

*****TESTIMONY IS EMBARGOED UNTIL 9:00 AM
THURSDAY, MARCH 29, 2012*****

**Subcommittee on Health
Committee on Ways and Means
United States House of Representatives**

Hearing
Prepared Statement of
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March 29, 2011
Washington, DC

Chairman Herger, Ranking Member Stark, and Members of the Subcommittee:

The Patient Protection and Affordable Care Act (ACA)¹ requires most lawful residents of the United States to either maintain a certain level of health insurance coverage (the minimum coverage provision) or pay a certain amount of money each year (the shared responsibility payment). The ACA labels this required payment a “penalty.”² For three independently sufficient reasons, the minimum coverage provision is within the scope of Congress’s enumerated powers in Article I, Section 8 of the United States Constitution. The provision is justified by (1) the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18; (2) the Commerce Clause, art. I, § 8, cl. 3; and (3) the Taxing Clause, art. I, § 8, cl. 1.

First, the Necessary and Proper Clause gives Congress the power to pass laws that are necessary and proper to carrying into execution Congress’s other enumerated powers. It is common ground on all sides of the ACA litigation that the Commerce Clause gives Congress broad authority to regulate insurance. *See United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944). It is thus also undisputed in the litigation that Congress has the constitutional authority to guarantee access to health insurance in the ACA by prohibiting

¹ Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.).

² ACA, Pub. L. No. 111-148, § 1501(b), 124 Stat. 119, 244 (to be codified at 26 U.S.C. § 5000A).

insurance companies from denying coverage based on preexisting conditions, canceling insurance absent fraud, charging higher premiums based on medical history, and imposing lifetime limits on benefits. 42 U.S.C.A. § 300gg, 300gg-1(a), 300gg-3(a), 300gg-11, 300gg-12.

Under well-established law, the minimum coverage provision is necessary and proper to carrying into execution these undeniably valid regulations of insurance companies. “[T]he relevant inquiry is simply ‘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 (2010) (quoting *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring in judgment) (quoting *United States v. Darby*, 312 U.S. 100, 121 (1941))). And as Justice Scalia has stressed, “where Congress has the authority to enact a regulation of interstate commerce, ‘it possesses every power needed to make that regulation effective.’” *Raich*, 545 U.S. at 36 (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118–19 (1942)).

Guaranteeing access to health insurance is a legitimate end, and the minimum coverage provision is reasonably adapted to the attainment of that end. Without the minimum coverage provision, there would be a perverse incentive for people to wait until they are sick to obtain health insurance. This is known as an “adverse selection” problem, and it would substantially undermine insurance markets. *See, e.g.*, Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 L. & CONTEMP. PROBS., no. 3 (forthcoming April 2012) (documenting and analyzing the adverse selection problem).

Indeed, in light of this adverse selection problem, the minimum coverage provision may be essential to Congress’s legitimate end of guaranteeing access. Regardless of the degree of necessity, however, when Congress is pursuing constitutional ends, courts have long been highly deferential in assessing Congress’s choice of means. *See McCulloch v. Maryland*, 17 U.S. (4

Wheat.) 316 (1819); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 564 (6th Cir. 2011) (Sutton, J., concurring in part and delivering the opinion of the court in part) (“The courts do not apply strict scrutiny to commerce clause legislation and require only an ‘appropriate’ or ‘reasonable’ ‘fit’ between means and ends.”) (quoting *Comstock*, 130 S. Ct. at 1956–57 (2010)).

Second, the minimum coverage provision is justified by the Commerce Clause standing alone. A federal law is constitutionally valid under the commerce power if it regulates economic subject matter that substantially affects interstate commerce. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 567 (1995). The minimum coverage provision regulates economic conduct that substantially affects interstate commerce because it regulates how people pay for—or do not pay for—the health care they inevitably consume. In passing the ACA, Congress determined that the “cost of providing uncompensated care to the uninsured was \$43,000,000,000” in 2008 alone. 42 U.S.C.A. § 18091(a)(2)(F) (West 2011). Congress further found that “health care providers pass on the cost to private insurers, which pass on the cost to families. This cost-shifting increases family premiums by on average over \$1,000 a year.” *Id.* Cost-shifting is undeniably an economic problem, and its aggregate effects on interstate commerce are substantial.

