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February 1, 2011

Senator Patrick Leahy
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Senator Jeff Sessions
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Senator Richard Durbin
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy, Ranking Member Sessions, and Senator Durbin:

To assist the Committee in its consideration of the issues presented in its hearing on "The Constitutionality of the Affordable Care Act," we write to express our view that the Constitution's text and history clearly support the constitutionality of the Affordable Care Act. In recent legal rulings and other public statements, there have been many misuses and misinterpretations of the Constitution, most notably regarding the Constitution's grant of power to Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[1] Constitutional Accountability Center has written extensively on the constitutional basis for the Act[2] and also represents a bipartisan group of state legislators from across the country in *Florida, et al. v. U.S. Dep't of Health & Human Services et al.*[3]

[1] U.S. CONST. art. I, § 8.
[2] *See, e.g.*, Elizabeth B. Wydra, "The States, Health Care Reform and the Constitution," available at http://www.theusconstitution.org/upload/fck/file/File_storage/The%20States,%20Health%20Care%20Reform,%20and%20the%20Constitution%281%29.pdf?phpMyAdmin=TzXZ9IzqiNgbGqj5tqLH06F5Bxe; Elizabeth B. Wydra, "Strange Brew: The Tea Party's Errant Constitutional Attacks on Health Care Reform," available at http://theusconstitution.org/blog.history/?p=1829; Iowa Sen. Jack Hatch & Elizabeth B. Wydra, "Dismiss the Florida Lawsuit: Health Care Reform Law Preserves Constitutional Federalism," available at http://www.huffingtonpost.com/elizabeth-b-wydra/dismiss-the-florida-lawsu_b_614846.html.
[3] The brief CAC filed on behalf of this group of legislators may be found at http://www.theusconstitution.org/blog.history/wp-content/uploads/2010/11/State-Legislators-Amicus-Brief.pdf.

I. Federal Power Under the Constitution's Text and History

Our Constitution creates a vibrant system of federalism that gives broad power to the federal government to act in circumstances in which a national approach is necessary or preferable, while reserving a significant role for the States to craft innovative policy solutions reflecting the diversity of America's people, places, and ideas.

While some have portrayed the Constitution as a document that is all about limiting government, the historical context shows that the Founders were just as, if not more, concerned with creating an empowered, effective national government. By the time our Founders took up the task of drafting the Constitution in 1787, they had lived for a decade under the dysfunctional Articles of Confederation—which created such an ineffectual central government that, according to George Washington,[4] it nearly cost the Americans victory in the Revolutionary War—and were focused on creating a new, better form of government with a sufficiently strong federal power.[5]

Specifically, the delegates to the Constitutional Convention instructed the Committee of Detail, which drafted the enumerated powers of Congress in Article I, that Congress should have authority to "legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the Exercise of individual Legislation."[6] Article I thus expressly grants Congress the power to, among other things, regulate interstate commerce and tax and spend to "provide for the general Welfare of the United States."

The Commerce Clause

Some of the challenges to the Affordable Care Act have proffered an overly narrow view of what the Framers of our Constitution meant when they gave Congress power to regulate "Commerce." While it is certainly true that this power relates to economic interactions and trade, "'commerce' also had in 1787, and retains even now, a broader meaning referring to all

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[4] Letter from George Washington to John Hancock, June 11, 1783, available at http://gwpapers.virginia.edu/documents/constitution/1784/hancock.html. The Articles of Confederation, adopted by the Second Continental Congress in 1777 and ratified in 1781, established a confederacy built merely on a "firm league of friendship" between thirteen independent states. There was only a single branch of national government, the Congress, which was made up of state delegations. Congress under the Articles of Confederation had some powers, but was given no means to execute those powers. Congress could not directly tax individuals or legislate upon them; it had no express power to make law that would be binding in the states' courts and no general power to establish national courts, and it could raise money only by making requests to the states.

