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Bill 'reforms' Constitution

Congress is asserting a new, unauthorized power to force us to buy health insurance.

By Robert A. Levy

and Michael F. Cannon

The Democrats' health-care overhaul asserts for Congress a power that the framers of the Constitution never envisioned: the power to force Americans to purchase unwanted goods or services.

With all the hype, one might think the "public option" is the linchpin of the Democratic health plan. Yet Congress has created entitlements in the past, and enrollment in a public option would not be mandatory (at least not initially).

The legislation's centerpiece is really the "individual mandate" - an unprecedented legal requirement that Americans purchase health insurance under penalty of law. The mandate is nearly universal, and without it, as President Obama admitted to a joint session of Congress, the legislation would fall apart.

But is it constitutional? The Constitution grants Congress the power to regulate interstate commerce. Does that power extend to behaviors, such as not purchasing health insurance, that are neither interstate nor commerce?

If you think the answer is a self-evident "no," then you haven't been following the Supreme Court over the past seven decades. Instead of serving as a shield against states that attempt to interfere with interstate commerce, the commerce power today has become a sword that the federal government wields in pursuit of a boundless array of socio-economic programs.

The Supreme Court has held that the power to regulate interstate commerce extends to trade within a single state if it has a substantial effect on interstate markets. Even noncommercial activities within a state can be restricted if they threaten to undercut federal regulation of interstate markets.

That's the framework into which Senate Majority Leader Harry Reid (D., Nev.) shoehorned his health bill. What he came up with is a paper-thin pretense for asserting extra-constitutional

powers.

First, Reid tried obfuscation. Tucked away in that 2,074-page bill is a citation of a 1944 Supreme Court ruling that deemed insurance to be interstate commerce. Reid conveniently omitted any reference to the McCarran-Ferguson Act passed the very next year, which gave states absolute authority to regulate health insurance.

That law's effect has been to bar individuals from purchasing health insurance across state lines. Accordingly, there is no interstate market to be affected, much less undercut.

Reid's second ploy was to pretend that forcing Americans to purchase a product that many of them do not want is integral to the regulation of our national health-care system. Perhaps so, but only if the Constitution's commerce clause, which was intended to eliminate state barriers to interstate trade, becomes the vehicle by which the federal government can compel people to engage in intrastate trade. Not even the Supreme Court's tortured commerce-clause jurisprudence goes that far.

If Congress were interested in using the commerce clause for its intended purpose, we would be debating the Health Care Choice Act, which would permit the interstate purchase of individual health policies. The Democrats, however, bottled up that bill in committee.

They would rather exploit the cartelization of health insurance in selected states to argue for a government-run insurance company. Never mind that a major reason for those cartels is the prohibition against purchasing insurance across state lines.

Finally, Reid would enforce this unconstitutional mandate with an unconstitutional tax. The Senate bill attaches a penalty for not complying with the mandate to the Internal Revenue Code. But the penalty is not based on income, so it's not an income tax. And it's not based on the value of the policy not purchased, so it's not an excise tax. Instead, the tax is a fixed amount based on family size. That means it's levied per person and therefore a "direct tax" under the Constitution, which requires that such taxes be apportioned among the states according to their population, as determined by the census.

The individual mandate would extend the dominion of the federal government to virtually all manner of human conduct - including the non-conduct of not buying health insurance - by establishing a federal police power that is authorized nowhere in the Constitution. Democrats will have legislated a new quasi-crime, and perhaps the sole offense in our history that can be committed only by people of a certain income, since those below the poverty line would be exempt from the mandate.

Congress' attempt to punish a non-act that harms no one is an intolerable affront to the Constitution, liberty, and personal autonomy. That shameful fact cannot be altered by calling it health-care reform.

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