

*By Dan Sullivan*

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Alaska Dispatch recently posted two pieces concerning the lawsuit that the State of Alaska has joined challenging the constitutionality of the recently enacted federal health care legislation. These articles raised legitimate and important issues which deserve a well-considered response. But first I want to review how we got here and the merits of our suit.



When Governor Parnell asked me to research the legislation's constitutionality, I had doubts whether there was a basis for a lawsuit. That's because when I attended law school it was conventional wisdom that the Commerce Clause of the U.S. Constitution empowered Congress to do just about anything. Certainly that was the impression that had been left by every relevant Supreme Court decision up to that point since 1937.

However, as we dug into our research, two important issues jumped out.

First of all, it is not just the critics of the legislation who say it is unprecedented in its sweeping new powers over Americans' lives. Congress' *own budget arm*, the non-partisan Congressional Budget Office, concurs, stating that "a mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action; [t]he [federal] government has never required people to buy any good or service as a condition of lawful residence in the United States."

Second, in reviewing case law, it became apparent that the Supreme Court's view of the Commerce Clause has shifted. There have been two cases in the past 15 years in which the Court has ruled that Congress' powers under the Commerce Clause are not unlimited. The Court has emphasized that maintaining these limits is essential to preserving the balance between state and federal authority created by the Constitution's Framers. Without such limits our federal system of government, which is based on the enumerated and limited powers of Congress, could become illusory, to the detriment of the rights of the people and states.

It's not in Alaska's interest to acquiesce to the constitutionally suspect "individual mandate" of the new federal health care legislation which would force every citizen into the health insurance market. Protecting the State of Alaska and our citizens' rights to make their own decisions independently of the federal government is key to our way of life and future prosperity.

Given the unprecedented nature of the individual mandate, there is no case law on point, so it is impossible to say how the Supreme Court will view its constitutionality. But

critics who say this lawsuit is frivolous have not done their homework because they do not acknowledge what even Congress admits – that the individual mandate is an unprecedented congressional reach and that the Supreme Court has recently emphasized that Congress' Commerce Clause powers must have limits. Indeed, Congress' own research arm, the Congressional Research Service, recently acknowledged: "[W]hether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service."

Moreover, despite Congress' own acknowledgement that the individual mandate raises new legal issues, critics of the lawsuit throw out phrases such as "legally baseless" and "of dubious merit." But these critics have not addressed the tough issues raised by their own positions. For example, if the state's lawsuit is baseless, then critics obviously believe that Congress has the power under the Commerce Clause to require Americans to purchase a product sold by a private company. As noted above, it is undisputed that this would be an unprecedented expansion of federal authority. Do the critics of the lawsuit believe that such an expansion of federal authority is good for Alaska and our citizens? Given that they believe that the U.S. Constitution provides Congress with the power to force American citizens to purchase a good or service in the private market, do they believe that there are any meaningful limits to Congress' authority under the Commerce Clause? If so, what are they?

The Dispatch column titled "Does Alaska have standing to sue over health care?" contained some very astute comments by Anchorage attorney Jeff Feldman, who questions whether the state has the "standing" to bring suit over health care legislation. We recognize that this is a potential obstacle; we did not address it in our memorandum to the governor because we were focused on the constitutionality of the new legislation. But we have examined the issue and believe we can properly address any challenges to standing.

Dispatch reporter Amanda Coyne also brought up the "opt out" provisions of the federal law, suggesting that if the state had its own comprehensive health coverage system, Alaskans would not have to abide by the individual mandate. But we think the bill's opt-out provision is not quite what proponents have made it out to be.

First, a state that develops its own health coverage system cannot automatically waive the mandate or other provisions of the federal law. It is up to federal authorities to determine whether the state system meets the federal standards of coverage, affordability, and comprehensiveness and to decide the scope of waiver to which a state may be entitled under the opt-out provisions. Second, the earliest a state may trigger the opt-out is January 1, 2017. That still leaves a minimum of three years during

which the state's citizens are subjected to the federal individual mandate, which is effective in 2014.

We recognize that the federal health care legislation has engendered important policy and legal debates throughout the country. It is important for Alaskans to have a deep understanding of what this legislation entails. For this reason, Governor Parnell made public the legal analysis provided to him by the Department of Law. We encourage Alaskans to read this analysis to gain a deeper understanding of the key aspects of the federal health care legislation and the merits of and reasons for the state's lawsuit.

Providing Alaskans and all Americans with the opportunity for affordable health care coverage is a laudable goal. But it shouldn't be achieved through a constitutional short-cut that vastly expands Congress' power, usurps state authority and threatens the individual liberty interests of the American people.