[5] Indeed, it is indicative of the shift from revolution to statecraft that the Constitution's first Article gives Congress the power to impose a broad range of "Taxes, Duties, Imposts and Excises." U.S. CONST. ART. I, § 8, cl. 1. "Thus, only a decade after they revolted against imperial taxes, Americans were being asked to authorize a sweeping regime of continental taxes, with the decisive difference that these new taxes would be decided on by public servants chosen by the American people themselves—taxation *with* representation." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107 (2005). Suggestions that the legitimate complaints of the "Boston Tea Party" in 1775 animated the Founders during the Constitutional Convention in 1787 are thus deeply flawed. *E.g.*, *Florida et al. v. U.S. Dep't of Health & Human Servs., et al.*, No. 3:10-cv-00091-RV, Order Granting Summary Judgment, Jan. 31, 2011.

[6] AMAR, *supra* note 5, at 108 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand., ed., rev. ed. 1966)). *See* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 8-12 (2010).

forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets."[7] This broader meaning of commerce is clear when reading the full text of the Clause: "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[8] Only if "commerce" is given a broad meaning does the Commerce Clause effectuate the Framers' direction that Congress should have authority to "legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the Exercise of individual Legislation."[9] If commerce were limited merely to active trade of goods, Congress would not be able to, for example, regulate navigation to and from foreign nations, as Chief Justice John Marshall noted in *Gibbons v. Ogden*.[10] As Chief Justice Marshall explained, "Commerce, undoubtedly is traffic, but it is something more: it is intercourse."[11]

While the meaning of commerce in the Constitution was intended to be broad, the text of the Commerce Clause places significant limits on federal regulation: Congress can only act if a given problem genuinely spills across state or national lines. As Chief Justice Marshall explained in *Gibbons*, the Commerce Clause uses the word "among" to mean "intermingled with" and that "commerce among the several states" means "commerce which concerns more States than one."[12] If commerce within a single state has external effects on other states or on the Nation as a whole then it falls under Congress's constitutional regulatory authority; if commerce is "completely internal" to a state, then Congress has no power to regulate.[13]

The Necessary and Proper Clause

The congressional powers written into the Constitution by the Founders are even stronger when coupled with Article I, section 8's sweeping grant of authority to Congress to make laws that are "necessary and proper" for carrying out the other powers granted by the Constitution. As conservative scholar Orin Kerr phrased it, "[t]he point of the Necessary and Proper Clause is that it grants Congress the power to use *means* outside the enumerated list of Article I powers to achieve the *ends* listed in Article I."[14]

Chief Justice John Marshall explained in *McCulloch v. Maryland*[15] that Congress should be shown significant deference regarding what laws it considers to be appropriate in carrying out its constitutional duties. Just last Term, the Supreme Court affirmed that so long as Congress does not run afoul of any other constitutional provision, the Necessary and Proper Clause affords Congress the power to use any "means that is rationally related to the implementation of a constitutionally enumerated power."[16] "[T]he Necessary and Proper Clause makes clear that the

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[7] AMAR, *supra* note 5, at 107.
[8] U.S. CONST. art. I, § 8.
[9] *See* AMAR, *supra* note 5, at 108 (citing FARRAND'S RECORDS 2:131-32); Balkin, *supra* note 6, at 8-9.
[10] 22 U.S. (9 Wheat.) 1, 194 (1824).
[11] *Id.*
[12] *Id.* at 194-95.
[13] Balkin, *supra* note 6, at 30 (quoting *Gibbons*, 22 U.S. at 195.
[14] Orin Kerr, "The Significant Error in Judge Hudson's Opinion" (emphasis in original), available at http://volokh.com/2010/12/13/the-significant-error-in-judge-hudsons-opinion/.
[15] 17 U.S. 316 (1819).
[16] *United States v. Comstock*, 130 S. Ct. 1949, 1956-57 (2010).

Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'"[17]

To be sure, the powers of the federal government under our Constitution are not unlimited—as the Tenth Amendment affirms, the Constitution establishes a central government of enumerated powers, and the States play a vital role in our federalist system—but the powers our charter *does* grant to the federal government are broad and substantial. And, since the Founding, the American people have amended the Constitution to ensure that Congress has all the tools it needs to address national problems and protect the constitutional rights of all Americans. Critics of the Affordable Care Act who begin with the premise that the Constitution establishes a weak, severely limited federal government are thus wrong from the start.

II. Congress's Power to Enact the Affordable Care Act Pursuant to Its Authority to Regulate Commerce and Enact Laws "Necessary and Proper" to Executing That Power

Congress's authority to pass legislation to fix problems in the health care industry is firmly rooted in the Constitution, in particular through the provisions in Article I, section 8 authorizing Congress to regulate interstate commerce and to enact laws that are necessary and proper to exercise its other powers.[18]

Since the health care industry comprises nearly 20 percent of the U.S. economy, no one can seriously dispute that Congress has the authority to regulate health care and the health insurance industries under its Commerce Clause power. Most critics therefore aim more narrowly at whether Congress has the power to require individuals who can afford it to purchase health insurance or pay a tax penalty if they refuse to do so.

As a threshold matter, those critics who claim that not doing anything—that is, choosing to remain uninsured—cannot be considered an economic act are incorrect. The decision not to buy health insurance is a profoundly economic act; the people who make it are making an economic choice to self-insure. That economic choice has significant financial consequences for everyone else. Because our country has decided that no one will be refused emergency care who needs it, regardless of ability to pay,[19] the uninsured can rely on receiving health care when they truly need it. When the uninsured fall seriously ill or get into an accident, they go to the emergency room, where they run up medical bills they often cannot afford to pay without insurance. But someone pays: the American people, who not only foot those bills as taxpayers but also end up paying higher premiums of their own because the uninsured have opted out of the national risk pool. In short, the national economic consequences of individuals deciding to go without insurance are substantial.

The Act contains an individual responsibility provision for a very basic reason: if you don't require people who can afford it to get insurance, they impose costs on taxpayers,

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[17] *Id.* at 1956 (quoting *McCulloch v. Maryland*, 17 U.S. at 316, 413, 418).

[18] This letter focuses on the Commerce Clause and the Necessary and Proper Clause; it does not address other potential sources of constitutional power to enact the Affordable Care Act.

[19] Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd.

hospitals, and local, state and federal governments. According to statistics compiled by Families USA, in 2005, 48 million Americans were uninsured and they incurred $43 billion in medical costs that they could not pay, an average of nearly $900 per uninsured individual.[20] Such a cost figure makes clear that the individual responsibility provision falls squarely within Congress's authority under the Constitution to regulate commerce, including actions—such as the decision not to buy health insurance—that substantially affect interstate commerce.

Even if the choice not to buy insurance could be seen as a non-economic activity, Congress still has the power under the Commerce Clause to require the individual responsibility provision. As the Supreme Court has held, Congress can regulate non-economic activity that has a substantial effect on interstate commerce. For example, in the 2005 case of *Gonzales v. Raich*,[21] the Supreme Court ruled that Congress, as part of its regulation of interstate commerce in illegal drugs, could prohibit a person from growing marijuana in her own backyard for personal, medicinal use (in a State where doing so was legal under local law). Certainly if backyard, medicinal marijuana cultivation for personal use falls under Congress's Commerce Clause power, Congress can regulate the decision to be uninsured.

In addition, the individual responsibility provision is a quintessential example of a law that is "necessary and proper for carrying into execution" [22] Congress's other constitutional powers, such as the power to regulate commerce among the several States. The Affordable Care Act is designed to make health care coverage affordable to all Americans and to prohibit certain insurance practices, such as denying coverage to individuals with pre-existing conditions. Among many other reasons, if Americans can go uninsured until they get sick and then impose these costs on those who already have health insurance policies, the ban on pre-existing conditions will be prohibitively expensive and the cost of insurance will increase across the board.

