

**THE LEGAL LIMIT: THE OBAMA ADMINISTRATION'S
ATTEMPTS TO EXPAND FEDERAL POWER**

Report No. 2:

*The Administration's Lawless Acts on Obamacare
and Continued Court Challenges to Obamacare*

By U.S. Senator Ted Cruz (R-TX)

Ranking Member,

Senate Judiciary Subcommittee on The Constitution,
Civil Rights and Human Rights

There is no clearer example of the Obama Administration's abusive view of federal power than its implementation of Obamacare. Repeatedly, the Administration has ignored the plain text of Obamacare, its "signature legislative achievement." Democrats forced a government shut down instead of agreeing to a congressional delay of Obamacare, but now the Obama Administration is unilaterally delaying it. This undermines the rule of law.

Moreover, the fight over Obamacare continues in our courts, because many aspects of the law are constitutionally or statutorily suspect. Obamacare has significant legal infirmities, regardless of whether one agrees with Obamacare as a policy matter. Press reports have frequently said that the Supreme Court found Obamacare constitutional. Not so. In *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), the Court voted 5-4 to rewrite the individual mandate as a tax, but it also found unconstitutional, by a vote of 7-2, the conditions placed on States that accept Medicaid funds. And *NFIB v. Sebelius* was just the first in a line of cases challenging pieces of Obamacare. Indeed, the Court just agreed to hear two more cases challenging Obamacare's contraception mandate.

Congress should repeal Obamacare in its entirety. Until it is able to do so, however, courts should vindicate various pending lawsuits challenging Obamacare under provisions such as the Constitution's Origination Clause, the Free Exercise Clause, the Religious Freedom Restoration Act, and the text of Obamacare itself. And more court challenges should be filed to stop the Obama Administration's lawless implementation of Obamacare.

The Obama Administration's Lawless Implementation of Obamacare

1. The Obama Administration unilaterally granted a one-year delay on all Obamacare health insurance requirements.

When pitching Obamacare to the American people, the President repeatedly promised: "If you like your plan, you can keep it. Period." Unfortunately, this promise was knowingly, deliberately false. Following the disastrous roll-out, millions of American had their health insurance plans canceled—because of Obamacare.

In an effort to delay, for one year, millions more Americans from having their plans canceled—despite the President's promise to the contrary—the President hastily scheduled a press conference. On November 14, 2013, President Obama proclaimed that individuals could

continue purchasing health insurance plans in 2014 (but not thereafter) even if those plans violate the requirements of Obamacare and its regulations. Like the Obama Administration's unilateral disregard of some of our immigration and drug laws, the President justified this proclamation as an exercise of his enforcement discretion.

Article II, Section 3 of the Constitution requires the President to "take care that the laws be faithfully executed." Categorically refusing to enforce laws is the opposite of fulfilling this constitutional duty. Yet that is precisely what President Obama has done with Obamacare.

2. The Obama Administration ignored Obamacare's text to unilaterally delay the employer mandate.

The Obama Administration ignored the text of Obamacare in delaying the employer mandate penalty until 2015. The text of Obamacare states that the employer mandate will take effect in 2014. But the Administration announced—through an internet post authored by the Assistant Secretary for Tax Policy at the U.S. Treasury, right before July 4, 2013—that it would not enforce the employer mandate in 2014.

The Administration said it had authority to delay the employer mandate penalties under Obamacare provisions dealing with reporting requirements. Those provisions require certain businesses to report to the federal government whether they are offering employees Obamacare-compliant health insurance, and they provide that these reports must be filed "at such time as the Secretary may prescribe." 26 U.S.C. §§6055 & 6056. So, under the statute, the Administration could delay when businesses must file these reports. But that says nothing about whether Obamacare requires businesses, in 2014, to comply with Obamacare or suffer the employer mandate penalty if they do not. Even if the reports do not have to be filed until years later, the law requires the Executive to penalize certain businesses who do not provide Obamacare-compliant health insurance in 2014. And the President is refusing to enforce the law.

3. The Obama Administration ignored Obamacare's text to unilaterally delay the out-of-pocket caps.

The Obama Administration also delayed, from 2014 to 2015, a provision of Obamacare that caps how much people have to spend on their own health insurance. Obamacare limits the amount of out-of-pocket costs, like deductibles and co-payments, that individuals and families must spend on their health care (\$6,350 for an individual; \$12,700 for a family). The Obama Administration's Labor Department posted this delay on its website in February 2013, as an answer to one of 137 "frequently asked questions about Affordable Care Act implementation," and the Department confirmed the policy in August. The Administration said this was necessary to give insurers and employers more time to comply because they used multiple companies to administer health benefits. But if the Administration needed this delay, it should have come to Congress and amended the clear statutory text through legislation. It cannot simply pretend the statute does not exist.

