

## VIEWPOINT

## Politics Of Health Care Legislation Endanger Constitutional Liberties

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The health care bills moving through Congress raise a host of contentious policy issues. But provisions in the bill before the Senate Finance Committee also test whether politics trumps the Constitution.

The liberty we enjoy in America requires limits on government power, and those limits come primarily from the Constitution. Our written Constitution delegates only certain powers to the federal government and Congress must point to at least one of them as authority to pass legislation.

This means, of course, that the Constitution might not allow some things Congress might want to do. Some provisions of the Finance Committee's health care bill are in this category. It would, for example, require nearly everyone to purchase health care insurance. Failure to do so could result in an "excise tax" to be assessed through the tax code and collected by the IRS.

The only conceivable constitutional basis for this mandate is Congress' power to regulate interstate commerce. To most people, "commerce" involves such things as trade and economic transactions. But the Supreme Court has broadened Congress' power to include regulating activities that substantially affect commerce, including noncommercial and even intrastate activities.

But the one constant has always been that the power to regulate commerce allows Congress to govern activities in which individuals choose to engage. The requirement that individuals purchase health insurance is something else entirely.

For the first time, the federal government would be ordering Americans to buy a particular product or service they had not chosen to purchase. Rather than regulate an activity in which individuals chose to engage, Congress would be requiring an activity in which individuals had chosen not to engage.

The nonpartisan Congressional Research Service issued a report concluding this is a completely novel, unprecedented constitutional issue.

This crosses a proverbial constitutional Rubicon. If Congress can order Americans to buy certain products, why did it bother with a Cash for Clunkers program or the upcoming program providing rebates for purchasing energy-efficient appliances? Congress could simply require Americans to buy certain cars, refrigerators or dishwashers.

Come to think of it, we could tackle the obesity problem by requiring Americans to buy fruits and vegetables. And there apparently was no need for the stimulus and TARP programs, since Congress could just order Americans to buy certain stocks, perhaps even deposit their paycheck in certain banks.

Cutting individual freedom of choice out of the equation would be a big relief for the federal government.

This is not at all like the requirement to buy car insurance. That comes from the states, which can do many things the feds may not. But the states require car insurance only as a condition for the privilege of driving a car. Under the Finance Committee bill, however, individuals must buy health insurance whether or not they ever visit a doctor, get a prescription or have an

operation. Even if they sit home and do nothing at all.

Another constitutional problem with the individual mandate is that the penalty for failing to purchase health insurance is, in fact, not the excise tax that the Finance Committee bill says it is. It is really not a tax at all, but a fine masquerading as a tax. An excise tax is a tax on the sale of goods or services, such as a gasoline tax. If you do not buy gas, however, you do not pay the gas tax.

The so-called "tax" imposed upon people who fail to buy health insurance, however, is the exact opposite. It applies not when there's been a transaction, but when there's been no transaction. If it is a tax at all, it is a direct tax imposed upon people rather than an excise tax imposed upon their purchases.

This matters because the Constitution requires that a direct tax be apportioned among the states based on population. America's founders were especially concerned to limit the federal government's power of direct taxation, and it took the 16th Amendment to allow Congress to impose a federal income tax without that apportionment requirement.

As an analysis published in the BNA Daily Tax Report recently confirmed, the penalty imposed upon those who don't buy health insurance would be an unapportioned direct tax in violation of the Constitution.

Another provision of the Finance Committee bill would impose an excise tax on the sale of high-premium insurance plans and provide relief from that tax for insurers in 17 unnamed states. Just as the Constitution requires that direct taxes be apportioned, it requires that excise taxes be "uniform throughout the United States."

A tax is uniform if it has the same force and effect wherever the subject of the tax is found. If the excise tax is the solution to the problem of high-premium insurance plans, then a tax that varies from state to state can hardly be called uniform throughout the country. Congress may no more do this than it could impose a cigarette tax in New York but not in Florida.

It is tempting to brush the Constitution aside to pursue political objectives, to let the ends justify the means. But if politics trumps the Constitution, the Constitution cannot limit government and, therefore, cannot protect liberty.

The best test of a fundamental principle is when we have to apply it to ourselves. Americans are watching to see whether Congress passes this test.

- Hatch, Utah Republican, is a senior member of the Senate Finance Committee.