



CONSTITUTIONAL ACTION REPORT

THE CONSERVATIVE CAUCUS RESEARCH, ANALYSIS & EDUCATION FOUNDATION, INC.
HOWARD PHILLIPS, PRESIDENT

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REPEAL THROUGH DEFUNDING: ENDING OBAMACARE IN THE 112TH CONGRESS

Although the repeal of ObamaCare has passed the House of Representatives during the 112th Congress, it still faces roadblocks in the Senate and at the White House. It appears that ObamaCare's opponents will be required to block implementation by refusing to provide any funding. This will raise objections from ObamaCare supporters who will insist that a Federal program, once enacted, cannot be indirectly repealed through the appropriations process. One commentator has already predicted a "Constitutional and budgetary crisis".¹

DEFUNDING IS A PRACTICAL OPTION

A careful examination of the Constitutional and legal questions, however, shows that the **defunding approach is well within the power of Congress (and of the House alone, which bears sole responsibility for initiating appropriations bills)**. Both the Constitution and Congressional practice support that conclusion.

NO MONEY SHALL BE DRAWN

Article I, Section 9 of the Constitution includes the statement that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law". James Madison described this as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people".²

No exceptions are provided, and **the state ratification debates affirm the strict interpretation of this clause**. Edmund Randolph pointed out that even the payment of lawful and recognized government debts could not take place without an appropriation, while George Nicholas declared that the House of Representatives could use its power of the purse to "put a stop to the operations of government".³ Both these statements have been validated in practice. St. George Tucker noted in his later commentary on the Constitution that "no claim against the United States (by whatever authority it may be established) can be paid but in consequence of a previous appropriation made by law" and the U.S. Supreme Court has continued to take this view.⁴

¹ Frum, David, *Newt's ObamaCare Shutdown Fantasy*, FrumForum, April 9, 2010, <http://www.frumforum.com/newts-obamacare-shutdown-fantasy>.

² Hamilton, Alexander, Madison, James, and Jay, John, *The Federalist Papers*, The New American Library, 1961. pg. 359.

³ Kaminski, John P. and Saladino, Gaspare J., eds., *Documentary History of the Ratification of the U.S. Constitution and the Bill of Rights*, State Historical Society of Wisconsin, Vol. X, pg. 1349 and Vol. IX, pg. 925-26.

⁴ Tucker, St. George, *View of the Constitution of the United States with Selected Writings*, Liberty Fund, 1999, pg. 298-99. The Supreme Court, in the 1990 decision of *Office of Personnel Management v. Richmond*, overturned an Appeals Court ruling ordering payment, and declared that "payments of money from the Federal Treasury are limited to those authorized by statute".

AUTHORIZATION WITHOUT APPROPRIATION IS INOPERATIVE

President Clinton acknowledged in 1995 that after vetoing the appropriations for some government agencies he had no choice but to close those agencies until he and Congress could reach agreement on a new appropriations bill.⁵ **The fact that many of those agencies had a legal authorization on the books was irrelevant without an appropriation.** By vetoing the appropriation, Clinton had imposed a de facto repeal of those authorizations, though an intentionally temporary one.

ARTICLE ONE, SECTION 8 ESTABLISHES BOUNDARIES

The Constitution also says, in Article I, Section 8, in the clause relating to raising and supporting armies, that “no Appropriation of Money to that use shall be for a longer term than two years.” This was included for the explicit purpose of guaranteeing that Congressional approval for a standing army would be required at least every other year.⁶

In that context, it is instructive to see how the First Congress, filled with many men who had served in the Constitutional Convention, the state ratification conventions, or both, dealt with the establishment of a standing army. Although their first act was merely to extend the existing law of the Confederation Congress, they followed up in 1790 with a new and expanded law. This “Act for Regulating the Military Establishment of the United States” included a provision that soldiers should be enlisted “for the service of the United States for the period of three years.”⁷ It is impossible to believe that these men could have believed that passing such a law could overcome the provisions of Article I, Section 8. Therefore, the only possible conclusion is that the First Congress recognized that their acts were subject to de facto repeal by a future Congress if that Congress refused to appropriate the pay for soldiers with time left on their legal three-year enlistment. Congress could pass laws with only the hope, not the assurance, that they would receive essential funding for as long as they were on the books.