4. The Obama Administration ignored federal statutes to allow congressional staff to get government-subsidized health care.

The Obama Administration ignored clear federal statutes in erroneously deciding that the federal government would continue subsidizing congressional staff health insurance. The federal government is allowed to subsidize an employee plan if it qualifies as a “health benefits plan” under 5 U.S.C. §8906. The Administration deliberately misconstrued “health benefits plan” when it concluded that Obamacare exchange health insurance plans fit within this definition. Federal law defines “health benefits plan” to mean “a *group* insurance policy . . . for the purpose of providing, paying for, or reimbursing expenses for health services.” 5 U.S.C. §8901(6) (emphasis added). Obamacare does not allow “official” congressional staff to continue receiving pre-Obamacare federal health insurance plans; instead these staff are forced to go through the Obamacare exchanges to purchase health insurance. So just like average Americans, these individual congressional staffers will have to purchase a plan for themselves. This is not a “group” insurance plan covering a number of different people. This is an individual plan. So the government lacks authority to subsidize the plans that official congressional staff buy through the Obamacare exchanges. But the President did so anyway.

Pending Court Challenges to Obamacare

5. Obamacare violates the Constitution’s Origination Clause and should be invalidated in its entirety.

Obamacare violated the Constitution’s Origination Clause, because it raised revenue but did not “originate” in the House of Representatives. Pending cases, including one appeal at the D.C. Circuit (*Sissel v. HHS*), raise this challenge. If successful, this challenge would invalidate Obamacare in its entirety.

Under the Constitution’s Origination Clause (Article I, Section 7, Clause 1):

“All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”

Senate Democrats played a shell game in an attempt to satisfy the Origination Clause while passing Obamacare. The House of Representatives had unanimously (416-0) passed H.R. 3590, which was a 714-word bill granting tax credits for veterans. So the House-passed H.R. 3590 would have lowered taxes on veterans, thereby *reducing* revenue for the federal government. In fall 2009, Senate Majority Leader Harry Reid took H.R. 3590, stripped out every word of this veteran tax credit bill, and replaced it with the 379,976 words of Obamacare. This was the bill that ultimately passed Congress and was signed by President Obama. Obamacare includes \$675 billion in new revenue-raising provisions. And five Justices of the Supreme Court ruled in *NFIB v. Sebelius* that Obamacare’s individual mandate is a tax.

The original House-passed version of H.R. 3590 was not a revenue raising bill. It may have dealt with tax issues, but every bill dealing with tax issues is not necessarily a revenue *raising* bill. Tax bills can reduce revenue. Indeed, the original version of H.R. 3590 would have

reduced—rather than have raised—federal revenues. Thus, regardless of how the Senate amended H.R. 3590, it never was, nor ever could have been, a “Bill[] for raising Revenue” that “originate[d] in the House of Representatives.”

And even if H.R. 3590 had been a revenue raising bill, the Senate only had power under the Origination Clause to make amendments that were “germane to the subject-matter of the [House] bill.” *Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911), *abrogated on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Obamacare was a complex overhaul of our nation’s health insurance system, which is hardly germane to a short veterans tax credit bill.

Obamacare, in contrast to H.R. 3590, was a revenue-raising bill. As the Supreme Court has held, it levies new taxes. If Obamacare’s \$675 billion in new revenue-raising provisions does not qualify as a revenue-raising bill, then the Origination Clause would become a dead letter. Obamacare therefore was not a bill that incidentally created revenue; it levied taxes to generate hundreds of billions in revenue for funding an overhaul of our nation’s health insurance system.

Under the plain text of the Constitution, Obamacare had to originate in the House of Representatives. It did not, and is therefore unconstitutional.

6. Obamacare’s contraception mandate violates the First Amendment and the Religious Freedom Restoration Act.

Obamacare’s contraception mandate uses governmental power to coerce citizens into violating their religious beliefs. The Supreme Court will address this issue in the spring, as it just agreed to hear two cases challenging the contraception mandate: *Conestoga Wood Specialties Corp. v. Sebelius* and *Sebelius v. Hobby Lobby Stores, Inc.* Moreover, the D.C. Circuit and 7th Circuit both recently invalidated Obamacare’s contraception mandate.

