for low-income individuals who are not eligible for Medicaid. States may implement new coverage programs for individuals and families with incomes between 133% and 200% of the poverty line. 42 [*21] U.S.C. § 18051. If a State chooses to implement these programs, their citizens would be able to choose a plan under contract with the State instead of one offered in the insurance exchange. *Id.* The State would receive federal funds to operate such a program equal to 95% of the subsidies that would have gone to providing coverage for this group in the exchange. *Id.* § 18051(d)(3). States may also enter into healthcare choice compacts in which two or more States establish such a program. *Id.* § 18053. Or again, a State may choose not to establish such a program and instead allow their citizens to access health insurance exchanges operated by the federal government.

b. States Maintain Primary Responsibility to Protect their Citizens.

Second, the ACA does not relieve States of their primary responsibility to enact laws and policies for the safety and well-being of their citizens. States may choose to enact further reforms to im-

prove over the federal reforms contained in the ACA, much as Massachusetts has done with its landmark healthcare reform law that has served as a model for many of the reforms instituted by the ACA. Indeed, the ACA gives States *additional* authority to regulate insurance companies. Under the authority to review any increases in the premiums set by insurance companies, California passed a law requiring all premium filings to be reviewed and certified by an [*22] independent actuary to ensure that premium costs are accurately calculated. Cal. Stats. 2010, Ch. 661.

c. The ACA Does Not Intrude in an Area Typically Committed to State Control

Third, the ACA does not intrude in an area that has historically been committed solely to the States. While States retain wide latitude to regulate the standards of medical care and the provision of health insurance, the federal government has maintained a presence in the health insurance arena for decades. A prime example is Medicaid, through which the state and federal governments cooperate in order to extend coverage to children, pregnant mothers, and the disabled who are below the federal poverty level. 42 U.S.C. § 1396a(a)(10)(A)(i). Using federal and state funds, States administer Medicaid according to a plan that is approved by the Secretary of Health and Human Services. *Id.* § 1396a(b). States, within federal guidelines, determine which benefits the State will offer, how much doctors are paid, and how the program will operate. Congress's continued involvement in the health insurance market is nothing new.

Aside from Medicaid, Congress has regulated large aspects of the insurance market since the passage of ERISA in 1974. ERISA regulates the provision of employer-sponsored health plans, and limits the ability of insurance companies to deny coverage to individuals with preexisting [*23] conditions. 29 U.S.C. § 1181. ERISA also sets minimum standards for certain aspects of employer-sponsored health insurance, such as requirements for minimum hospital stays following the birth of a child, and parity in mental health and substance abuse benefits. *Id.* §§ 1185(a), 1185a. Congress has twice

revisited its regulation of health insurance since then. Passed in 1986, COBRA requires that employers continue to offer health insurance to individuals and their dependents that otherwise might be terminated, such as if an individual loses his or her job. *Id*. §§ 1161 *et seq*. HIPAA, passed in 1996, set federal requirements for maintaining the privacy of medical information, 42 U.S.C. §§ 1320d-1 *et seq*. and further limited the exclusion of individuals with preexisting health conditions, 29 U.S.C. § 1181.

Since the establishment of Medicaid in 1965 and the passage of ERISA in 1974, the federal government has been actively involved in the regulation of the health insurance market. While the ACA represents an expansion of the federal government's presence, it is not a usurpation of an area traditionally left to state regulation alone.

d. Federal Intervention is Needed to Reform the Health Insurance Market.

Because of the national scope of healthcare and its importance to the national economy, States are unable to solve the problem of the uninsured [*24] without the assistance of the federal government. Most people obtain their healthcare through their employers, and States' attempts to reform the healthcare market come at great risk: a state's requirement that employers offer health insurance could lead to businesses moving to other States. Similarly, the regulation of insurance practices by a single State may make insurance companies reluctant to offer policies there. That is an especially powerful concern when a single insurance company provides coverage for the majority of individuals in a State, such as in Alabama, where the largest carrier has a 96% market share.[13] Moreover, a State that offered especially generous benefits could see individuals move to that State to take advantage of those benefits, increasing the State's financial burden. When Congress regulates the insurance industry on a national basis, these problems are greatly reduced.

[13] Letter from United States Government Accountability Office to Sen. Snowe, *Private Health Insurance: 2008 Survey Results on Number and Market Share of Carriers in the Small Group Health Insurance Market* (Feb. 27, 2009).

