

Committee on Ways & Means
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“The Supreme Court’s Ruling on Health Care: Ramifications for the
Power of Congress to Lay and Collect Taxes”

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In *National Federation of Independent Business v. Sebelius* (June 28, 2012) (NIFB), the United States Supreme Court held that the Affordable Care Act’s financial incentive for individuals to maintain health insurance, called the “shared responsibility payment,” is a valid exercise of Congress’s constitutional authority under Article I, Section 8, clause 1 of the Constitution. That clause provides that

Congress shall have Power ... to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States...

At the outset of its opinion, the Court first concluded that the “shared responsibility payment” was *not* a “tax” within the meaning of the federal statute that bars any pre-enforcement suit seeking to restrain collection of “any tax.” If the payment were a “tax” for this purpose, the Supreme Court would have dismissed the entire law suit (except for the Medicaid challenge) as untimely since federal taxes can be challenged only after payment is due, not before. The Court concluded, “The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act.”

After rejecting the government’s argument that the choice between maintaining insurance and making the individual responsibility payment was a valid exercise of Congress’s power under the Commerce Clause, the Court proceeded to hold that the choice was, however, a valid exercise of Congress’s authority to raise revenue. The payment is relatively modest: it begins at \$95 dollars for the first year and never exceeds 2.5% of income.

It is a payment that few will ever make. The Congressional Budget Office (CBO) estimates that four million people each year will choose to make the shared responsibility payment instead of obtaining coverage. Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act (Revised April 30, 2010), at 1. It is thus anticipated that only about 1 percent of the people in this country will ever make a payment under the provision.

This is not surprising, since the requirement is not applicable to anyone who is over 65 or on Medicare; it is not applicable to anyone who has insurance through their employment; it is not applicable to anyone who has insurance through their school; it is not applicable to anyone who has an adequate individual health insurance policy or to anyone who is covered on a parent's policy. Therefore nearly 99% of the public will never have to make any payment. Those few who will make this payment are those who choose not to maintain health insurance and who therefore impose the risk of paying for their health care on their fellow citizens. Americans who have health insurance coverage are completely unaffected by this requirement.

The Court noted that the provision is an amendment to the Internal Revenue Code; the payment is made to the federal treasury when federal income taxes are paid; and it produces at least some revenue for the federal government. "It is of course true that the Act describes the payment as a 'penalty,' not a 'tax,'" the Court said. But that label "does not determine whether the payment may be viewed as an exercise of Congress's taxing power." Quoting from *Quill Corp. v. North Dakota (1992)*, the Court stated that "magic words or labels" should not "disable an otherwise constitutional levy."

We have ... held that exactions not labeled taxes nonetheless were authorized by Congress's power to tax. In the *License Tax Cases (1867)*, for example, we held that federal licenses to sell liquor and lottery tickets--for which the licensee had to pay a fee--could be sustained as exercises of the taxing power. And in *New York v. United States (1992)* we upheld as a tax a "surcharge" on out-of-state nuclear waste shipments, a portion of which was paid to the Federal Treasury. We thus ask whether the shared responsibility payment falls within Congress's taxing power, "[d]isregarding the designation of the exaction, and viewing its substance and application." *United States v. Constantine (1935)*; *Quill Corp. v. North Dakota, (1992)*.

The Supreme Court's decision upholding this provision of the Affordable Care Act was a relatively routine application of settled precedent and breaks no novel ground. As the Chief Justice explained, Congress has for well more than a century used its revenue raising powers to encourage or discourage behavior, encouraging people to put aside funds for their children's college education, for example, or discouraging them from using drugs or alcohol or buying lottery tickets. As the Court noted, "Tax incentives already promote, for example, purchasing homes and professional education." The fact that an enactment under the taxing power is designed to influence behavior thus does not mean that it is unacceptably punitive or regulatory in nature.

Although the power under the tax and spending provisions of the Constitution is extensive, it is not unlimited. Congress may not tax exports, and it must "impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity." *License Tax Cases (1867)*. (The Chief justice correctly explained that

the Shared Responsibility Payment is not a “direct tax.”) In his opinion, moreover, the Chief Justice was careful to note that there are other constitutionally enforceable limits on the use of the taxing power. “A few of our cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority.” In more recent decades, the Chief Justice noted in his opinion, the Court has played a more modest role and has “declined to closely examine the regulatory motive or effect of revenue-raising measures.” The Court stands ready, however, to invalidate any measure which “becomes a mere penalty with the characteristics of regulation and punishment.”

A few final observations about the public debate over the Supreme Court’s decision may be in order. First, the decision by five Justices to sustain the provision under the tax code should not have come as a complete surprise. The argument justifying the payment under Congress’s section 8, clause 1 power was advanced by the government in every district court and every court of appeals. It was fully addressed in the Solicitor General’s opening brief and again in his reply brief, as well as in at least two major amicus briefs. The Solicitor General devoted the final portion of his opening oral argument to this justification and returned to it again at the conclusion of his rebuttal time. As [this article](#) noted at the time, Chief Justice Roberts indicated during the first day of the March argument that he understood and appreciated the force of the argument based upon the tax power.

Secondly, the notion that the Supreme Court discovered some “hidden tax” is nonsense. The payment required of those who decline to maintain health insurance is set out clearly in the statute. The exact amount of the payment and when and how it is to be paid was fully debated and entirely transparent on the face of the law.

Finally, both Governor Romney and President Obama have been criticized for denying that the payment required of those fail to have health insurance constitutes a “tax increase.” But both Governor Romney and President Obama are correct: whether one labels the payment as a penalty or a tax or a tax penalty or a financial incentive, it does not make sense to describe it as a “*tax increase*,” let alone a tax increase on the middle class.

As President Obama noted when asked on ABC’s This Week (while the legislation was before Congress) whether the “mandate” was a tax *increase* on the middle class,

... for us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase. What it's saying is, is that we're not going to have other people carrying your burdens for you anymore than the fact that right now everybody in America, just about, has to get auto insurance. Nobody considers that a tax increase.

And as Governor Romney noted of the Massachusetts mandate in his 2009 [op ed](#), “we established incentives for those who were uninsured to buy insurance. Using

tax penalties, as we did, ... encourages 'free riders' to take responsibility for themselves rather than pass their medical costs on to others."

In my view, both the Governor and the President have been unfairly criticized. A tax penalty applicable to only a small few who fail to have insurance and who therefore pass the financial risk on to their fellow citizens was not a general tax increase on the citizens of either Massachusetts or America.

The "shared responsibility payment" is merely a financial incentive for people to have adequate health insurance. This financial incentive goes hand-in-glove with the provisions insuring that Americans will be able to obtain health insurance even if they have preexisting conditions that previously would have allowed insurance companies to reject them. It is a payment that few Americans will ever make or even notice. The Supreme Court has sustained it against constitutional challenge, and rightly so.