



For Immediate Release
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Contact: Scott Mulhauser/Erin Shields
202-224-4515

**Floor Statement of Senator Max Baucus (D-Mont.)
Regarding the Constitutionality of Health Care Reform**

Mr. President, some of my Colleagues on the other side of the aisle have asserted that the penalty that is proposed under the bill before us for failing to maintain health coverage is unconstitutional. And the Senator from Nevada, Senator Ensign, has raised a point of order that is now pending.

Those of us who voted to proceed to the health reform bill and who voted for cloture on the substitute amendment take seriously our oath to support and defend the Constitution. And we have looked at this question seriously and concluded that the penalty is constitutional.

And those who study constitutional law as a line of work have drawn that same conclusion. Most legal scholars who have considered the question of a requirement for individuals to purchase health coverage argue forcefully that the requirement is within Congress' power to regulate interstate commerce.

Take Professor Erwin Chemerinsky, a renowned constitutional law scholar, author of four popular treatises and casebooks on constitutional law, and Dean of the University of California Irvine School of Law. Professor Chemerinsky has gone so far to say that those arguing on the other side of the issue do not have "the slightest merit from a constitutional perspective."

In arguing that a requirement to have health coverage falls within Congress' power to regulate interstate commerce, Professor Chemerinsky compares health care reform to the case of *Gonzales v. Raich* — often cited by the other side.

In *Gonzales v. Raich*, the Supreme Court held that the Federal Government's Commerce Clause powers extend to the cultivation and possession of small amounts of marijuana for personal use. Professor Chemerinsky notes that the relationship between health care coverage and the national economy is even clearer than the cultivation and possession involved in *Gonzales v. Raich*.

Mr. President, I ask unanimous consent that Professor Chemerinsky's Los Angeles Times article be printed in the Record at this point.

As a second example, I refer my colleagues to an article by Mark Hall, law professor at Wake Forest University. Professor Hall's article is a comprehensive, peer-reviewed analysis of the constitutionality of a Federal individual responsibility requirement.

In it, Professor Hall concludes that there are no plausible Tenth Amendment or States' rights issues arising from the imposition by Congress of an individual responsibility to maintain health coverage.

Professor Hall notes further that health care and health insurance both affect and are distributed through interstate commerce. And that gives Congress the power to legislate a coverage requirement using its Commerce Clause powers.

Professor Hall notes that the Supreme Court indicated in its decisions in *United States v. Morrison* and *United States v. Lopez* — two other cases relied on by the other side — that the non-economic, criminal nature of the conduct in those cases was central to the court's decisions in those cases that the Government had not appropriately exercised power under the Commerce Clause.

Health insurance, on the other hand, does not deal with criminal conduct. Health insurance is commercial and economic in nature and, to reiterate, substantially affects interstate commerce.

Health insurance and health care services are a significant part of the national economy. National health spending is 17.6 percent of the economy. And it is projected to increase from \$2.5 trillion in 2009 to \$4.7 trillion in 2019.

Private health insurance spending is projected to be \$854 billion in 2009. It covers things like medical supplies, drugs, and equipment that are shipped in interstate commerce.

Health insurance is sold by national or regional health insurance carriers. Thus health insurance is sold in interstate commerce. As well, claims payments flow through interstate commerce.

The individual responsibility requirement, together with other provisions in the Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services.

Under existing health and labor laws, the Federal Government has a significant role in regulating health insurance.

Other prominent legal scholars have also said that Congress has the constitutional authority to impose a requirement on individuals to maintain health coverage.

Jonathan H. Adler, Professor of Law at Case Western Reserve University School of Law, has stated:

"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."

Doug Kendall of the Constitutional Accountability Center similarly concluded:

"The fundamental point behind pushing people into the private insurance market is to make sure that uninsured individuals who can pay for health insurance don't impose costs on other tax payers."

Professor Michael Dorf of the Cornell University Law School noted that:

“[T]he individual mandate is ‘plainly adapted’ to the undoubtedly legitimate end of regulating the enormous and enormously important health-care sector of the national economy. It is therefore constitutional.”

And Robert Shapiro, Professor of Law at Emory University School of Law, stated:

“Whatever one thinks of the wisdom of the individual mandate, or of health care reform generally, it would be surprising if the Constitution prohibited a democratic resolution of the issue. Happily, it does not.”

Thus, Mr. President, the weight of authority is that health care and insurance represents interstate commerce. And the individual responsibility requirement to maintain coverage would be within Congress’ power to regulate interstate commerce.

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