Third, the minimum coverage provision is also justified by Congress’s tax power. Although Congress called the ACA’s required payment for non-insurance a “penalty,” the Supreme Court has never held that mere labels determine whether something is a tax for constitutional purposes. Congress does not lose a power that it has by calling it a power that it lacks, just as Congress does not gain a power that it lacks by calling it a power that it has. As Judge Kavanaugh concluded, “[T]he fact that an exaction is not labeled a tax does not vitiate Congress’s power under the Taxing Clause.” *Seven-Sky v. Holder*, --- F.3d ---, 2011 WL

5378319, at *48 n.37 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction and not deciding the merits) (citing *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867)).

What matters constitutionally is not how Congress labels a required payment to the Internal Revenue Service but whether it “is productive of some revenue” and “operates as a tax.” *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937); see, e.g., *United States v. Kahriger*, 345 U.S. 22, 31, 28 (1953) (noting that the exaction “produces revenue”). The Congressional Budget Office (CBO) estimates that four million people each year will choose to make the shared responsibility payment instead of obtaining coverage. CBO, *Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act* (Revised April 30, 2010), at 1, http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/individual_mandate_penalties-04-30.pdf. The CBO further predicts that the required payment provision will produce \$54 billion in federal revenue from 2015 to 2022. CBO, *Updated Estimates for the Insurance Coverage Provisions of the Affordable Care Act* (March 2012), at 11, <http://www.cbo.gov/sites/default/files/cbofiles/attachments/03-13-Coverage%20Estimates.pdf>. Thus the ACA’s required payment for non-insurance will operate as a tax. It is therefore a tax for purposes of Congress’s tax power. See generally Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: A Theory of the Tax Power for a Court that Limits the Commerce Power*, 99 VA. L. REV. (forthcoming 2013) (analyzing the characteristics of taxes and penalties).³

Opponents of the minimum coverage provision insist that if the provision is upheld, then federal commerce power is constitutionally limitless. That is incorrect. Upholding the minimum coverage provision does not imply limitless federal power to issue any and all mandates. On the

³ This conclusion does not imply that the federal tax Anti-Injunction Act (TAIA), 26 U.S.C. § 7421(a), bars the current challenges to the minimum coverage provision. See Michael C. Dorf & Neil S. Siegel, “*Early-Bird Special*” *Indeed!: Why the Tax Anti-Injunction Act Permits the Present Challenges to the Minimum Coverage Provision*, 121 YALE L.J. ONLINE 389 (2012), <http://yalelawjournal.org/2012/01/19/dorf&siegel.html>.

contrary, the minimum coverage provision respects three significant limits on the commerce power. First, the provision addresses economic problems. Second, these problems are interstate in scope. And third, the provision does not violate any individual rights.

In a country with unrestricted interstate travel and mobile participants in health care and insurance markets, individual states are not well situated to force insurers to cover people with preexisting conditions. With different regulations in different states, insurers can move to states that do not impose such a requirement. Moreover, individuals may decline better job opportunities in states that do not guarantee access to health insurance because they cannot afford to lose their insurance. *See Siegel, Free Riding on Benevolence, supra* (documenting the phenomena of insurer exodus and “job lock”).

In addition, in a society committed to providing stabilizing care to the uninsured in an emergency, states are not well situated to combat \$40-50 billion in cost shifting each year from the uninsured to others. When uninsured individuals obtain care without paying, providers raise their prices and insurance companies raise the premiums that individuals and families must pay. Because many of these insurance companies operate in multiple states, this cost shifting can disrespect state boundaries. The overall capital reserves of insurance companies constitute a larger pool that undergirds all their market segments. Thus, just as market investments can hurt the overall financial health of insurers, so can poor loss ratios in one state hurt the ability of insurers to remain in more marginal markets in other states. Poor loss ratios in a particular state may stretch the overall reserves of insurance companies, which in turn may affect their ability to operate in other states. *See Siegel, Free Riding on Benevolence, supra*.

