

The Washington Post

The unwelcome role of the IRS in Obamacare

By: Michael Gerson – May 23, 2013

Let us stipulate that now might not be the best time — with IRS officials exposed for abusing power, caught in self-serving deceptions, invoking their constitutional right against self-incrimination — to dramatically expand the authority and size of their agency. But this is what Obamacare requires. Thousands of new IRS agents will implement 40-odd provisions of the Patient Protection and Affordable Care Act — the exact number is a matter of dispute since the law itself is so confusing. The largest tax law and social policy change in a generation will be imposed on a skeptical public by a government agency whose credibility is in ruins.

But the IRS is not merely implementing Obamacare. It engaged in a regulatory power grab to ensure that it *could* implement Obamacare.

As written, the Affordable Care Act provides tax credits and subsidies for the purchase of health insurance through exchanges that are run by “a governmental agency or nonprofit entity that is established by a state.” Since the federal government is constitutionally forbidden from ordering states to create exchanges, the law provides incentives to ensure their cooperation. This was part of the reform’s political appeal: Federal subsidies would be mediated through state institutions, undermining the criticism that U.S. health care was being nationalized.

But 33 states have so far refused to create health exchanges, with reactions ranging from “no” to “hell no.” The law allows the Department of Health and Human Services to set up federal health exchanges in the holdout states. But the statute makes no mention of the IRS providing credits and subsidies through federal exchanges. Without subsidies, employers and some individuals in those states would be exempt from mandates. Obamacare would be unworkable in over half the country.

The IRS resolved this conundrum by denying its existence. In a May 2012 regulatory ruling, it asserted its own right to provide credits outside the state exchanges as the reasonable interpretation of an ambiguous law. But the language of the law is not ambiguous. And health scholars Jonathan Adler and Michael Cannon, in an exhaustive recent analysis, find no justification for the IRS’s ruling in the legislative history of Obamacare. “The statute,” they argue, “and the lack of any support for the IRS rule in the legislative record put defenders of the IRS rule in the awkward position of arguing that it was so obviously Congress’ intent to offer tax credits in federal exchanges that despite a year of debate over the PPACA, it never occurred to anyone to express that intent out loud. A better explanation is that the PPACA’s authors miscalculated when they assumed states would establish exchanges.”

So: The IRS seized the authority to spend about \$800 billion over 10 years on benefits that were not authorized by Congress. And the current IRS scandal puts this decision in a new light. What was the role of politics in shaping this regulatory decision? What pressure was applied? Surely the IRS is above such things. Or maybe not. “It doesn’t look good from the road,” says Cannon, the director of health policy studies at the Cato Institute, “when IRS employees violate the clear language of federal law in a matter that just happens to rescue the top domestic policy achievement of their boss, the president.”

The IRS ruling is being challenged in a case brought by the attorney general of Oklahoma. Chief Justice John Roberts’s decision on the first Obamacare case made clear that the federal judiciary is reluctant to intervene in health matters. But lawsuits brought by states are generally taken seriously in federal court, and this one might also make its way to the Supreme Court. Both the statutory language and the legislative history are on Oklahoma’s side. A ruling against the administration could force Congress to revisit Obamacare.

As the implementation of health care reform moves forward, Congress may need to take another look at the law anyway. The unintended effects of Obamacare now seem unavoidable: higher premiums in employer plans; additional burdens on a Medicaid system already struggling with quality issues; cost controls in Medicare that will drive out providers; a perverse incentive structure that encourages businesses to dump employees on the exchanges while discouraging the young and healthy from signing up, eventually raising costs.

But the IRS power grab is a reminder of how shoddy the law really is. The whole enterprise is precariously perched atop a flimsy bureaucratic excuse. And the agency providing that excuse is a discredited mess.