Finally, requiring individuals to obtain or purchase particular items is not as unprecedented as some critics claim. As Professor Adam Winkler has explained,[23] just five years after the Constitution was drafted, in the second 1792 Militia Act,[24] Congress required male citizens to obtain certain weapons and other items, such as a "knapsack," ammunition, and, in some cases, "a serviceable horse." This was a necessary and proper regulation to effectuate Congress's power to raise armies.[25] In the case of health care, the individual responsibility provision's requirement to obtain health insurance if one can afford it is a necessary and proper regulation effectuating Congress's power to regulate interstate commerce in health care.

In sum, Congress determined that the individual responsibility provision was the appropriate means of regulating the health care and insurance markets. Since the Act does not run afoul of any other constitutional provision—there is no constitutional right to inflict uninsured health care costs on the American taxpayers—health care reform falls squarely within

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[20] *See generally* Pub. L. No. 111-148, §§ 1501(a)(2)(F), 10106(a).
[21] 545 U.S. 1 (2005).
[22] U.S. CONST. art. I, § 8.
[23] Adam Winkler, "The Founders' 'Individual Mandate,'" available at http://www.huffingtonpost.com/adam-winkler/the-founding-fathers-indi_b_523001.html.
[24] Text available at http://www.constitution.org/mil/mil_act_1792.htm.
[25] U.S. CONST. art. I, § 8 (granting Congress power to "raise and support armies").

Congress's power to regulate commerce and enact necessary and proper legislation to carry out this power.

III. Principles of Federalism and the Affordable Care Act

States historically have been leaders in policy innovations that better protect their citizens, resources, and environment.[26] The States have a long history of leadership on health care reform—indeed, the Affordable Care Act incorporated the valuable lessons learned from the experience of health care reform practices by our State and local governments, and preserves the role of the States as laboratories of democracy by giving States considerable policy flexibility.

For example, States have the discretion to form their own insurance exchange or join with other States to form a regional exchange.[27] A State may also choose not to operate an exchange at all, in which case the federal government will administer a statewide insurance exchange for the benefit of the State's citizens.[28] While States must provide the opportunity to buy four levels of health care plans on the exchange—platinum, gold, silver, and bronze plans, at declining expense—they have significant discretion with respect to other aspects of the plans.[29] States can also set up their own programs—with or without a individual responsibility provision, or with a public option—under what has been called the Empowering States to Be Innovative provision.[30] States can obtain a waiver from the federal government if they set up a system that meets the coverage and cost containment requirements in the Act.[31] This allows for the diversity and innovation that is the hallmark of the States.[32]

Nonetheless, some critics of health care reform, such as the plaintiffs who have initiated a legal challenge to the Act in Florida, have claimed that the Act infringes on the sovereignty of the states because it expands the Medicaid program to include all non-elderly individuals with incomes up to 133 percent of the poverty line, or about $29,000 for a family of four. This is legally frivolous for the simple reason that States are entirely free to rid themselves of any burdens imposed by the Act by withdrawing from the federal Medicaid program. States cannot be "coerced" into doing anything with respect to Medicaid—Medicaid is a wholly voluntary federal-State partnership, which the States could opt out of if their leaders and citizens so desired, avoiding the Act's new requirements for expanded Medicaid coverage.

The Supreme Court has made clear that the Constitution allows the federal government to structure or condition federal funds and programs in a certain way, allowing States to choose whether to participate and accept those conditions, or not.[33] It is well-established that "Congress

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[26] *See* Exec. Order on Federalism No. 13132, 64 Fed. Reg. 43255, § 2(e) (Aug. 4, 1999) ("States possess unique authorities, qualities, and abilities to meet the needs of the people and should function as laboratories of democracy.")

