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Nonpartisan congressional report suggests Pelosi's drug pricing bill could be found unconstitutional

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ASHINGTON — House Democrats' [signature drug pricing legislation](#) could run afoul of

not one, not two, but three separate parts of the U.S. Constitution, Congress' own legal experts write in a new report.

The Oct. 21 Congressional Research Service report obtained by STAT states that H.R. 3, which would allow the government to negotiate over drug prices and levy huge fines on companies who refuse, might run afoul of the Fifth and Eighth Amendments, as well as Congress' taxing power under the Constitution.

Importantly, the report does not reach a definitive conclusion as to whether the bill is unconstitutional — that decision would be up to a judge. In fact, the report notes that drug makers would in many cases face an uphill battle if they chose to challenge the law in court. But it wouldn't be the first time a drug pricing policy was found unconstitutional — in fact, President Trump's plan to require drug sticker prices in ads was found unconstitutional back in July. The Trump administration is appealing that decision.

The legislation's potential constitutional infirmities loomed large at an Energy and Commerce Committee meeting held last week, before the report was released. And at least one Republican has already seized on this new report — at another committee meeting this week, he held it up as a reason to slow down consideration of H.R. 3. The legislation is likely headed for a floor vote in November.

“These things do get litigated,” said Rep. George Holding (R-N.C.). “Perhaps it might be opportune to take a pause, [and] have further hearings on the central constitutional problems.”

The bad news for Democrats is that the potential constitutional issues with the bill can't be fixed with a few tweaks — they relate to the central crux of the bill.

The bill's provision to give the health secretary power to negotiate the price of some drugs, for example, could be challenged in court under the Takings Clause of the Constitution, which prevents the government from taking private property without “just compensation,” the CRS report finds.

Drug makers could argue in court that the losses in revenues they experienced as a result of negotiation could be considered a “taking” under the Constitution, the report suggests.

Such a challenge isn't likely to be drug makers' best argument if they want to overturn H.R. 3 — the Congressional Research Service notes “it is generally difficult to prevail on a Takings challenge” — but it underscores the difficulty Democrats may have in tweaking the bill to shore it up against a challenge in court.

Democrats have thus far appeared unwilling to make significant tweaks to the bill, and have largely denied the potential constitutional issues.

Perhaps the most problematic portion of the sweeping law, from a constitutional perspective, is the provision that rapidly escalates taxes on companies who refuse to negotiate with the government over their drug prices.

Under the law, drug makers who refuse to negotiate would face a 65% tax which would escalate to 95% in the event of noncompliance.

First, there's a question as to whether Congress has the power to levy these taxes in the first place. The report notes that while courts have granted Congress a lot of latitude when it comes to taxing, Congress' authority is more shaky when it comes to taxes that are actually fines.

"I didn't know that we had a limitation on our taxing power, but apparently we do," said Holding, in response to the report.

Determining whether Congress actually has the power to levy a certain tax isn't a simple matter — in fact it typically involves judges weighing a number of complex factors like whether a tax is "proportional" to the "extent or frequency" of certain conduct.

Ultimately, the report's authors come down on the side of the Democrats, writing "Congress likely has the constitutional authority to impose the excise tax discussed in the previous section."

But even if Congress does have the power to levy the tax, the tax could still be considered "excessive" under the Eighth Amendment's excessive fines clause, CRS finds.

"Assuming the excise tax is not authorized by Congress's taxing power alone and is actually a means of enforcing a regulatory drug pricing statutory scheme, it could be viewed as a punitive measure subject to the Excessive Fines Clause," they write.

A spokesperson for the Energy and Commerce Committee argued that the CRS report "argues both sides."

"We've consulted with legal experts and firmly believe the legislation is constitutional," they added. "Any lawyer can argue against a bill's constitutionality, but that doesn't mean those arguments have merit."

A spokesperson for the Ways and Means Committee told STAT that the taxes created by H.R. 3 "falls squarely within Congress's taxing authority."

"There is a long line of Supreme Court cases that recognizes Congress's broad authority to set federal taxes as it sees fit," the spokesperson added.

A staff director for that committee put it more bluntly during last week's meeting.

"We do not believe that this bill is in violation of the constitution," said health subcommittee staff director Amy Hall.

