

## POLITICS VS. THE HEALTH CARE LAWSUIT

*NC Attorney General's Decision Is Not Supported by a Proper Legal Analysis*

**KEY FACTS:** • North Carolina Attorney General Roy Cooper decided not to join a lawsuit challenging whether the recently enacted federal health care bill is constitutional.

- The Attorney General's legal analysis used to justify not taking action avoided the primary legal questions regarding the law's constitutionality.
- Specifically, the analysis completely avoided the question of whether Congress has the power under the Commerce Clause to regulate people for not taking an action (i.e., inactivity). Another way of putting it: Can Congress regulate Americans for simply existing?
- If Congress has the power to regulate people for merely existing, then there would be no logical conclusion to this power. Congress could force people to start businesses, invest in the stock market, buy guns, etc.
- The Attorney General should, at a minimum, conduct a proper legal analysis. Because, as of now, this weak analysis looks like political cover not a sound legal rationale for such a major decision.
- Ultimately, the Attorney General should join in the lawsuit filed by 20 other states (so far). If he does not, then the General Assembly should pass resolutions and take whatever action it can to pressure him to do the right thing for North Carolina.

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**O**n April 16, 2010, North Carolina Attorney General Roy Cooper announced that the state would not join in a lawsuit challenging whether the recently enacted federal health care bill was constitutional.<sup>1</sup> Unlike the (so far) 20 Attorneys General from other states joining together to bring a lawsuit,<sup>2</sup> Mr. Cooper did not believe the law was unconstitutional.<sup>3</sup>

In explaining his decision not to join in the lawsuit, Mr. Cooper alleged that his decision was based on legal grounds.<sup>4</sup> However, the legal analysis<sup>5</sup> that he relied upon does not address the most important legal question regarding the health care law. Specifically, the legal analysis failed to address whether Con-

gress has the power to regulate “inactivity” under the Commerce Clause of the United States Constitution.

This brief *Spotlight* explains the inadequacy of the Attorney General’s analysis based on his attempt to avoid addressing the central issues. The analysis in its current form, given its weaknesses, makes it appear the Attorney General is simply acting out of political motivations, not legal principles, nor in the best interests of North Carolina.

### **The Primary Legal Issue**

There is one legal question that has garnered more attention than all others in the health care debate: whether Congress can regulate “inactivity.”<sup>6</sup>

Congress does not have unlimited power. It derives its power under Article I, Section 8 of the United States Constitution.<sup>7</sup> Under this section of the Constitution is the Commerce Clause.<sup>8</sup> If Congress does have power to require individuals to purchase health insurance by imposing a penalty on those who fail to do so, it likely would come from the Commerce Clause.

Congress has the power to regulate interstate commerce and even *intrastate* commerce that has a substantial effect on interstate commerce.<sup>9</sup> This power is very broad.

The two most extreme cases are *Wickard v. Filburn* (1942)<sup>10</sup> and *Gonzales v. Raich* (2005).<sup>11</sup> In *Wickard*, the United States Supreme Court held that Congress had power under the Commerce Clause to prohibit a farmer from growing his own wheat for personal consumption because it would have had an effect on the wheat market—since he was growing his own wheat, he would not buy wheat on the open market.<sup>12</sup>

In *Raich*, the Court held that Congress, under the Commerce Clause, could prohibit individuals from growing medicinal marijuana for their own personal use because it would have an effect on the illegal market for marijuana.<sup>13</sup>

In both of these extreme cases, the individual being regulated is taking an action; be it growing wheat or marijuana. However, there is no action that the government is regulating when it comes to mandating the purchase of health insurance. An individual would be subjected to regulation not because of any action, but because of inaction. If someone merely exists, they could be regulated.

The Court would be taking its Commerce Clause jurisprudence to a new extreme. It would, for the first time, allow Congress to use the Commerce Clause to create commerce as opposed to regulating commerce. The implications would be significant.

If such a mandate were allowed, there would be no basis to prohibit Congress from telling Americans they had to purchase bubble gum or handguns. There would be no basis to prohibit Congress from requiring people to invest in the stock market or start a new business. The examples are endless because there is no logical conclusion if Congress could force people to engage in commercial activity.

Whether Congress can regulate “inactivity” has been the most widely discussed problem with the bill and is part of the Attorneys General’s lawsuit as well as Virginia’s lawsuit<sup>14</sup> against the health care bill. This critical legal question got the attention of the Congressional Budget Office in 1994:

A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An individual mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Second, it would require people to purchase a specific service that would be heavily regulated by the federal government.<sup>15</sup>

Recently, the United States Senate had doubts about whether an individual mandate was constitutional and asked

the Congressional Research Service (CRS) for its opinion on the matter.<sup>16</sup> In its 2009 analysis, CRS explained:

Whether 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 service.<sup>17</sup>

### **Attorney General Cooper Ignores the Primary Legal Question**

Not once in Attorney General Roy Cooper's legal memorandum analyzing the health care bill does he address this primary question. The legal analysis mentions many relevant cases and makes broad statements of law, but never addresses this question, nor does it even properly address other critical legal issues important to this debate.

