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Congress is getting a special exemption from ObamaCare — and no, it's not legal

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The Heritage Foundation's John Malcolm and I have a new op-ed where we draw from newly uncovered to documents to show that the officials who bestowed upon Congress its own special exemption from ObamaCare likely violated numerous federal laws. Malcolm is a former assistant U.S. attorney, a former deputy assistant attorney general in the Department of Justice's Criminal Division, and the current chairman of the Criminal Law Practice Group of the Federalist Society.

First, a little background. The Affordable Care Act threw members and staff out of the Federal Employees Health Benefits Program, and basically says they can only get health benefits through one of the law's new exchanges. Under pressure from Congress and the president himself, the federal Office of Personnel Management (which administers benefits for federal workers, including Congress) decided the House and Senate would participate in the District of Columbia's "Small Business Health Options Program," or "SHOP" Exchange, rather than the exchanges that exist for individuals. The reason is that federal law would not allow members and staff to keep receiving a taxpayer contribution of up to $12,000 toward their premiums if they enrolled in individual-market exchanges. Yet putting Congress in a small-business exchange isn't exactly legal, either. Both federal and D.C. law expressly prohibited any employer with more than 50 employees from participating D.C.'s SHOP Exchange. The House and Senate each employ thousands upon thousands of people.

Okay, now here's an excerpt from our new op-ed:

"Documents obtained under the Freedom of Information Act show that unnamed officials who administer benefits for Congress made clearly false statements when they originally applied to have the House and Senate participate in D.C.'s "SHOP" Exchange for 2014. Notably, they

claimed the 435-member House had only 45 members and 45 staffers, while the 100-member Senate had only 45 employees total…

"Making a materially false or fraudulent statement as part of a claim against the U.S. Treasury is a separate federal crime, as is wire fraud. Ordinary citizens who violate these laws face fines of up to three times the amount drawn from the Treasury and/or up to 20 years in prison. They might also face prosecution for health care fraud (10 years), violating the Sarbanes-Oxley ban on falsifying documents (20 years), conspiracy to commit such offenses (5 years), and other crimes under federal and D.C. law.

"Newly unearthed documents suggest these officials knew they were violating the law."

Those new documents include admissions by officials in Congress and D.C.'s small-business exchange that the House and Senate are in fact not small businesses.

Just as I am once again highlighting how the Obama administration is trying to save this ill-conceived and unworkable law by spending money it has no authority to spend, University of Michigan law professor Nicholas Bagley is once again defending the administration. Bagley agrees with a large part of my account when he writes:

"The exchange website in Washington, DC includes a field for the number of employees. If you enter a figure above 50, the website won't accept the application. That's because large employers are ineligible to use the SHOP exchange."

Actually, the web site doesn't include that field any more, which is part of why Bagley is wrong. But I'll save that for another day.

Bagley's argument is that since OPM determined Congress may participate in D.C.'s SHOP Exchange, those false statements were not "material to the approval of their applications," and therefore do not satisfy the elements of one of the federal crimes we mentioned.

If OPM's interpretation of the statute is lawful, Bagley may be right. But if OPM's decision is not lawful, the these false statements are what Malcolm and I allege: a material part of a fraudulent scheme "to facilitate illegal, taxpayer-funded gifts to members of Congress." So a lot is riding on whether OPM's determination is lawful.

Bagley claims OPM's determination is lawful because the ACA exempts Congress from the rules requiring SHOP Exchanges to reject employers with more than 50 employees. If he has evidence that such an exemption exists, he should cite it. He doesn't cite it, however, because it doesn't exist. If it did, OPM no doubt would have cited it when the agency announced this curious decision in the first place. Instead, the agency just pretended that such an exemption existed, and pretended the statutory requirement it was vitiating, and D.C.'s corresponding statutory requirement, do not. All Bagley offers in support of this claim is a link to a three-year-

old post of his that addresses a different issue (about which Bagley is also wrong; but again, we'll save that another day). Curiouser and curiouser.

In sum, if Bagley can substantiate his claim that "the ACA singles out [Congress] as a special case" where the rules requiring SHOP Exchanges to reject large employers do not apply, he should do so. If not, what does that tell us?

Michael F. Cannon is the Cato Institute's director of health policy studies.