Written by **Jack Kenny** on November 6, 2009

Constitutional Healthcare

The Speaker of the U.S. House of Representatives was apparently dumbfounded recently when a reporter asked about the constitutional authority for requiring people to buy health insurance, as mandated in the healthcare reform bills before Congress.

As reported on CNSNews.com, the exchange between the reporter and Speaker Nancy Pelosi (D-Calif.) was as follows:

"Madam Speaker, where specifically does the Constitution grant Congress the authority to enact an individual health insurance mandate?"

"Are you serious? Are you serious?" came the Speaker's inscrutable reply.

"Yes, yes I am," the CNSNews.com reporter answered. Pelosi then simply shook her head and took a question from another reporter. Pelosi's press secretary, Nadeam Elshami, later said that asking the Speaker where the Constitution authorized the mandate in the health bills was not "a serious question."

"You can put this on the record," the news organization quotes Elshami as saying. "That is not a serious question. That is not a serious question." The spokesperson later responded to written follow-up questions, CNSNews.com reported, with an e-mailed press release on the "Constitutionality of Health Insurance Reform," claiming congressional authority for the mandate may be found in its constitutional power to regulate interstate commerce.

A "Health Insurance Reform Daily Mythbuster" press release, originally issued from Pelosi's office on September 16, claims one of the "myths" about the House bill called "America's Affordable Health Choices Act" is what Pelosi called "the nonsensical claim that the federal government has no constitutionally valid role in reforming our health care system — apparently ignoring the validity of Medicare and other popular federal health care reforms." The Speaker acknowledged that under the House bill "individuals must either purchase coverage (and non-exempt employers must purchase coverage for their workers) — or pay a modest penalty for not doing so. The bill uses the tax code to provide a strong incentive for Americans to have insurance coverage and not pass their emergency health care costs onto other Americans — but it allows them to pay their way out of that obligation. There is no constitutional problem with these provisions," she concluded.

Parrying Pelosi

Pelosi categorized as "myth" the argument that the health-insurance legislation violates the Constitution's Tenth Amendment, which reserves to the states or to the people those powers not delegated to the national government. "But the Constitution gives Congress broad power to regulate activities that have an effect on interstate commerce," Pelosi argued. "Congress has used this authority to regulate many aspects of American life, from labor relations to education to health care to

agricultural production. Since virtually every aspect of the health care system has an effect on interstate commerce, the power of Congress to regulate health care is essentially unlimited."

Pelosi cited a pair of Supreme Court decisions that upheld the power of Congress under the commerce clause to ban racial discrimination (*Katzenbach v. McClung*) and to forbid the growing and sale of marijuana for medical use where state laws allow it (*Gonzales v. Raich*).

But a 1994 Congressional Budget Office analysis of the budgetary impact of healthcare legislation then before Congress included a finding that an act of Congress requiring individuals and employers to purchase health insurance or pay a fine would be unprecedented. In the words of the CBO memo: "The imposition of an individual mandate, or a combination of an individual and an employer mandate, would be an unprecedented form of federal action. The appropriate budgetary treatment of such a policy therefore has not been addressed."

The healthcare reform efforts of the early nineties were never enacted by Congress, and popular resentment of what was seen as excessively intrusive regulation, promoted by the Clinton administration, contributed to a Republican landslide and takeover of Congress in the 1994 elections. But the breadth of the regulatory authority given Congress under the commerce clause has been the subject of debate and litigation from the early days of the republic.

Under the first national charter produced by the former colonies, the Articles of Confederation, Congress had no authority to regulate commerce among the states or with other nations. As a result, states attempted to shield businesses within their respective borders from outside competition by erecting tolls and tariffs on products of other states, as well as imports from foreign lands. To eliminate such barriers and promote the growth of commerce across state lines, the framers of the Constitution gave Congress power to establish laws governing the free trade of goods and services. Article I, Section 8 delegates to Congress the power "to regulate Commerce with foreign Nations and among the several States and with the Indian Tribes." As Pelosi noted, that power has often been broadly interpreted to mean regulation not only of commerce itself, but anything that may, as the Speaker says, "have an effect on interstate commerce." And since virtually everything may in some way, shape, or form "have an effect on interstate commerce," the regulatory power of Congress under such a broad construction is, as Pelosi says, "essentially unlimited."