### **Conclusion/What Should Be Done?**

At a minimum, the Attorney General should address the primary legal issues, and if he decides that North Carolina still should not join the lawsuit, that decision, however unfortunate, would certainly look more legitimate than one based on such an inadequate analysis. His current decision looks political.

The arguments against the health care bill are compelling, and the implications of such a federal encroachment on individual rights should concern any state. It is the Attorney General's job to represent the interests of North Carolinians based on sound legal grounds—unless he joins the lawsuit, he is failing in that responsibility.

If he decides not to join the lawsuit, state legislators should pass resolutions urging him to change his mind, and to the extent feasible, use their spending powers by withholding funds to the Department of Justice in order to pressure the Attorney General.

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### **End Notes**

1. North Carolina Attorney General Roy Cooper, letter to Gov. Beverly Perdue, April 16, 2010, <http://projects.newsobserver.com/sites/projects.newsobserver.com/files/Cooperletter.pdf>.
2. "Florida Attorney General: Alaska Pledges to Join Health Care Lawsuit," Office of the Attorney General of Florida Press Release, April 20, 2010, <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/C47FAF73AA7E22A08525770B0073EB88>.
3. *Op. cit.*, note 1.
4. *Ibid.*
5. North Carolina Solicitor General Christopher G. Browning Jr., memorandum to Attorney General Roy Cooper regarding Patient Protection and Affordable Care Act, H.R. 3590, April 16, 2010, <http://projects.newsobserver.com/sites/projects.newsobserver.com/files/healthcarememo.pdf>.
6. See, e.g., *Virginia v. Sebelius*, Civil Action No. 3:10CV188, Complaint for Declaratory and Injunctive Relief, (E.D. VA), March 23, 2010, [http://www.oag.state.va.us/PRESS\\_RELEASES/Cuccinelli/Comm%20v.%20Sebelius%20-%20Complaint%20filed%20with%20Court%20\\_323\\_10.pdf](http://www.oag.state.va.us/PRESS_RELEASES/Cuccinelli/Comm%20v.%20Sebelius%20-%20Complaint%20filed%20with%20Court%20_323_10.pdf); *Florida v. Sebelius*, Case No. 3:10-cv-91, Complaint, (N.D. FL), March 23, 2010, [http://myfloridalegal.com/webfiles.nsf/WF/MRAY-83TKWB/\\$file/HealthCareReformLawsuit.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-83TKWB/$file/HealthCareReformLawsuit.pdf); Randy Barnett, Nathaniel Stewart and Todd Gaziano, "Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional," Heritage Foundation Legal Memorandum, December 9, 2009, <http://www.heritage.org/Research/Reports/2009/12/Why-the-Personal-Mandate-to-Buy-Health-Insurance-Is-Unprecedented-and-Unconstitutional>; "Health Care Reform," New Federal Initiatives Project, Federalist Society for Law and Public Policy Studies, [http://www.fed-soc.org/publications/pubid.1503/pub\\_detail.asp](http://www.fed-soc.org/publications/pubid.1503/pub_detail.asp); "The Budgetary Treatment of an Individual Mandate to Buy Health Insurance," CBO Memorandum, Congressional Budget Office, August 1994, <http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf>; Daren Bakst, "The courts can stop Obamacare," *Washington Times*, March 28, 2010, <http://www.washingtontimes.com/news/2010/mar/28/the-courts-can-stop-obamacare>.
7. U.S. Const., art. I, § 8.
8. U.S. Const., art. I, § 8, cl. 3.

9. See, e.g., this discussion on the Commerce Clause on the Justia's Supreme Court Center site, <http://supreme.justia.com/constitution/article-1/28-national-police-power.html>.
10. *Wickard v Filburn*, 317 U. S. 111 (1942).
11. *Gonzales v. Raich*, 545 U.S. 1 (2005).
12. *Op. cit.*, note 10.
13. *Op. cit.*, note 11.
14. Virginia filed a separate lawsuit challenging the law. See *Virginia v. Sebelius*, Civil Action No. 3:10CV188, Complaint for Declaratory and Injunctive Relief, (E.D. VA), March 23, 2010, [http://www.oag.state.va.us/PRESS\\_RELEASES/Cuccinelli/Comm%20v.%20Sebelius%20-%20Complaint%20filed%20with%20Court%20\\_323\\_10.pdf](http://www.oag.state.va.us/PRESS_RELEASES/Cuccinelli/Comm%20v.%20Sebelius%20-%20Complaint%20filed%20with%20Court%20_323_10.pdf).
15. "The Budgetary Treatment of an Individual Mandate to Buy Health Insurance," CBO Memorandum, Congressional Budget Office, August 1994, <http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf>.
16. *Op. cit.*, note 14.
17. Congressional Research Service, "Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis," July 24, 2009, [http://assets.opencrs.com/rpts/R40725\\_20090724.pdf](http://assets.opencrs.com/rpts/R40725_20090724.pdf).