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Obamacare: The new battles ahead

By MICHAEL TANNER

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For better or worse (mostly worse), The Affordable Care and Patient Protection Act is now law. After 14 months of bitter, divisive and partisan debate, Democratic leaders in Congress scraped together barely enough votes to pass the president's health-care bill. Whatever you think of the merits of the plan, it was an impressive legislative achievement.

But anyone who believes that we're done arguing about health-care reform just hasn't been paying attention. The battle now shifts to other venues.

The Senate: The only reason that many House Democrats voted for the bill was that they simultaneously passed another bill that amended the main bill. (Yes, it's confusing: House leaders made it that way on purpose to give their vulnerable members political cover.)

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That bill now goes to the Senate, where Democrats will use a parliamentary tactic called reconciliation to avoid a Republican filibuster. But reconciliation entails its own arcane parliamentary requirements -- which may prove a bigger hurdle than the Republicans.

In fact, even as the House vote was taking place, Senate Republicans were pointing out that the bill reduced the deficit by using an increase in Social Security tax revenue -- something explicitly prohibited under reconciliation rules.

Other provisions are expected to run afoul of the "Byrd rule," which bars any provision that does not directly affect the budget. Democratic leaders, such as Budget Committee Chairman **Ken Conrad**, have acknowledged that large portions of the bill may not survive parliamentary challenges.

This will surely disappoint House Democrats who voted for a bill they profoundly disliked based on assurances that it would be "fixed" in the Senate. They'll be even less happy to learn that, if the Senate alters even a single word of the House bill -- and it will -- the bill will have to go back to the House for still another vote.

Yes, House Democrats will have to do it all again.

The Courts: Before the ink dries on the president's signature, there will be a rush of lawyers filing legal challenges to almost every aspect of the reform. Virginia Attorney General **Ken Cuccinelli** will be first in line, challenging the bill's mandate that every American purchase a government-approved insurance plan.

Last month, Virginia's Legislature passed a law rejecting such a mandate, and Cuccinelli has been practically salivating at the prospect of filing a challenge. Likely joining in will be the attorney general of Idaho, whose Legislature recently passed a law requiring their state to sue. Up to two dozen other states may pile on. Several private citizens and interest groups will likely file their own suits as well.

And there is at least some reason to believe they might succeed. The individual mandate is unprecedented in constitutional history -- a federal requirement that individuals, simply by reason of citizenship, must purchase a specific product. Even the Congressional Research Service was unable to reach a definitive conclusion about whether the mandate met

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constitutional muster.

Other legal challenges will target the requirement that states set up government-run insurance "exchanges." There are several Supreme Court precedents that suggest the federal government cannot force state officials to act. Texas is reportedly ready to lead this challenge. There may also be challenges to some of the provisions that provide special benefits for specific states.

Thirteen state attorneys general promised to sue over the "Cornhusker Kickback," a provision that had the federal government paying Nebraska's Medicaid costs. That provision will likely be removed through reconciliation, but other special-interest provisions remain. They could be challenged as a violation of equal protection.

The Republicans: GOP leaders have made it clear that they will make repealing the bill a centerpiece of every campaign this fall. Seventeen House Democrats who voted for the health-care bill represent districts that supported **John McCain** in 2008. Dozens of others are locked in close races in marginal districts.

Even in Democratic-leaning states like Illinois, GOP senatorial candidate **Mark Kirk** is pledging to "lead the effort to repeal" the bill. Given the bill's unpopularity, Republicans can expect to reap significant electoral gains.

In reality, of course, there is little chance of the bill's repeal. Even if Republicans were to take both houses of Congress, they'd still face a presidential veto and a Democratic filibuster. But more importantly, once an entitlement is in place, it becomes virtually impossible to take away. Still, we can expect efforts to repeal many of the most unpopular aspects, ranging from the individual mandate to tax hikes.

President Obama may believe that "everything that can be said about health-care reform has been said," but there is a lot more speechifying yet to come.

Michael Tanner is a Cato Institute senior fellow.

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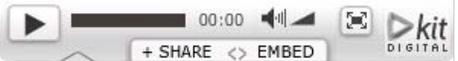
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