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Baking Some Humble Pie for Congress



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The challenge to the Affordable Care Act, a.k.a. Obamacare, has come a long way since then-Speaker of the House Nancy Pelosi incredulously asked "are you serious?" in response to a reporter's question on its constitutionality. As oral arguments before the Supreme Court near, the Court should show Pelosi just how "serious" a transgression this law is. Not only is the individual mandate, which requires nearly every American purchase a qualifying health insurance plan, a forced wealth transfer that is not authorized by any of Congress's limited powers, it is a forced transfer that was deliberately and deceptively passed in order to avoid the political liability of imposing a tax. For both reasons it is unconstitutional. For the second reason we should be angry.

By forcing relatively healthy people to purchase insurance, Congress hoped to subsidize the health care costs of less healthy people. Under current constitutional law, the same result could have been accomplished by increasing taxes and directly subsidizing insurance companies. Instead, Congress chose to command everyone to give their money to a private business. The ultimate effect is essentially the same: an expensive, dysfunctional, and ineffective health care system mostly controlled by the federal government. By choosing to use the individual mandate Congress has not only harmed our health care system, it has seriously imperiled our Constitution.

Imagine a world in which Congress is allowed to avoid the political accountability of huge tax increases and budgetary explosions by commanding people to purchase a product. Members of Congress would be able to claim accurately, if not totally honestly, that they did not raise taxes or increase the budget during their term. The Framers of the Constitution understood politicians' self-interested motives and thus added safeguards that limit the powers of Congress and ensure the accountability of our representatives to the people. By ignoring these safeguards, the Act violates "the letter and spirit of the constitution," in the words of Chief Justice John Marshall.

The Framers were aware that the power to tax was among the most dangerous powers of government. During the Constitutional Convention they devoted considerable time to debating the Origination Clause, a relatively unknown clause requiring that all "Bills for

raising Revenue shall originate in the House of Representatives." Many delegates saw the clause as so essential to good government that they were willing to quit the convention if it were not included. In the words of George Mason, to not include the clause would "unhinge the compromise" that had created popular representation in the House and equal representation in the Senate.

The clause was crucial because, in the words of Ben Franklin, "It was always of importance that the people should know who had disposed of their money, and how it had been disposed of." Only the House, being closest to the people in terms of number of constituents and length of term, could be trusted with taking money from the people in a responsible fashion.

Additionally, in order to provide the people information on how much money is being taken and spent, the Framers also included the Statement and Account Clause, which requires a "regular Statement and Account of Receipts and Expenditures of all public Money shall be published from time to time."

Though both the Origination Clause and the Statement and Account Clause are largely unenforceable through the courts, they form part of the "spirit of the constitution," and that spirit is clear: forced wealth transfers must be above-the-board and transparent. The individual mandate is not only off-the-books, it is a duplicitous attempt on the part of Congress to avoid the political liability for the costs of an entitlement program but to still receive the political gains from the beneficiaries.

President Clinton's health care proposal mostly failed because of an astronomical budgetary estimate that included the personal costs of an individual mandate. After that episode, Congress learned to be sneaky when it comes to budget estimates. By using special accounting tricks in Obamacare, the costs to individuals forced to purchase insurance are not included in the budgetary estimate of the law. In other words, the individual mandate allows Congress to achieve the ultimate politicians' coup: clandestinely taking money and doling out benefits.

If this law stands, they will do it again. How could they resist?

The challenge to the Affordable Care Act not only asks the Supreme Court to enforce the limits on congressional power explicitly listed in our Constitution, it asks for the return of some measure of humility to a Congress that self-interestedly ignored constitutional limits. The Court should unambiguously chide Congress and restore some dignity to the men who sat through a hot Philadelphia summer to ensure an honest and accountable government.

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