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Health insurance mandate alarms some

Critics say it may be unconstitutional to charge a penalty for not buying a product. Supporters compare the mandate to car insurance requirements.

By David G. Savage

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Reporting from Washington

Among some libertarians and conservatives, the most troubling aspect of the pending healthcare reform bills is the prospect of a federal requirement that Americans buy insurance.

"What next? Can Congress order you to buy spinach?" asked Roger Pilon, director of constitutional studies at the Cato Institute.

He and other defenders of limited federal power foresee a constitutional challenge to the mandate to buy insurance based on the claim that Congress' power to regulate commerce does not extend to forcing citizens to buy a commercial product.



"I think the individual mandate will be challenged. And it will be a close call," Pilon said.

In recent weeks, the debate over how to bring about affordable health coverage for all has overshadowed the novelty of a federal requirement to purchase insurance. When the Clinton administration considered such a plan in 1994, the Congressional Budget Office said it "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."

The newly unveiled House bill would set a tax penalty of as much as 2.5% of adjusted income for people who do not have health insurance as of 2013. The Senate Finance Committee scaled down its penalty, but settled on a maximum of \$750 per adult, or \$1,500 for a household. A Senate version of the bill says the IRS could only enforce the penalty by subtracting it from any refund owed to the taxpayer.

In the past, Congress has used tax breaks to encourage certain purchases, such as a tax deduction for the mortgage interest paid when buying a home. However, critics of the health insurance mandate say they do not know of a similar example of a federal tax penalty for not buying a product.

"This hasn't been done for more than 200 years," said Peter Urbanowicz, a deputy general counsel at the Department of Health and Human Services in the George W. Bush administration. "Health insurance is a

good thing, and everyone should have it. But there are limits to what Congress can do. It doesn't have the authority to tell you to buy something."

Supporters of the mandate to buy insurance, including President Obama, point to state laws that require motorists to buy auto insurance. To register a car, drivers in nearly every state must show that they have liability insurance to cover the cost to others if they cause an accident.

The logic behind the health insurance mandate is similar, supporters say. If a person without coverage is hurt in an accident and sent to the hospital, he might run up huge medical bills that he cannot pay, which would then be absorbed by others with insurance or by taxpayers.

Many constitutional-law experts also predict that even a conservative Supreme Court would uphold a federal requirement that individuals buy health insurance. The justices have said that Congress has wide latitude to regulate economic activity, and health insurance qualifies as that.

Although the mandate to buy insurance may well face a constitutional challenge, "I don't think this is a close call," said Erwin Chemerinsky, dean of the UC Irvine law school. He said that individuals' refusal to buy insurance could have an effect on the market, and the Supreme Court has said that Congress may regulate actions that affect a market.

As an example, he cited the court's decision four years ago that upheld federal restrictions on home-grown marijuana in California even though two women who used medical marijuana at home argued that they did not intend to buy or sell it.

A 6-3 majority said Congress may "regulate activities that substantially affect interstate commerce," and at least in theory, the home-grown marijuana could have been sold in the illegal drug market.

A legal challenge to the healthcare mandate may be several years away. To challenge this requirement in court, a taxpayer would have to face a penalty, and the pending legislation does not phase in the penalties until after 2013.

david.savage@latimes.com

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