Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On The Constitutionality Of The Affordable Care Act

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I thank Senator Durbin for chairing today's hearing on Congress' authority under the Constitution to enact the Affordable Care Act. I have no doubt that Congress acted well within the bounds of its constitutional authority in working to secure affordable health care for all Americans. As I said when the Affordable Care Act was debated in the Senate, the authority of Congress to act is well-established by the specific powers vested in Congress by Article I, Section 8 of the Constitution, by prior acts of Congress like Social Security and Medicare, by longstanding precedent established by the courts, and by the history of American democracy. This Act was neither novel nor unprecedented, but rested on the foundation used over the last century to build and secure the social safety net.

Opponents of the Affordable Care Act have sought to continue their political battle by challenging the landmark legislation in the courts the moment President Obama signed it into law. These political opponents seek to achieve in the courts what they could not in Congress. They want judges to override legislative decisions properly assigned by the Constitution to Congress, the elected representatives of the American people.

Every member of Congress takes an oath of office to "support and defend the Constitution of the United States." We take this oath seriously. Arguments about the law's constitutionality, including about the requirement that individuals purchase health insurance or pay a tax penalty, were considered and rejected in congressional committees. During the Senate debate, as Chairman of the Senate Judiciary Committee, I responded, publicly and on the record, to arguments about the constitutionality of this requirement. During that debate, the Senate formally rejected a constitutional point of order claiming that the individual responsibility requirement was unconstitutional. The Senate's judgment was that the Act is constitutional.

Millions of Americans have access to health care today because of the Affordable Care Act. With this law, Congress acted to further secure the Nation's social safety net, protecting some of our most vulnerable citizens. The Affordable Care Act eliminated discriminatory practices by health insurers, ensuring that a patient's gender was no longer a pre-existing condition. The historic law provided important tools to help law enforcement recover taxpayer dollars lost to fraud and

abuse in the health care system. Now many of our Nation's senior citizens pay less for their prescription drugs.

Challenges to the Affordable Care Act have been making their way through the Federal courts since the enactment of the historic health care reform law. Two Federal courts have upheld Congress' authority to enact the Affordable Care Act and two have not. These decisions are being appealed, and there is little doubt the Supreme Court will be the final arbiter of this constitutional question.

I recently joined congressional leaders in filing an amicus brief in one of those lawsuits, now pending before the Sixth Circuit Court of Appeals. I did so not only because I have fought for decades to secure affordable health care for all Americans, but because I am convinced that Congress acted well within the limits of Article I of the Constitution in doing so. I believe we must defend the enumerated powers given to Congress by the Constitution so that our ability to help protect hardworking American workers, families and consumers is not unduly curtailed. Before passing the law, we debated whether to control costs by having all Americans be covered by health insurance. We considered untold numbers of amendments in Committees and before the Senate. That is what Congress is supposed to do. We consider legislation, debate it, vote on it, and act in our best collective judgment to promote the general welfare. Some Senators agreed and some disagreed, but this was a matter decided by a super-majority of the full Senate.

Ironically, the so-called individual mandate now under partisan attack in the courts has long been a Republican proposal. The individual mandate was supported by the senior Senator from Arizona, Senator McCain, when Republicans opposed health care reform efforts during the Clinton administration. It was a part of the health care reform effort in Massachusetts supported by former Governor Mitt Romney and by Scott Brown, now a Republican Senator from Massachusetts. Hundreds of Republican health care reform ideas were included in the Affordable Care Act as it was drafted, developed, debated and passed. In fact, Republican health care reform proposals offered in previous Congresses included similar requirements that individuals obtain health insurance.

Three clauses in Article I, Section 8 of the Constitution -- the "General Welfare Clause," the "Commerce Clause" and the "Necessary and Proper Clause" -- each provide an independent source of authority for Congress to reform health care by containing spiraling costs and ensuring its availability for all Americans. During the debate on the Affordable Care Act, I noted that using a tax penalty to enforce the requirement that individuals buy health insurance is far from unprecedented, despite the claims of critics. Individuals are required to pay for Social Security and Medicare, for example, by payroll taxes collected under the Federal Insurance Contributions Act (FICA), which are typically collected as deductions and noted on Americans' paychecks every month. Those who seek to undermine this source of congressional authority would turn back the clock to the hardships of the Great Depression, striking down principles that have been settled for nearly three quarters of a century and standing the Constitution on its head.

There is also no doubt that Congress has the power under the Commerce Clause to regulate the massive national health care market. The question is whether courts should create and impose new limitations on the means by which Congress regulates this core commercial market.

When the Senate considered the Affordable Care Act, I pointed to the set of findings adopted by Congress in the law itself related to the significant cumulative economic effects of the rising costs of health care. These findings bear directly on the Supreme Court's test for constitutionality under the Commerce Clause. Among Congress' findings were that "health insurance and health care services are a significant part of the national economy," comprising more than 17 percent of the Nation's gross domestic product, and that the individual "requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased."

Moreover, Congress specifically determined that the requirement for Americans to buy health insurance or pay a tax penalty was necessary to control the massive costs caused by free riders, millions of Americans who cannot afford to buy health insurance or who refuse to buy health insurance and then must rely on expensive emergency health care when inevitably faced with medical problems. Recent studies show that the vast majority of uninsured Americans are forced to seek emergency care in hospitals and clinics across the country. Because this is America, doctors and hospitals do not turn them away, and they should not. But in opting out of paying for health insurance, these free riders do not opt out of the health care market. Rather, they shift the cost of their decision on to people who do have health insurance. Those costs are profound. The Congressional Budget Office in 2008 found that this cost-shifting caused by individuals who chose not to purchase health insurance amounted to $43 billion nationwide. This results in higher insurance premiums for Americans who do buy health insurance and has a significant effect on the economy as a whole.

I understand that some partisans are hoping that the courts will deliver a victory they could not secure in the Congress. I hope that the independent judiciary will be as mindful as Justice Cardozo was nearly 75 years ago in upholding the constitutionality of Social Security. In Helvering v. Davis, Justice Cardozo wrote: "[W]hether wisdom or unwisdom resides in the scheme of benefits set forth . . . it is not for us to say. The answer to such inquiries must come from Congress, not the courts." I agree. Justice Cardozo understood the separation of powers enshrined in the Constitution and the Supreme Court's precedent. I hope that courts today follow this wise example and do not seek to cast aside this landmark legislation or Congress' ability to act to protect the American people.

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