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Democrats Pre-Emptively Second-Guess Each Other on Obamacare's Supreme Court Reckoning

Saturday brought us two lengthy articles, from the New York Times and Washington Post, about Obamacare's individual mandate. Some liberal critics complain that the Obama administration didn't heed their warnings about the mandate's Constitutional weakness, while still others complain that the White House failed to heed their advice on how best to defend the mandate in court. You can detect a theme there. But neither accusation is true. Contemporaneous accounts tell us the real story of why President Obama decided to roll the mandate dice.

The *Post* piece, by Peter Wallsten, contains some hilarious complaints from prominent law professors who ought to know better. Yale constitutional law professor Akhil Amar was furious that the administration didn't cite the Militia Acts of 1792, signed by President George Washington, because those acts contained a requirement that every "free able-bodied white male citizen" purchase a musket, a bayonet, a belt, two spare flints, and a cartridge box. "It was an ace in the hole," said Amar. "You've got George Washington signing a bill that helps you. Why wouldn't you use it?"

There's one minor problem: arming the Militia is one of the enumerated powers of Congress described in Article I, Section 8 of the Constitution. Or more specifically: "The Congress shall have power…To provide for organizing, arming, and disciplining, the Militia."

And the administration did indeed try to enlist the "musket mandate" idea in the lower courts. As Wallsten notes in his piece, Judge Jeffrey Sutton—a conservative in the Sixth Circuit—upheld the mandate's constitutionality, but heaped scorn upon the musket argument. "To argue that Congress's power to enlist individuals to defend the country's borders proves that it may enlist individuals to improve the availability of medical care gives analogy a bad name. There is a difference between drafting a citizen to join the military and forcing him to respond to a price quote from Aetna."

Not to be outdone, Harvard Law professor Einer Elhauge thought the White House was mistaken not to cite a 1798 law called the Act for the Relief of Sick and Disabled Seamen. That law required companies involved in interstate and international commerce to pay for health insurance for their ships' crews. Again, regulation of "Commerce with foreign Nations, and among the several States," is an enumerated power of Congress. (I discuss other fallacies with the "seamen mandate" argument here.)

Peter Baker of the *New York Times* notes that the majority of Democrats were dismissive of the mandate's constitutional challenges in 2010. "Are you serious?" said Nancy Pelosi, scornfully, at the time. The few who did worry publicly, like NYU Law prof Michael

Waldman, were quickly shot down by their peers.

President Obama, the former con law lecturer, wasn't so naïve. As Ron Suskind details in his book *Confidence Men*, Obama "was concerned about legal challenges" to the mandate, but was also told of Jonathan Gruber's work—work that heavily influenced the estimates of the Congressional Budget Office—that estimated that Obamacare would cover half as many people without a mandate.

Indeed, Democrats in Congress were also aware of the mandate's weakness. The House version of the bill did contain a severability clause with regard to the individual mandate, because they appreciated this risk. The Senate version of the bill, however, did not.

As John McDonough writes in his book Inside National Health Reform, "By the late fall [of 2009], Senate Republicans had begun to argue against the constitutionality of the individual mandate as a talking point against reform, and Democratic staffers decided to leave out severability to deprive Republican senators of a talking point against the law—Republicans would claim that the inclusion of the severability showed the Democrats' lack of confidence."

Because of Scott Brown's election in Massachusetts, Democrats were not able to merge the Senate and House versions in the traditional way, and had to pass the Senate version mostly intact—without the severability clause.

The point being: Many Democrats, including the President, were well aware of the mandate's constitutional risks. They went forward with it anyway, because getting the right "number" in terms of the law's coverage expansion was, in their view, more important than doing right by the Constitution. We'll soon find out if they will pay a price for that decision.

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NOTE: Over at *National Review*, I will be hosting a live blog, beginning at 10 a.m. ET on Monday, June 25, to discuss the impending Supreme Court decision. If the Court pushes back its last day of session, the live blog will resume at that date. Joining me will be Ilya Shapiro of the Cato Institute, Ben Domenech of the Heartland Institute, and Nicole Fisher of the University of North Carolina.