



Is Obama's Tax On Health Care Constitutional?

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Without regard to one's views about the health care legislation promoted by President Obama and currently being redrafted by Sen. Max Baucus, everyone is entitled to expect that the task will be carried out with competence and integrity - also with dignity and a high regard for the intelligence of the American people.

Further, even if everyone agreed that the proposed federal interventions in health care were consistent with "best medical practice" and produced the best possible medical care at the least price, all these federal actions would still have to meet constitutional standards.

The controversial tax that both Obama and Baucus would impose on people who do not buy health insurance appears to be a "direct tax" on persons that is unlawful under Article 1, Section 2, of the Constitution, which requires that "direct Taxes shall be apportioned among the several States ... according to their Numbers"

In addition, Art. 1, Sec. 9, says: "No capitation, or other direct Tax, shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken"

The only exception to the constitutional prohibition against unapportioned direct taxes is for the federal income tax, which was authorized by the 16th Amendment - but the direct tax on the uninsured is not an income tax.

Sen. Baucus claims that the tax on the uninsured is an "indirect" excise tax - like the federal gasoline tax - that does not have to be apportioned. But Sen. Baucus appears to be in error. An excise tax is a tax on a "thing" (such as a commodity or a license). That is why an excise tax is classified as "indirect."

People who choose not to buy insurance are not things.

They are people. And the tax is imposed directly on them in exactly the same way as a direct income tax, except that in this instance, the tax amount does not depend on the size of the person's income.

This constitutional defect in one of the linchpin elements of the health care legislation was not brought to light for public discussion by either the White House or the chairman of the Senate Finance Committee.

Instead, it was exposed a few days ago by Sen. Orrin Hatch of Utah, one of the few people in this rapidly deteriorating health care drama who are conducting themselves with a high degree of intelligence and regard for the integrity of the Constitution and our basic civic institutions.

President Obama recently got himself into an embarrassing contretemps with a TV personality on a Sunday talk show about whether a tax is a tax.

He insisted that the tax on the uninsured is not a tax at all, but instead a federal fine or penalty imposed on those who fail to do what the government has told them to do.

In opting to rely on the government's power to regulate instead of its power to tax, he has jumped from one constitutional briar patch into another.

The Supreme Court in *United States v. Lopez* has narrowed the scope of what Washington can do to us under the guise of regulating "commerce ... among the several states"

A fine or penalty on the uninsured could pass muster only if a person's individual choice not to buy insurance has a "substantial effect on commerce."

It is not sufficient that forcing people to buy health insurance might be good for them or help the economy or the public fisc.

Let us all hope that that the court stands fast - because if Barack Obama can make us buy a designated insurance policy, why can't he make us see designated doctors, submit to designated treatments, send our children to designated schools, force us to live in designated neighborhoods, give our money to designated charities (such as Acorn) and do all kinds of other designated things?

In the past, President Obama is reported to have expressed frustration with the Constitution, classifying it as a negative document that mostly says what government can't do rather than concentrating on what government can do to make things better.

He is also said to have claimed power and prerogatives because "I won," referring to the fact that he got more votes last November than his opponent - as if America were a prize won in a game or raffle that he can now do with as he wishes.

Not so, Mr. President, not so.

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