Yet the Constitution is in its entirety a charter of limited, delegated powers. Even before the Tenth or any of the other amendments were drafted, James Madison in *The Federalist*, No. 45, assured his countrymen: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." Later he wrote that the commerce clause "grew out of the abuse of power by the importing States in taxing the non-importing and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." Thomas Jefferson likewise wrote in 1791 that the commerce clause "does not extend to the internal regulation of the commerce of a State (that is to say, of the commerce between citizen and citizen) … but to its external commerce only, that is to say, its commerce with another State, or with foreign nations or with Indian tribes."

"New"Commerce Clause

In the heyday of the New Deal, however, a totally different view prevailed in the executive branch of the federal government. President Franklin D. Roosevelt viewed the commerce clause, as written, as a relic

of the "horse and buggy age" and proclaimed that since that time, "we have developed an entirely different philosophy." The nation as a whole had become more interdependent, he said. "It has been our hope that under the interstate commerce clause we could recognize by legislation and by judicial decision that a harmful practice in one section of the country could be prevented on the theory that it was doing harm to another section of the country. That was why the Congress for a good many years, and most lawyers, have had the thought that in drafting legislation we could depend on an interpretation that would enlarge the constitutional meaning of interstate commerce to include not only matters of direct interstate commerce, but also those matters that indirectly affect interstate commerce."

In other words, an improved, 20th-century "interpretation" of the commerce clause would empower the federal government to regulate not only commerce among the states, but all manner of things that are neither interstate nor commerce. Majorities in Congress readily enacted the regulatory schemes of the popular President, but the Supreme Court for several years refused to go along with the revised understanding of interstate commerce that Roosevelt divined from the "entirely different philosophy" he had discovered in the Congress and among "most lawyers." The justices chose instead to honor their oath to uphold the Constitution as written. But eventually, with his public relations campaign against the "horse and buggy" court, his effort, though unsuccessful, to "pack the court" with additional justices, and his opportunities to replace retiring judges, Roosevelt was able to prevail upon the Supreme Court to join the President and the Congress in expanding the power of the federal government to manage and even micromanage economic activity within, as well as commerce among, the several states.

The most famous case, still frequently cited in legal debate over the commerce clause, is the 1942 decision of the U.S. Supreme Court in *Wickard v. Filburn*. The case arose from the New Deal Agricultural Adjustment Act, an effort to maintain artificially high prices of agricultural products by limiting production and supply. Under a Department of Agriculture directive establishing production quotas, Roscoe Filburn, a farmer in southern Ohio, was given a wheat acreage allotment of 11.1 acres. When it was discovered that he planted and harvested wheat on 23 acres, nearly 12 acres over his allotment, Filburn was ordered to destroy the excess crop and pay a fine for exceeding his quota. Filburn sued in U.S. District Court, naming Secretary of Agriculture Claude R. Wickard as the principal defendant. The district court issued a permanent injunction against Wickard, and the U.S. government appealed the ruling to the U.S. Supreme Court.

Filburn's suit contended that the wheat grown on the extra acreage was used to feed livestock on his own farm and thus never entered interstate commerce. The penalty assessed against him, therefore, was a penalty on the production, not on the interstate sale of the wheat, and thus exceeded the regulatory power of Congress under the Constitution. But in the opinion of the Supreme Court, Filburn, by growing the additional wheat and consuming it on his own farm, was "affecting" prices in the interstate market.