In addition, residents of one state may travel interstate in order to obtain needed medical care. *See id.* (citing examples involving Tennessee, Mississippi, and Arkansas; Maryland, the

District of Columbia, and Virginia; Pennsylvania and West Virginia; and Washington, Alaska, Montana, and Idaho). And at any moment in time, millions of Americans may require medical care while present in a state other than their state of residence. The phenomenon of cross-state hospital use means that cost shifting is an interstate problem, not an intrastate problem.

These are all large economic problems. They require collective action that only the federal government can take and that Article I, Section 8 grants Congress the authority to take. *See Seven-Sky v. Holder*, 661 F.3d 1, 20 (D.C. Cir. 2011) (majority opinion of Silberman, J.) (“The right to be free from federal regulation is not absolute, and yields to the imperative that Congress be free to forge national solutions to national problems, no matter how local -- or seemingly passive -- their individual origins.”); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010) (interpreting Section 8 in light of the collective action problems that the nation faced under the Articles of Confederation, when Congress lacked the power to tax, regulate interstate commerce, and raise a military by regulating individual behavior instead of requisitioning the states).

While upholding the minimum coverage provision would respect longstanding constitutional limits on congressional power, invalidating the provision would create new and indefensible limits on congressional power. Striking down the provision would also establish a potentially unlimited judicial power to invalidate federal statutes based on political preference.

For example, opponents of the minimum coverage provision argue that Congress may not use its commerce power to regulate “inactivity.” If the courts were to adopt this novel proposal to limit federal power, Congress would be powerless to mandate vaccination in the face of a public health emergency, such as a deadly flu pandemic spreading like wildfire around the

country. *Cf.* 42 U.S.C. § 264(a) (2006) (authorizing the Secretary of Health and Human Services to make and enforce regulations necessary “to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession”). Given interstate mobility, Americans would be at the mercy of any state that refused to mandate vaccination.

National security, too, could be jeopardized if the asserted prohibition on regulating “inactivity” gained general support. Wisely, the Founding generation declined to impose such an arbitrary limit on the scope of federal power. Thus the Militia Act of 1792 required “every free able-bodied white male citizen” between the ages of 18 and 45 to obtain at his own expense “a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges.” 1 Stat. 271.

Opponents of the minimum coverage provision also argue that the Necessary and Proper Clause does not justify it because the provision does not help to carry into execution the ACA provisions that guarantee access to health insurance. Rather, opponents argue, the provision counteracts the perverse incentive these provisions create to wait until one is sick to get insured. On this view, Congress may never use the Necessary and Proper Clause to ameliorate a problem that is partially of Congress’s own creation.

This proposed limit on federal power ignores *McCulloch* and *Comstock* and threatens to read the Necessary and Proper Clause out of the Constitution. Congress may prevent terrorist attacks on military bases even though Congress created the bases that face possible attack. Congress may prevent mail theft even though it created the Postal Service that risks being robbed. Likewise, Congress may ameliorate problems associated with rights to access health insurance even though Congress created those access rights in the first place.

In sum, the minimum coverage provision is within the scope of Congress's enumerated powers in three, independently sufficient ways. The Necessary and Proper Clause, the Commerce Clause, and the Taxing Clause each support the provision. Opponents of the provision are right that examining its constitutionality involves fundamental questions of constitutional limits, but not in the way they insist. While the provision respects important limits on Congress's authority, there are no defensible limits on the limits that opponents would create to invalidate the provision. This absence of limits on judicial interference with Acts of Congress demonstrates why the Supreme Court should uphold the minimum coverage provision. Striking it down would amount to the most consequential invalidation of a federal law on federalism grounds since the constitutional crisis of the Great Depression and the New Deal.