

The Lawsuit that Might Kill Obamacare

By: John Hayward – April 2, 2013

ObamaCare has been challenged on various legal grounds, but one of its most serious legal threats builds upon the very same Supreme Court decision that held it constitutional. The *Washington Times* reports on a suit from the Pacific Legal Foundation that has been making its way quietly through the court system:

A challenge filed by the Pacific Legal Foundation contends that **the Affordable Care Act is unconstitutional because the bill originated in the Senate, not the House.** Under the Origination Clause of the Constitution, all bills raising revenue must begin in the House.

The Supreme Court upheld most provisions of the act in June, but Chief Justice John G. Roberts Jr. took pains in the majority opinion to define Obamacare as a federal tax, not a mandate. That was when the Sacramento, Calif.-based foundation's attorneys had their "aha" moment.

"The court there quite explicitly says, "This is not a law passed under the Commerce Clause; this is just a tax," foundation attorney Timothy Sandefur said at a Cato Institute forum on legal challenges to the health care act. "Well, then the Origination Clause ought to apply. The courts should not be out there carving in new exceptions to the Origination Clause."

It would be ironic if the crazy legal hocus-pocus employed to make ObamaCare compatible with the Constitution became its undoing. "It's a tax... no, it's a penalty... no, it's a tax..." The President and his allies have steadfastly refused to refer to the ObamaCare mandate as a "tax," even though such a designation is the only reason the Affordable Care Act still exists. Perhaps it will magically change into a "penalty" once again to evade the Pacific Legal Foundation challenge.

The Justice Department has offered two basic arguments in its effort to dismiss the PLF lawsuit:

The Justice Department filed a motion to dismiss the challenge in November, arguing that the high court has considered only eight Origination Clause cases in its history and "has never invalidated an act of Congress on that basis."

[...] In their brief, attorneys for the Justice Department argue that the bill originated as House Resolution 3590, which was then called the Service Members Home Ownership Act. After passing the House, the bill was stripped in a process known as "gut and amend" and replaced entirely with the contents of what became the Patient Protection and Affordable Care Act.

In other words, the Origination Clause is one of those piddly little dead-letter kinda-sorta-laws that our titanic government doesn't have to pay attention to, And they already dodged anyway, it by dragging the Service Members Home Ownership Act out of the House, strapping it to the laboratory tables of the Senate, and using mad science to surgically transform it into the Patient Protection and Affordable Care Act. Something that important couldn't very well be left to fair and open debate in the House of Representatives, could it? Some of those people have quaint notions about "individual liberty" that would have gotten in the way. And the American people might have grown restless during such debate. Much better to pass the bill first and *then* find out what was in it, as then-Speaker Nancy Pelosi famously recommended.

DOJ also argues that the taxes raised by ObamaCare are "incidental to the bill's mission," a standard that has allowed some creative stretching of the Origination Clause in the past. That seems rather difficult to square with the absolutely vital nature of the ObamaCare "tax" designation to its continued survival – if it had not been ruled as a tax by the Roberts Court, it would have gone down in flames.

In theory, the Pacific Legal Foundation would scuttle the entirety of ObamaCare, unlike other challenges that might be addressed by piling a few hundred more pages of corrective regulation atop the current seven-foot Frankenstein monster of paperwork. In practice, I find myself skeptical that a government vast enough to embrace ObamaCare is going to let itself be thwarted by the kind of legalistic fine print it expects its subjects to obey. We may find out soon, as the U.S. District Court for the District of Columbia is expected to rule on the Justice Department's motion to dismiss in the very near future.