The actions of the Fourth Congress in 1796 also show an agreement that **Congress, and especially the House, has full discretion in the appropriations process.** The Senate had ratified the Jay Treaty in 1795, and the Treaty could not be carried out without appropriations by Congress. It became apparent as Congress convened that the Republicans in the House of Representatives, being opposed to the treaty, posed a serious threat to the passage of any such appropriation. President Washington, however, never even attempted to claim that the mere ratification of the treaty allowed him to spend the necessary funds, bypassing the appropriations process. Instead, during March and April of 1796, Federalists in the House lobbied constantly to win Republican support, and finally succeeded in passage on the narrow margin of 51-48.⁸

It is well worth noticing that the climactic floor speech for the Federalists, that of Fisher Ames, conceded the Constitutional point and argued that the treaty should be carried into effect on its merits. After phrasing the question as whether the treaty was bad enough to justify rejection by the House, and conceding that he would vote against appropriations for a treaty if he considered it bad enough, he then argued that the funding should be approved based on the benefits the treaty would bring to the United States.⁹

The House and Senate Rules might be cited as justification for mandatory funding, since they seem to establish a bond between the processes of authorization and appropriation. However, Congressional practice has long made this bond nothing but an ignored formality. Despite the requirement in the rules that only

⁵ Drew, Elizabeth, *Showdown: The Struggle Between the Gingrich Congress and the Clinton White House*, Simon Schuster, 1996, pp. 322-341

⁶ *The Federalist Papers*, pg. 158.

⁷ Bickford, Charlene Bangs & Viet, Helen E., *Documentary History of the First Federal Congress of the United States of America, March 4, 1789-March 3, 1791, Vol. V*, The Johns Hopkins University Press, 1986, pg. 1274.

⁸ Elkins, Stanley & McKittrick, Eric, *The Age of Federalism: The Early American Republic, 1788-1800*, Oxford University Press, 1993, pg. 441-49 and Cunningham, Noble E., *The Jeffersonian Republicans: The Formation of a Party Organization, 1789-1801*, pg. 77-85.

⁹ Allen, W.B., ed., *Works of Fisher Ames, Vol. II*, pg. 1152 ff.

authorized programs may receive appropriations, Congress has continued to appropriate even when authorizations have expired. The appropriation itself is treated as a sort of de facto authorization. This has become such an accepted practice that the Congressional Budget Office is now required to issue an annual report on “Unauthorized Appropriations and Expiring Appropriations”. The report issued in January 2010 stated that “Congress has appropriated about \$290 billion for fiscal year 2010 for programs and activities whose authorization of appropriations have expired”.¹⁰ If Congress can accomplish a de facto authorization through the appropriations process, it must also have the power to bring about a de facto repeal through appropriations.

Defunding ObamaCare should be debated solely on its merits, without concern for Constitutional objections to the method. A long historical record demonstrates that the appropriations clause of the Constitution has consistently been understood to mean exactly what it says. If Congress refuses to make an appropriation, or puts restrictions on the expenditure of the money which it does appropriate, the matter is settled. If Congress is willing to repeal ObamaCare, defunding is a legitimate approach.

FEDERAL JUDGES RECOGNIZE THE UNCONSTITUTIONAL NATURE OF OBAMACARE

Federal district judges Henry Hudson in Virginia and Roger Vinson in Florida have correctly ruled that at least part of the health care bill enacted in 2010 violates the U.S. Constitution. Virginia Attorney General Ken Cuccinelli has followed up by requesting the U.S. Supreme Court to take up the matter without waiting for an appeals court decision. If the Supreme Court grants this request, it is all but certain that the Court will hand down a decision well before the 2012 election.

HOW MUCH WILL OBAMACARE REALLY COST?

