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# Constitutionality of health overhaul questioned

[Donald Lambro](#)

On top of all the other obstacles facing President Obama in his quest to pass health reform is this one: Does the U.S. Constitution allow the government to require uninsured Americans to buy medical insurance or impose a tax penalty if they refuse?

Congress has never before required citizens to purchase any good or service, but that is what both House and Senate health bills would mandate.

While this debate has been overshadowed by other issues involving the plan's nearly \$1 trillion cost and its government-run option, the constitutional argument strikes at a pivotal part of the health care plan's finances. To make a government-run health care plan work, the nation's largely uninsured young adults would need to be covered to help subsidize medical care for older and typically less-healthy Americans, legislators say.

House Speaker Nancy Pelosi dismissed the complaint Thursday when she was asked by a reporter if the Democrats' health reform proposal was constitutional.

"Are you serious? Are you serious?" Mrs. Pelosi replied.

But House Minority Leader John A. Boehner said the argument could not be ignored.

"I'm not a lawyer, and I'm certainly not a constitutional lawyer, but I think it's wrong to mandate that the American people have to do anything," he told reporters at his own press briefing last week.

The question of the mandate's constitutionality "hasn't been part of the public debate, but the legal community has been debating it. It's been on all the legal blogs," said Michael Cannon,

director of health-policy studies at the libertarian Cato Institute. He said "the Constitution does not grant Congress the power to force Americans to purchase health insurance."

In 1994, the nonpartisan Congressional Budget Office noted that a "mandate requiring all individuals to purchase health insurance 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 CBO said. The statement was part of an analysis of then-President Clinton's ill-fated health care reform plan, which also required that all Americans purchase health insurance plans.

The Constitution gives Congress the power "to regulate commerce ... among the several states" - a clause that has served as the foundation for broad economic regulatory and taxing powers claimed by the legislative branch.

But Randy Barnett, a professor at Georgetown University Law Center, asks, "Where in the [Constitution] is the power to mandate that individuals buy health insurance?" His answer: Nowhere.

"The business of providing health insurance is now an entirely intrastate activity" beyond the regulatory sway of the federal government, he said.

Washington lawyers David B. Rivkin Jr. and Lee A. Casey argued in an Aug. 22 column in The Washington Post that Congress has no constitutional power to tell people what they must buy.

"The Constitution assigns only limited, enumerated powers to Congress, and none, including the power to regulate interstate commerce or to impose taxes, would support a federal mandate requiring anyone who is otherwise without health insurance to buy it," they said.

But other legal scholars say that the Supreme Court has in recent decades taken a much broader view of Congress' commerce powers and would likely do the same in this case if the legislation's mandate is challenged in court.

"I would be willing to wager with Professor Barnett that the Supreme Court would uphold such a mandate, given the court's expansive reading of the Commerce Clause. In fact, I don't think the vote would be close," Washington and Lee University professor Timothy Stoltzfus Jost said.

Even some conservative legal analysts who oppose the health care reform think that in the end, if the legislation passes, Congress would win in the courts.

"In this case, the overall scheme would involve the regulation of 'commerce' as the Supreme Court has defined it for several decades, as it would involve the regulation of health care markets. And the success of such a regulatory scheme would depend upon requiring all to participate," writes Jonathan H. Adler, law professor at Case Western Reserve University School of Law.

House Majority Leader Steny H. Hoyer of Maryland was asked at a news conference recently whether Congress had "the power to mandate that somebody buy health insurance." He replied: "Promoting the general welfare in the Constitution obviously gives broad authority to Congress to effect that end. Clearly, this is within our constitutional responsibility."

The Senate Finance Committee, which recently approved one of the Senate's two main health care bills, "thoroughly explored the issue and believes that the policies put forward in our bill will fall within" the constitutional powers of Congress, a top aide said.

But the excise tax that would be imposed on anyone who did not purchase insurance and its enforcement "would invite [constitutional] scrutiny," said a paper presented to the Federalist Society for Law and Public Policy Studies by Peter Urbanowicz, a lawyer and health care management consultant, and Dennis G. Smith, senior research fellow in health care reform at the Heritage Foundation.

They cited Columbia University health policy professor Sherry Glied, named by Mr. Obama to a top policy job in the Department of Health and Human Services, who warned that "developing a system to promptly identify and penalize scofflaws will take effort and ingenuity, particularly in our diverse and mobile country."

"It may require a degree of intrusiveness and bureaucracy that some will find unpalatable."

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