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Obamacare and the Excise Tax

The Justice Department wrongly claims that a tax on the non-purchase of insurance qualifies as an excise.

The legal battle over Obamacare is in full swing. Judge Henry E. Hudson recently denied the Obama Justice Department's motion to dismiss, and a host of highly significant constitutional questions will now confront him. Among them is the somewhat arcane — but highly significant — issue of Congress's power to impose excise taxes under Article I, Section 8 of the Constitution.

Although the Justice Department is claiming that the individual insurance mandate is constitutionally justified as an excise tax, Georgetown law professor Randy Barnett points out in the *Wall Street Journal* that "the bill doesn't say excise tax." Professor Barnett goes even farther in a friend-of-the-court brief he wrote with several other scholars, pointing out that even if the mandate were an excise tax, it would be unconstitutional because it varies by region; the penalty depends in part on the cost of health insurance in a given market. Excise taxes, after all, must be "uniform throughout the United States."

These arguments might suffice to wave off the Justice Department's excise claim, but this debate raises the more fundamental issue of the nature of the excise. Once the excise is understood in the context of its English origin and the period surrounding the Constitution's ratification, it becomes clear that the excise was a tax on commodities and licenses. The DOJ's contention that the individual mandate is an excise becomes manifestly absurd in light of this original understanding.

In the Anglo-American legal tradition, the excise originated in the upheaval of the English Civil War. In 1643, the Long Parliament passed a tax on tobacco, wine, and liquor, among other items. What these goods had in common was that they were all commodities, tangible things bought and sold through inland commerce.

The list of excisable goods continued to grow throughout the war, but it was not until 1660, after the restoration of the monarchy under Charles II, that the excise was extended to cover the sale of licenses. It was in 1660 that wine licenses became subject to the excise, and these licenses began appearing in regularly published indexes of English excise taxes by the mid-1670s.

The most extensive discussion of the excise in England occurred in the early 1730s, when Sir Robert

Walpole proposed converting customs duties on tobacco and wine into excise taxes. The idea would have allowed the taxes on these items to be collected farther inland as opposed to at the ports, where fraud was rampant.

Several pamphlets came out debating the proposal. One such pamphlet listed the items that could eventually be subjected to the excise, including "food and raiment, bread, butter and cheese, fish, flesh and fowl, all the commodities of our own produce which we can't subsist without." These, it was feared, might someday be "thrown under the claws of this rapacious dragon," the excise.

Thus, in England before the American Revolution, the excise applied exclusively to commodities and licenses. The same was also true in the American colonies, where the excise had been levied primarily on quintessentially American necessities: beer and liquor.

After the Revolution, under the Articles of Confederation, Congress warned states against the excise, fearing that if laborers found that "the necessities of life grow dearer by an excise, [they] must endeavor to exact higher wages." Congress worried about inflation, for if the prices of commodities — the so-called "necessities of life" — increased due to the excise, it would result in demands for higher wages.

That the excise applied only to commodities and licenses was evident during the ratification debates over the new Constitution. In fact, Luther Martin, a Maryland delegate to the Constitutional Convention, discussed the powers understood to be encompassed by the excise when he reported back to the Maryland legislature: "By the power to lay excises . . . the Congress may impose duties on every article of use or consumption, — on the food that we eat, on the liquors we drink, on the clothes that we wear."

Similar notions of the excise can be seen in the state ratifying conventions of South Carolina, New York, and Virginia. Even Hamilton, in *Federalist 21*, corroborates the commodity-centered definition of the excise when he writes of "imposts, excises, and, in general, all duties upon articles of consumption."

How, then, did we arrive at the point where the Justice Department claims that a tax on the non-purchase of insurance qualifies as an excise? The answer is the Social Security Act of 1935, which imposed the payroll tax in the form of an excise. The Supreme Court upheld this as a valid exercise of Congress's taxation power in the 1937 cases of *Steward Machine Co. v. Davis* and *Helvering v. Davis*. In those cases, the Court largely ignored the original meaning of the excise, choosing instead to rely on acts of Parliament and American colonial statutes that either bore little relationship to the tax or failed to show that the original meaning of the excise was anything but commodities-based.

Few today would seriously contend that the payroll tax should be found unconstitutional, so what is the point of discussing the original meaning of the excise? Social Security need not necessarily be found unconstitutional for the original meaning of the excise to be reinstated. Payroll taxes are levied on wages and business income, and there are other taxation powers Congress could use to keep these in place

without erroneously invoking the excise.

The argument over the individual mandate shows just how far Congress has stretched the definition of the excise. If allowed to continue, the limits on the national government's power to tax — which constituted one of the core issues of the American Revolution — become meaningless. The lawsuit over the individual mandate presents an opportunity to reexamine congressional power under the excise and to re-impose constitutional discipline on a runaway legislature. If we are willing to demand strict adherence to constitutional boundaries, we may yet be able to preserve ourselves from the "claws of this rapacious dragon."

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