Similar motivations caused Congress to regulate the labor market in the early 20th century. The Supreme Court initially determined that such efforts were outside Congress's Commerce Clause powers in a series of decisions that have since been discredited. *See, e.g., Bailey v. Drexel* [*25] *Furniture Co*, 259 U.S. 20 (1922) (invalidating congressional efforts to regulate child labor). The Court ultimately recognized that interstate competition would render efforts by individual States inadequate, and that national standards were needed. *United States v. Darby*, 312 U.S. 100, 122–23 (1941). Like decisions invalidating Congress's attempts to reform labor practices, arguments that the minimum coverage provision are not within Congress's Commerce Clause powers represent a myopic view of that authority.

States' efforts to regulate the health insurance market illustrate the need for congressional action. Maryland, like many states, has undertaken substantial efforts to address these problems, and it has made significant gains. In 2008, Maryland dramatically expanded its Medicaid program, raising the eligibility ceiling for parents and caretakers of dependent children from 30% to 116% of the federal poverty level. As a result of this expansion, the State's Medicaid program now provides coverage to approximately 74,000 Marylanders who would otherwise lack insurance. In 2002, the State created the Maryland Health Insurance Plan (MHIP), which provides coverage to Marylanders who are ineligible for Medicare or Medicaid and who have been deemed medically uninsurable by private [*26] carriers. Today, MHIP insures about 20,000 Maryland residents who would be assured of access to health insurance under the ACA starting in 2014.

While Maryland's efforts have been beneficial, these programs have come at a high cost, and have only reduced, not removed, the barriers to affordable care. Despite the State's expansion of its Medicaid program and its introduction of MHIP, 16.1% of Marylanders still lack health insurance, similar to the figure for the country as a whole. In 2009, the State's hospitals provided $999 million in uncompensated care to those without insurance. Moreover, the expansion of Maryland's Medicaid program to a substantial number of

additional low-income parents is expected to cost the State $498 million in the 2012 fiscal year. To provide benefits to MHIP's high-risk pool of enrollees, MHIP charges premiums substantially higher than those charged in the private market, and, in addition, the State imposes a 0.8% assessment on the net patient revenues of all Maryland hospitals to support MHIP. In the face of unexpectedly high demand for coverage and the high cost of claims, MHIP was forced, between 2006 and 2010, to increase premiums by about 40% for most of its membership and to institute new benefit caps and to lower existing ones. Notwithstanding the Plan's objective to provide insurance for otherwise uninsurable individuals, in 2007 MHIP was compelled to begin excluding coverage for benefits for [*27] preexisting conditions during the first six months of an enrollee's participation in the Plan.

Maryland's efforts illustrate the limits of States' ability to grapple with the national healthcare crisis, and the role that cooperative federalism can play in helping States increase their citizens' access to affordable health insurance. The ACA provides additional funds for Maryland to expand its Medicaid program, and allows for waivers should Maryland, or any other State, seek to do more. The ACA's prohibition on insurance companies' practice of excluding individuals with preexisting conditions reduces the need for MHIP and for the surcharge hospitals pay to support the Plan.

e. Upholding the Minimum Coverage Provision Will Not Provide the Federal Government with a General Police Power.

Sustaining the power of Congress to require individuals to maintain adequate health insurance would not give the federal government a general police power. First, existing precedent provides constraints on congressional power that preclude Congress from exercising a national police power now and in the future. Regardless of whether the authority to enact the minimum coverage provision is found in the Commerce Clause or the Necessary and Proper Clause, a decision sustaining its constitutionality would be based on the fact that the provision either directly affects interstate com-

merce or that [*28] it is *necessary* to support such a direct regulation. A ruling that acknowledges this direct link to interstate commerce poses no risk that the federal government will occupy traditional areas of authority reserved to the States.

Second, in advancing the "slippery slope" argument, Virginia seeks a decision striking down an existing, validly-enacted statute on the basis of the possible future enactment of an unconstitutional statute. This is not a valid basis for challenging the *ACA's* constitutionality. The mere potential that Congress could attempt to enact an unconstitutional law in the future is an insufficient reason to invalidate the ACA today. Frederick Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361 (1985).

Third, for all of the controversy surrounding the ACA, it is not fundamentally different from other federal programs that have been in existence for decades. The federal government has helped provide access to health insurance for large segments of the population through Medicare and Medicaid. It has regulated the provision of healthcare through employer-sponsored plans through ERISA, which governs how most Americans obtain health insurance. The ACA is conceptually no different from Social Security, which is in effect a federally-required retirement-insurance program. In both instances, Congress requires payment over time to avoid [*29] the social and economic costs of individuals who are unable or unwilling to prepare for retirement or for a catastrophic illness.