[27] *See* ACA § 1321, 42 U.S.C. 18041.

[28] *Id.* at § 1321(c).

[29] *See* ACA § 1331, 42 U.S.C. 18051.

[30] ACA § 1332, 42 U.S.C. 18052.

[31] *Id.*

[32] *See generally New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (observing that, under our federalism, "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

[33] *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

may attach conditions on the receipt of federal funds."[34] If the State finds the conditions too onerous, it may simply refuse the federal funds.[35]

Similarly, the wholly voluntary nature of Medicaid for the States dooms any federalism-based arguments that the Medicaid expansion in the Affordable Care Act somehow "compel[s] the States to enact or administer a federal regulatory program."[36] Because the States can opt out of Medicaid altogether, it is impossible for them to be unconstitutionally compelled to enact or administer the Medicaid expansion required by the Act. The Supreme Court has expressly held that Congress may constitutionally "hold out incentives to the states as a method of influencing a state's policy choices."[37]

Congress established Medicaid in Title XIX of the Social Security Act of 1965; the States then had the option whether to jointly fund the program with the federal government, or not. With the Affordable Care Act, Congress expanded Medicaid to help reduce the number of uninsured people by 32 million in the next ten years; States can again determine whether to continue working with the federal government in the Medicaid partnership, or not.

The Affordable Care Act is appropriately respectful of constitutional principles of vibrant federalism.

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Despite claims by certain critics of the Affordable Care Act that the federal government is sharply limited by the Constitution and too weak to act in crucial areas of policy, such as health care reform, the text and history of the Constitution show otherwise. From the broad and substantial powers granted to Congress in the 1787 Constitution, to the sweeping enforcement powers added to the Constitution through the amendment process in the last two centuries, our Constitution establishes a federal government that is strong enough to act when the national interest requires a national solution.

Congress has the power to regulate the nearly 20 percent of the U.S. economy that is the health care industry, and, when faced with a national health care crisis where millions are uninsured and can't afford decent health care, is empowered to act to reform the health care industry. The Affordable Care Act's individual responsibility provision fits within Congress's Commerce Clause power and is also a necessary and proper means of effectuating Congress's commercial regulation of the health care industry. Far from offending constitutional principles of federalism, the Act reflects how the federal and state governments can work together to protect their citizens and resources.

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[34] *Id.*

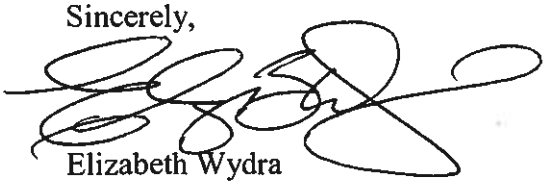
[35] *See Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127 (1947) (upholding the Hatch Act, which required that any employee of a state highway commission [financed in whole or part with federal funds] must be removed from office if he/she was found to be engaging in political activities, because the federal government may attach conditions to disbursement of funds, and because the employee and the State have the right to refuse funds).

[36] *Printz v. United States*, 521 U.S. 898, 926 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

[37] *Id.* at 166; *see also id.* at 167 ("Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices.")

We thank the Committee for providing a forum to discuss these significant issues, which are of great consequence to every American and particularly to those of us who work to secure the promise and premise of the Constitution.

Sincerely,



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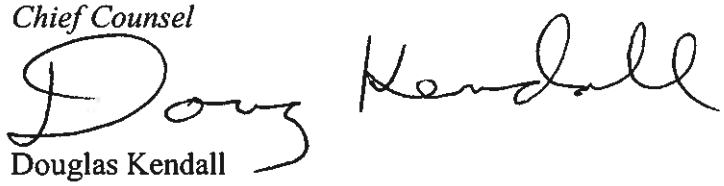

Douglas Kendall
President
CONSTITUTIONAL ACCOUNTABILITY CENTER

cc: Members of the Senate Judiciary Committee