"But if we assume that (the wheat) is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market," wrote Justice Robert Jackson, a Roosevelt appointee. "Home grown wheat in this sense competes with wheat in commerce." In language that brings to mind the nearly $800 billion "economic stimulus" bill passed by Congress early this year, Justice Jackson wrote: "The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves no doubt that Congress may

properly have considered wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect defeating and obstructing its purpose to stimulate trade therein at increased prices."

In his 1960 bestseller *The Conscience of a Conservative*, U.S. Senator Barry M. Goldwater wrote that the *Wickard* ruling left the government's regulatory powers under the commerce clause as "wide as the world," since virtually any activity may be said to have "a substantial effect" on interstate commerce. It is worth remembering that the wording in the Constitution gives Congress the power to regulate "commerce," not anything that might affect commerce.

In *Katzenbach v. McClung*, one of the Supreme Court rulings cited in Pelosi's "Mythbuster" press release, the High Court held unanimously that racial discrimination in restaurants posed significant burdens on "the interstate flow of food and upon the movement of products generally." One may find segregation in restaurants and other public accommodations morally repugnant and still wonder how it affects the "interstate flow of food" and other products.

Conscience on the Court

More recently, the Rehnquist Court found some assertions by Congress of its regulatory power to be unconstitutional. In a 1995 case, *United States v. Lopez*, the High Court held that Congress exceeded its authority by passing a law forbidding the possession of a firearm in an area designated as a school zone. Lawyers for the government argued both that guns contribute to violent crime, which has a harmful effect on interstate commerce, and that guns in a school zone pose a threat to the learning environment, resulting in a less productive citizenry. Writing the opinion of the court in the 5-4 decision, Chief Justice William Rehnquist observed that under the government's reasoning:

> Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.... Under the theories that the Government presents in support of (the Act), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Indeed, under Speaker Pelosi's reasoning, we may be hard pressed to posit any commodity that Congress may not require citizens to purchase. If Congress has power under the commerce clause to compel us to purchase health insurance or pay a penalty for not doing so, then why need it even have bothered to bribe us with a cash rebate under the "Cash for Clunkers" program to turn in our old cars and buy new ones? Why not simply pass a law requiring every motorist to buy a new car every few years or pay a fine for noncompliance? That would "stimulate" interstate commerce.

And it is, to say the least, disingenuous of the Speaker to suggest that a law requiring a fine of anyone who fails to buy a certain product is offering people a choice — that, in her words, "it allows them to pay their way out of that obligation." In organized crime an offer of that kind is commonly referred to as "selling protection."

By now generations of school children have been taught that the interstate commerce clause is one of the "elastic clauses" in the Constitution, capable of being stretched to accommodate an expanding role for the federal government. The same has been said of the power given Congress in Article I, Section 8 to "provide for the common Defense and general Welfare of the United States" and the power to "make all Laws that shall be necessary and proper for carrying into Execution the foregoing, and all other

Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." But those general phrases sum up and reference specific powers "vested by this Constitution in the Government," not whatever powers the President or Congress may divine or devise at any given time. Otherwise, there would have been no point in enumerating and delegating those powers of the federal government, which, Madison insisted, are "few and defined."

Madison, known as the "Father of the Constitution" for the leading role he played in the writing and passage of the document, said of the general Welfare clause: "If Congress can do whatever in their discretion can be done by money and will promote the General Welfare, the Government is no longer a limited one, possessing enumerated powers, but an indefinite one, subject to particular exceptions."

In his first term as President (1801-1805), Jefferson warned that "our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by Construction." Yet those whom we have elevated to high office have made and continue to make it "a blank paper by construction," speaking and acting as though, with a few "particular exceptions," the Constitution they have sworn to uphold consists of but a single sentence of their own imagining: "Congress shall have Power to do Whatever seemeth Good to the Congress to do."

No doubt to Speaker Pelosi, Senate Majority Leader Harry Reid, and a majority of their colleagues, that sounds about right.

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