Indeed, the Social Security Act was also challenged as an incursion on States' prerogatives.[14] The Supreme Court's rejection of that argument is so compelling in the context of the debate over the ACA that it bears repeating:

> The problem is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it ef-

[14] Congress also possesses the authority to enact the minimum coverage provision under Congress's taxing power: only taxpayers are subject to the tax penalty imposed for failure to maintain a minimum level of coverage; the penalty is calculated by reference to an individual's income and is included in that individuals' tax return; the IRS collects the penalty and enforces the minimum coverage provision; and the $4 billion in projected annual revenues are used to fund other provisions of the ACA. *Cf. Sozninsky v. United States*, 300 U.S. 506 (1937); *United States v. Sanchez*, 340 U.S. 42, 44 (1950).

> fectively. Congress, at least, had a basis for that belief. States and local governments are often lacking in the resources that are necessary to finance an adequate program of security for the aged. . . . Apart from the failure of resources, states and local governments are at times reluctant to increase so heavily the burden of taxation to be borne by their residents for fear of placing themselves in a position of economic disadvantage as compared with neighbors or competitors. . . . A system of old age pensions has special dangers of its own, if put in force in one state and rejected in another. The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. Only a power that is national can serve the interests of all. [*30]

Helvering v. Davis, 301 U.S. 619, 644 (1937). The same thing could be said of the healthcare crisis currently gripping the States and the nation. The ACA no more intrudes on state sovereignty than did the Social Security Act.

As States, Amici are fiercely protective of their sovereignty, and have a vital role in ensuring that the balance of power between the state and federal governments reflected in the Constitution is rigidly maintained. The ACA does nothing to disturb that balance. Rather, it provides States with the necessary tools to ensure that their citizens have access to affordable medical care in a healthcare market that is truly national in scope.

II. THE MINIMUM COVERAGE PROVISION IS SEVERABLE FROM THE REMAINDER OF THE AFFORDABLE CARE ACT[15]

For the reasons set forth above, Amici strongly believe that the minimum coverage provision is well within Congress's powers under the Commerce Clause, and that it does not interfere with traditional areas of State sovereignty. Should this Court conclude that Congress lacked authority to enact the minimum coverage provision, however, it should affirm the decision of the district court severing that provision and provisions making reference to it from the

[15] The arguments in this portion of the brief address the cross-appeal in No. 11-1058.

ACA. "The standard for determining the severability of an unconstitutional provision is well [*31] established: '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a matter of law.'" *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)). In making this determination, the Court must determine whether the remainder of the ACA is capable of functioning independently. *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987).

Although the ban on denying coverage based on a preexisting condition is dependent on the minimum coverage provision, the vast majority of the ACA can function as intended by Congress without it. California has taken a lead in implementing many of these provisions even before the minimum coverage provision takes effect in 2014, showing that these provisions, and many others, can operate independently. For instance, California has enacted legislation implementing the ACA's ban on denying coverage of children based on preexisting conditions, as well as its requirement that insurance plans cover dependent children who are 25 or under. 2010 Cal. Stat., Ch. 656 and 660. California has also passed legislation that prohibits a person's health insurance policyholder from canceling insurance once the enrollee is covered unless there is a [*32] demonstration of fraud or intentional misrepresentation of material fact. 2010 Cal. Stat., Ch. 658.

The ACA contains numerous provisions aimed at improving the quality of healthcare that do not depend on the minimum coverage provision. For instance, Title V of the ACA provides new incentives to expand the number of primary care doctors, nurses, and physician assistants through scholarships and loan repayment programs. Title IV of the ACA, on the other hand, contains provisions aimed at preventing illness in the first instance. It requires insurance companies to offer certain preventive services, and authorizes $15 billion for a new Prevention and Public Health Fund, which will support initiatives from smoking cessation to fighting obesity. 42 U.S.C. § 300u-11. The ACA also includes $4 billion in funding for two pro-

grams aimed at moving Medicaid beneficiaries out of institutions and into their own homes or other community settings.[16] One of these programs was enacted during George W. Bush's presidency, and was reauthorized by the ACA. ACA § 2403. Recently, the Department of Health and Human Services announced the first round of grants totaling [*33] $621 million, including over $22 million allocated to West Virginia.[17] Since this program was in effect before the ACA was enacted, it can clearly exist independently of the minimum coverage provision.