Obamacare requires group health plans and health insurance to provide contraception coverage. There are some narrow exceptions to this contraception mandate for some grandfathered plans, religious organizations, and small businesses. But employers who do not fall within these narrow exceptions must provide contraception health insurance—even if the employer has a religious belief against providing contraception. And if employers do not provide Obamacare-compliant health insurance, they are fined about \$2,000 annually per employee.

Importantly, the issue is not whether individual citizens will have access to contraceptives. There is no doubt that every American will retain the right to purchase contraceptives, and Obamacare does nothing to change that. Rather, the issue is whether the federal government can force other Americans to pay for those contraceptives—contrary to their deeply held religious faith.

Obamacare’s contraception mandate infringes on the right to free exercise of religion guaranteed by the First Amendment and the Religious Freedom Restoration Act. The exercise of religion does not cover merely praying or worshipping; it extends to following a religious ethic or code of

conduct. When employers refuse to provide contraception coverage due to their religious beliefs, they are exercising their religion.

Nor does this mandate further a compelling governmental interest in the least restrictive way, as required by the Religious Freedom Restoration Act. There are other ways to increase access to contraception without requiring employers to violate their religious beliefs. Whether other options represent good policy is a debatable question, but as a legal matter, there are other means that do not interfere with the free exercise of religion. The government's claim of a compelling interest is also suspect. Obamacare's contraception mandate excludes grandfathered plans, based on a non-religious, secular purpose of allowing some people to keep their plans. When a law grants secular exemptions while imposing religious burdens, it is much harder for the government to establish a compelling interest. It is unclear why the government has a compelling interest in increasing access to contraception by requiring some employers to violate their religious faith while excluding other employers from the mandate.

7. The Obama Administration disregarded the text of Obamacare by expanding the employer mandate penalty through IRS regulation.

Under the plain text of Obamacare, in the 34 States that have refused to create Obamacare health insurance exchanges, employers should not be subject to Obamacare's employer mandate penalty. But the Obama Administration disregarded the text of Obamacare by creating an IRS regulation that extends the employer mandate to businesses in those States. Two federal district courts (the District of D.C. in *Halbig v. Sebelius* and the Eastern District of Virginia in *King v. Sebelius*) recently have allowed lawsuits to go forward challenging this IRS regulation.

The text of Obamacare grants subsidies to individuals only in States that choose to create their own state-level Obamacare healthcare insurance exchanges. If a State chooses not to create its own exchange, the State's citizens could still use a federal exchange created by the federal government. But the subsidies are allowed, under the statutory text of Obamacare, only when the individual purchases a health plan "through an Exchange established *by the State* under 1311 of the Patient Protection and Affordable Care Act." 26 U.S.C. §36B(b)(2)(A) (emphasis added). So if the exchange is not "established by the State"—that is, if the exchange is established by the federal government—then the statute does not authorize a subsidy.

Furthermore, if subsidies are not available, then Obamacare's employer mandate does not apply. The employer mandate penalty is assessed only if at least one-full time employee enrolls in an exchange plan, for which "an applicable premium tax credit . . . is allowed or paid." 26 U.S.C. §4980H(a), (b). If no federal tax credit subsidies are available in a State—because the State did not create an exchange—then the employer mandate does not apply to the businesses in that State.

Yet the IRS disregarded this plain statutory text by directing the Treasury Department to grant subsidies in States that chose not to create state-level Obamacare exchanges. Instead of interpreting "Exchange established by the State" to mean exactly what it says, 26 U.S.C. §36B(b)(2)(A), the IRS dramatically broadened that statutory phrase to include "a State

Exchange, regional Exchange, subsidiary Exchange, and Federally-facilitated Exchange.” 77 Fed. Reg. 30,377, 30, 378 (May 23, 2012). That change was contrary to law.

* * *

By disregarding the statutory text passed by Congress, the Obama Administration is ignoring the will of the people and governing by unilateral executive fiat. This violates the separation of powers, because the Obama Administration has declared it is willing to exercise the legislative power constitutionally reserved to Congress.

Obamacare is hurting millions of Americans. And the Obama Administration’s lawless implementation of Obamacare flouts the constraints of our Constitution. To preserve the rule of law, we must restore the balance of power that ensures our laws are executed as written. We are a nation of laws, not men, and the Obama Administration’s willful disregard of the Constitution threatens the liberty of every American.