

## Health care reform is constitutional

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October 23, 2009 04:59 AM EDT

Those opposing health care reform are increasingly relying on an argument that has no legal merit: that the health care reform legislation would be unconstitutional. There is, of course, much to debate about how to best reform America's health care system. But there is no doubt that bills passed by House and Senate committees are constitutional.

Some who object to the health care proposals claim that they are beyond the scope of congressional powers. Specifically, they argue that Congress lacks the authority to compel people to purchase health insurance or pay a tax or a fine.

Congress clearly could do this under its power pursuant to Article I, Section 8 of the Constitution to regulate commerce among the states. The Supreme Court has held that this includes authority to regulate activities that have a substantial effect on interstate commerce. In the area of economic activities, "substantial effect" can be found based on the cumulative impact of the activity across the country. For example, a few years ago, the Supreme Court held that Congress could use its commerce clause authority to prohibit individuals from cultivating and possessing small amounts of marijuana for personal medicinal use because marijuana is bought and sold in interstate commerce.

The relationship between health care coverage and the national economy is even stronger and more readily apparent. In 2007, health care expenditures amounted to \$2.2 trillion, or \$7,421 per person, and accounted for 16.2 percent of the gross domestic product.

Ken Klukowski, writing in POLITICO, argued that "people who declined to purchase government-mandated insurance would not be engaging in commercial activity, so there's no interstate commerce." Klukowski's argument is flawed because the Supreme Court never has said that the commerce power is limited to regulating those who are engaged in commercial activity.

Quite the contrary: The court has said that Congress can use its commerce power to forbid hotels and restaurants from discriminating based on race, even though their conduct was refusing to engage in commercial activity. Likewise, the court has said that Congress can regulate the growing of marijuana for personal medicinal use, even if the person being punished never engaged in any commercial activity.

Under an unbroken line of precedents stretching back 70 years, Congress has the power to regulate activities that, taken cumulatively, have a substantial effect on interstate commerce. People not purchasing health insurance unquestionably has this effect.

There is a substantial likelihood that everyone will need medical care at some point. A person with a communicable disease will be treated whether or not he or she is insured. A person in an automobile accident will be rushed to the hospital for treatment, whether or not he or she is insured. Congress would simply be requiring everyone to be insured to cover their potential costs to the system.

Congress also could justify this as an exercise of its taxing and spending power. Congress can require the purchase of health insurance and then tax those who do not do so in order to pay their costs to the system. This is similar to Social Security taxes, which everyone pays to cover the costs of the Social Security system. Since the 1930s, the Supreme Court has accorded Congress broad powers to tax and spend for the general welfare and has left it to Congress to determine this.

Nor is there any basis for arguing that an insurance requirement violates individual liberties. No constitutionally protected freedom is infringed. There is no right to not have insurance. Most states now require automobile insurance as a condition for driving.

Since the 19th century, the Supreme Court has consistently held that a tax cannot be challenged as an impermissible take of private property for public use without just compensation. All taxes are a taking of private property for public use, but no tax has ever been invalidated on that basis.

Since the late 1930s, the Supreme Court has ruled that government economic regulations, including taxes, are to be upheld as long as they are reasonable. Virtually all economic regulations and taxes have been found to meet this standard for more than 70 years. There is thus no realistic chance that the mandate for health insurance would be invalidated for denying due process or equal protection.

Those who object to the health care proposals on constitutional grounds are making an argument that has no basis in the law. They are invoking the rhetorical power of the Constitution to support their opposition to health care reform, but the law is clear that Congress constitutionally has the power to do so. There is much to argue about in the debate over health care reform, but constitutionality is not among the hard questions to consider.

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