Finally, the ACA contains important consumer protections that will assist Amici in their duty to protect individuals from abusive practices of insurance companies. In addition to barring the practice of insurance companies rescinding coverage, the ACA allows consumers to appeal coverage determinations, and establishes an external review process to examine those decisions. California has already implemented a provision that expands consumer assistance programs and has received $3.4 million to enhance the capacity of existing consumer assistance networks and to provide assistance with filing complaints and/or appeals of adverse coverage decisions.[18] California has also received a $1 million grant to implement a provision of the ACA that grants States the authority to review premium increases. Each of these provisions is completely independent of the minimum coverage provision, as the district court recognized. Accordingly, [*34] should this Court invalidate the minimum coverage provision, it should leave the vast majority of the ACA intact.

CONCLUSION

The decision of the district court should be reversed.

---

[16] http://www.hhs.gov/news/press/2011pres/02/20110222b.html (last accessed Feb. 27, 2011).

[17] *See* note 15.

[18] http://www.healthcare.ca.gov/Priorities/ImproveQualityandSecurityofPrivateInsurance.aspx (last accessed Feb. 27, 2011).

Dated: March 7, 2011

Respectfully submitted,
KAMALA D. HARRIS
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
TRAVIS LEBLANC
Special Assistant Attorney General

S/ Daniel J. Powell

DANIEL J. POWELL
Deputy Attorney General
Attorneys for Amici Curiae
State of California

CUMULATIVE INDEX 1: CHRONOLOGICAL

Date; Cite	Author	Recipient	Topic
1996-3-22; 1 J.L. (1 Pub. L. Misc.) 19	Fois, Andrew	Hatch, Orrin G.	Duty to Defend – National Defense Authorization Act, 110 Stat. 186
1997-1-18; 1 J.L. (1 Pub. L. Misc.) 30	Hertling, Richard A.	Leahy, Patrick J.	Duty to Defend – Department of Justice Oversight
2009-12-30; 1 J.L. (1 Pub. L. Misc.) 47	McMaster, Henry, et al.	Pelosi, Nancy; Reid, Harry	Potential Constitutional Problems with the "Nebraska Compromise"
2010-1-5; 1 J.L. (1 Pub. L. Misc.) 51	Abbott, Greg	Hutchison, Kay Bailey; Cornyn, John	Potential Constitutional Problems with H.R. 3590
2011-3-7; 1 J.L. (1 Pub. L. Misc.) 59	Harris, Kamala D.	Hudson, Henry E.	Constitutionality of the Individual Mandate

CUMULATIVE INDEX 2: AUTHORS

Author	Recipient	Topic	Date; Cite
Abbott, Greg	Hutchison, Kay Bailey; Cornyn, John	Potential Constitutional Problems with H.R. 3590	2010-1-5; 1 J.L. (1 Pub. L. Misc.) 51
Fois, Andrew	Hatch, Orrin G.	Duty to Defend – National Defense Authorization Act, 110 Stat. 186	1996-3-22; 1 J.L. (1 Pub. L. Misc.) 19
Harris, Kamala D.	Hudson, Henry E.	Constitutionality of the Individual Mandate	2011-3-7; 1 J.L. (1 Pub. L. Misc.) 59
Hertling, Richard A.	Leahy, Patrick J.	Duty to Defend – Department of Justice Oversight	1997-1-18; 1 J.L. (1 Pub. L. Misc.) 30
McMaster, Henry, et al.	Pelosi, Nancy; Reid, Harry	Potential Constitutional Problems with the "Nebraska Compromise"	2009-12-30; 1 J.L. (1 Pub. L. Misc.) 47

CUMULATIVE INDEX 3: RECIPIENTS

Recipient	Author	Topic	Date; Cite
Cornyn, John; Hutchison, Kay Bailey	Abbott, Greg	Potential Constitutional Problems with H.R. 3590	2010-1-5; 1 J.L. (1 Pub. L. Misc.) 51
Hatch, Orrin G.	Fois, Andrew	Duty to Defend – National Defense Authorization Act, 110 Stat. 186	1996-3-22; 1 J.L. (1 Pub. L. Misc.) 19
Hudson, Henry E.	Harris, Kamala D.	Constitutionality of the Individual Mandate	2011-3-7; 1 J.L. (1 Pub. L. Misc.) 59
Leahy, Patrick J.	Hertling, Richard A.	Duty to Defend – Department of Justice Oversight	1997-1-18; 1 J.L. (1 Pub. L. Misc.) 30
Pelosi, Nancy; Reid, Harry	McMaster, Henry, et al.	Potential Constitutional Problems with the "Nebraska Compromise"	2009-12-30; 1 J.L. (1 Pub. L. Misc.) 47

CUMULATIVE INDEX 4: TOPICS