TCCF President Howard Phillips sent the following letter to Speaker John Boehner on January 20, 2011:

Dear Mr. Speaker:

On January 6, 2011, the Congressional Budget Office provided you with a preliminary estimate of the effect that passage of H.R. 2, “To repeal the job-killing health care law and health care-related provisions in the Health Care and Education Reconciliation Act of 2010”, would have on the Federal deficit.

The CBO gave its opinion that repeal would greatly increase the deficit, but admitted that this estimate was based on the assumption that all related laws would remain unchanged. While the CBO conceded that its assumption ignored the fact that “current law now includes a number of policies that might be difficult to sustain over a long period of time”, it justified the assumption on the grounds that “CBO cannot forecast future changes in law”.

It is vital that the American public be given accurate knowledge of the effects of repealing ObamaCare. A CBO analysis based on the fantasy of no change in related laws would do more harm than good. Objective observers realize that estimates are worthless if based on the assumption that Medicare payments to doctors will be radically reduced (something Congress has repeatedly postponed), that subsidies to state exchanges will be cut back, and that unions will accept a heavy tax on their health insurance plans.

I strongly urge you to instruct the CBO to provide you a second estimate, one which is based on likely changes in the law. This second estimate is nearly certain to be more accurate than the estimate based on standard CBO procedures, and will give the American people a far better understanding of what is at stake in dealing with ObamaCare.

Sincerely,
Howard Phillips, President

¹⁰ *Unauthorized Appropriations and Expiring Authorizations, January 2010*, Congressional Budget Office, 2010, pg. 2.

Rep. Paul Ryan (R-IL), Chairman of the House Budget Committee did write such a letter to the CBO. The response from Douglas Elmendorf, Director of the CBO, confirmed that if more realistic assumptions are used, repeal of ObamaCare would not increase the deficit and could reduce it by as much as \$60 billion in Fiscal Year 2021.

A CONSTITUTIONAL BUDGET

The major cause of our nation's large deficit and the accumulated national debt has been the willingness of Congress to enact lavish spending programs that exceed the Constitutional functions of the Federal government. One of TCCF's ongoing programs has been to examine portions of the Federal budget to determine which programs are unconstitutional.

Anyone who would like a copy of the 2010 analysis of the Department of Housing and Urban Development can obtain one for free by contacting TCCF. Call us at 703-281-6782, email to info@ConservativeUSA.org, FAX to 703-281-4108, or write to 450 Maple Avenue East, Suite 309, Vienna, Virginia 22180.

We expect to perform a Constitutional analysis on several departments of President Obama's proposed FY 2012 budget, and will announce those in a later issue of the **CONSTITUTIONAL ACTION REPORT**.

OBAMACARE SHOULD BE REPEALED OR DEFUNDED

Americans want the health care bill enacted last year to be repealed, or deprived of funding if President Obama vetoes repeal, according to a poll conducted by The Conservative Caucus Foundation (TCCF). Making repeal the first act of the new Congress, as was done by the House of Representatives last month, was approved by 96%. If repeal cannot pass both houses and obtain the President's signature, 95% agree that Republicans should "defund any and all aspects of ObamaCare immediately".

Increasing the Federal deficit was cited by 94% as a reason for repeal, while 92% considered the legal requirement to purchase insurance to be one of the worst features of the act. Cutting Medicare by \$500 billion was a major concern for 91%, and forcing people into lower quality health care plans for 90%.

NORTH AMERICAN UNION HAS LITTLE PUBLIC SUPPORT

Few Americans support a North American Union (NAU) that would merge the government of the United States with those of Mexico and Canada, according to a poll conducted by The Conservative Caucus Foundation (TCCF).

Ninety-eight percent described the NAU scheme as "an assault on our way of life", ninety-nine percent saw it as a "betrayal of the Constitution", and all disagreed with the policy of implementing an NAU without the approval of Congress or the voters.

Defending the U.S. border with Mexico, rather than eliminating it, won 99% support. The cost of U.S. welfare benefits for Mexicans and Canadians was also a concern to 99%.

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