

## Ensure that Congress Follows the Constitution

### THE ISSUE:

To protect individual liberty, the Framers of the Constitution carefully enumerated the powers to be vested in the national government, rejecting any broader approach as dangerous. This great limitation has been whittled away to almost nothing. Today, Congress routinely legislates without regard to the constitutional limits on its powers, and only rarely do the courts act to enforce these limits. Indeed, Congress does not just ignore the constitutional limitations on its powers. Members have repeatedly failed to read the bills upon which they were voting, and some have even declared that they have to pass gargantuan bills first so that they can find out what is in them. None of this inspires confidence in Congress as an institution or in its Members, who take an oath to support the Constitution.

### THE FACTS:

- **Congress Mocks Constitutional Limits on Its Powers.** When House Speaker Nancy Pelosi (D–CA) was asked what provision of the Constitution authorized Congress to require all Americans to buy health insurance, she responded, “Are you serious? Are you serious?” Her press spokesman followed up by saying, “You can put this on the record. That is not a serious question.”
- **Congress Did Not Have Authority to Impose an Individual Health Insurance Mandate.** Congress has never before attempted to require all Americans to buy any particular good or service from a private market, and that is for a very good reason: Congress lacks the constitutional power to do so. The individual insurance mandate exceeds any authority recognized by the Supreme Court, but much more important, it is clearly contrary to the actual, enumerated powers conferred on Congress in the text of the Constitution.

- **Congress Rarely Gives Reasoned Consideration to the Legislation It Passes.** Speaker Pelosi also explained, “But we need to pass the [health care] bill so that you can find out what is in it, away from the fog of controversy.” What we have learned since its enactment has not been reassuring. For his part, Representative John Conyers (D–MI) responded to suggestions that he read the health care bill before voting on it by saying, “What good is reading the bill if it’s a thousand pages and you don’t have two days and two lawyers to find out what it means after you read the bill?”
- **Congress Does Not Provide Its Members with the Opportunity to Give Reasoned Consideration to the Legislation upon Which It Votes.** After Congress voted to post the text of the 2009 stimulus bill on the Internet for 48 hours before voting on it, the current leadership did not release the amended version of the bill that emerged from conference until 11:00 pm—only 10 late-night hours before the House was scheduled to take up the bill for consideration.
- **Congress Does Not Have Adequate Rules and Procedures for Consideration or Debate on the Constitutionality of Its Legislation.** There is no requirement that bills even mention the constitutional powers that authorize them, and there is no adequate mechanism for Members of Congress who have constitutional concerns about particular pieces of legislation to raise their concerns and have them considered by other Members.

### THE SOLUTIONS:

- **Provide Proper Notice of Bill Texts to Members of Congress and the Public.** Each House of Congress should adopt a rule requiring, absent special circumstances, the posting of the text of all bills on an Internet

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site not less than two days before floor debate begins on such bills. Members should be given a point of order to challenge departures from the rule that would require at least a bare majority vote.

- **Don't Use Improper Means to Enact Major Laws.** The "reconciliation" process that is reserved for budget bills should not have been used in the Senate for passage of a health care reform that restructured a major portion of the economy and government. Congress should prevent such abuses, especially with respect to all major legislation.
- **Adopt Adequate Procedures to Consider the Constitutionality of Pending Bills.** Each house of Congress (or both houses in a joint resolution or law) should adopt rules and procedures along the lines of those set forth in the Enumerated Powers Act, which has been introduced by Representative John Shadegg (R-AZ) and Senator Tom Coburn (R-OK) and would require that all legislation

in Congress contain a concise explanation of the constitutional authority empowering Congress to act on it. Under such rules, failure to comply would subject the bill to a point of order, a procedural device that delays consideration of the measure until the problem is corrected or the objection is overruled. The rules should also allow debate, pursuant to a point of order, if Members of Congress believe that the statement of constitutional authority is erroneous.

- **Repeal Unconstitutional Provisions.** Congress should promptly repeal any unconstitutional legislation enacted by the previous Congress. A good place to begin is with the mandate requiring all Americans to maintain or buy private health insurance under the new health care law, which, as Randy Barnett, Nathaniel Stewart, and Todd Gaziano have shown, is [unconstitutional](#). Other provisions of the improperly considered legislation should also be reviewed and repealed.