

Minnesota Should Be Heard in Health Care Battle

By Minnesota State Senator Julianne Ortman

The State of Minnesota has a responsibility to act now to protect and defend itself and its residents from an abuse of power by the federal government.

The federal health care bill (HR 3590) is unconstitutional. The State of Minnesota has a responsibility to act now to protect and defend itself and its residents from an abuse of power by the federal government. The U.S. Constitution was designed to protect against congressional over-reaching by a separation of powers, not just between the three branches but also in the form of governmental powers divided between the federal government's limited set of enumerated powers and the States' more expansive powers.

The Tenth Amendment reserves to the States the right to exercise all governmental powers not specifically granted to the federal government: *"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."* The State of Minnesota has an evident and compelling interest in opposing an usurpation of its sovereignty by a federal government run wild. The

federal health care bill contains two substantial and unconstitutional provisions that encroach on the rights of the people and the State of Minnesota.

First, the mandate in the bill that would force U.S. residents to buy health insurance is unconstitutional. The bill identifies for the source of authority, the Commerce Clause in Article I, Section 8 of the U.S. Constitution, which authorizes Congress, in a limited role, to regulate commercial activity that affects interstate commerce.

While the Commerce Clause would allow regulation of health insurance companies and services, or the provision of healthcare, this is not what is proposed. Rather, the bill

would compel private persons to buy insurance from a private insurance company. The Commerce Clause has never been used to force anyone to buy anything; it is used to regulate economic activity, not inactivity (i.e., *not* buying insurance).

In 1994, President Clinton proposed universal health care coverage; the Congressional Budget Office (CBO) reported that such a system likely would be unconstitutional under U.S. Supreme Court precedents interpreting the Commerce Clause, and warned that such an action by Congress 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." A



Julianne Ortman is in her second term as a member of the Minnesota State Senate. She serves as the Minority Lead on the Tax Committee. She is licensed to practice law in Minnesota, Virginia, and the District of Columbia, and has been practicing law since 1989.

Congressional Research Service Report in July, 2009 similarly questioned whether the Commerce Clause “will provide a solid constitutional foundation for legislation containing a requirement to have health insurance.”

Second, the federal legislation imposes an unconstitutional tax on individuals who do not comply with the mandate to buy health insurance. It is called a “shared responsibility penalty,” but it is a tax nonetheless, and will be imposed upon any non-exempt person in the U.S who fails, for one month or more, to maintain “minimum essential coverage.”

This penalty is a “capitation tax” because it is imposed on a per-person basis (rather than on income), and thus is specifically prohibited by the Constitution in situations (such as this) where it cannot be applied proportionately among the States according to their population: “No capitation or other direct tax shall be laid, unless in

proportion to the census...” and “direct taxes shall be apportioned among the several states...according to their respective numbers.” *U.S. Const. Article I, Sections 8 and 3.*

Given the numerous exemptions in the bill (for example the poor, the incarcerated, and illegal aliens) which cannot affect all 50 States to exactly the same degree, this tax cannot be implemented proportionally in a way that meets the constitutional requirement. Moreover, the Supreme Court is unlikely to stretch the contours of the Constitution to suffer such an unlawful capitation tax when other financing and enforcement options are available that would not offend the Constitution.

There are many other flaws in this legislation, among the most obvious of which are: 1) the fact that the CBO projects a 10–13% increase in premium costs by 2016 as a result of the scheme; and 2) it

is overwhelmingly unpopular (53% of respondents to a recent Rasmussen poll oppose the plan and 46% strongly oppose it, while only 43% favor it).

In our constitutionally divided government, the different divisions are expected to control each other at the same time that each unit controls itself. *See Federalist No 51 (James Madison)*. Evidently the federal government has neither the will nor the ability to control itself, so now is the time for the State of Minnesota to speak to the issue.

Members of the Minnesota House and Senate took the same solemn oath, “to support the Constitution of the United States and the Constitution of the State of Minnesota.” Fidelity to the Constitution is our highest obligation as elected officials. Now is the time for us to speak out to protect and defend our State and its residents against unconstitutional encroachment by the federal government.