Backgrounder

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How to Limit the Damage from Obamacare—Pulling It Out Weed by Weed

The Honorable Ernest J. Istook, Jr.

Abstract: *Obamacare—the popular name for the recently enacted Patient Protection and Affordable Care Act (PPACA)—is highly disliked by American voters who want to see it repealed. A majority of states are suing to overturn it, and the House of Representatives has voted to repeal it. Though repeal is being blocked by the Senate and the Obama Administration, there are ways that lawmakers can reduce the damage that Obamacare is inflicting on the American economy and everyday freedoms. Former Representative from Oklahoma Ernest Istook explains the tools—from routine defunding to cutting off backdoor funding for PPACA—that policymakers could employ now.*

Although attempts to repeal the massive and misnamed Patient Protection and Affordable Care Act (PPACA) are being blocked by the Senate[1] and the White House, there are multiple tools that lawmakers can employ to reduce the damage that "Obamacare" is inflicting on the U.S. economy and American freedoms. In its rampant and uncontrollable growth, Obamacare resembles weeds that take over a lawn, going even further to become a government version of kudzu.[2]

The massive 2,700-page health care law is deliberately designed to make defunding and dismantlement difficult. Although original estimates reported that it created 159 new government agencies,[3] later studies show even more, but that an exact count is impossible due to the complexity of the law. The new law also attempts to bypass the normal appropriations process,

Talking Points

- In its rampant and uncontrollable growth, Obamacare resembles weeds that take over a lawn—going even further to become a government version of kudzu.
- The massive 2,700-page health care law is deliberately designed to make defunding and dismantlement difficult.
- Obamacare also attempts to bypass the normal appropriations process, another feature that makes defunding more difficult. By making advance appropriations for tens of billions of dollars up to and beyond the year 2020, these provisions are an attempt at taking spending decisions away from the current Congress and from future Congresses and Presidents.
- Attempts at repealing Obamacare are being blocked by the Senate and the White House, but there are tools that lawmakers can employ now to limit the damage caused by Obamacare, such as undertaking routine defunding measures and stopping backdoor funding of the bill.

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another feature that makes defunding more difficult. By making advance appropriations for tens of billions of dollars up to and beyond the year 2020, these provisions of Obamacare seek to take spending decisions away from the current Congress and from future Congresses and Presidents. Although Obamacare was not pitched to the public as a mandatory spending entitlement, the details of the legislation reveal an intent to block any future Congress from controlling Obamacare's spending.

This paper examines several details of how to limit the damage caused by the law until it can be repealed; it is accompanied by 15 Heritage Foundation *WebMemos* documenting 15 specific areas of the law that most deserve attention and unraveling.[4]

Any strategy to repeal Obamacare will require lawmakers to focus on provisions that form the foundation of the new law's architecture, so that eliminating these would topple major portions of it. Such pillar provisions, among others, include:

- The individual and employer mandates;
- The health insurance "exchanges";
- The evisceration of Medicare Advantage;
- The requirement that states dramatically expand their Medicaid programs regardless of the expense;[5] and
- The authority granted to the Office of Personnel Management to create a prototype "public option" of a government-run insurance company.

Energy spent on dismantling lesser provisions may yield some positive peripheral benefits but will not undercut the pillars of Obamacare. One well-known example of an incidental provision is the requirement that businesses file a "1099" form with the IRS every year, detailing their financial transactions with vendors. Although this provision creates an enormous and unwarranted burden on businesses and should be repealed, its repeal would not strike at the heart of Obamacare.

Defunding: A Routine Policy Tool

Congress is not required to fund Obamacare or the myriad new programs that it spawned. As with every other federal program, the level of funding can be adjusted—even zeroed out—by the current Congress. Special provisions in the health care law will complicate the process, but the propriety of defunding as a rightful tool is unquestionable.

Congress's standard protocol involves a two-stage process. First, authorizing legislation is passed, creating a program or an agency. Then, separately, the appropriations process determines how much funding, if any, will be allocated to that purpose, which must compete against other programs that also seek funding. Despite the vast amount of federal spending, more programs are authorized than can or will actually be funded.

As noted by the Congressional Research Service (CRS), "Congress is not required to provide funds for every agency or purpose authorized by law."[6] Defunding is a legitimate use of the power of the purse that the Founding Fathers wisely granted to Congress.[7] As James Madison said, "This power over the purse may, in fact, be regarded as the most

1. Nicholas Ballasy, "Reid: Obamacare 'Is Not Going to Be Repealed': GOP 'Should Get a New Lease on Life and Talk About Something Else,'" CNSNews.com, January 6, 2011, at *http://cnsnews.com/news/article/senate-leader-reid-house-gop-should-get* (January 24, 2011).
2. Imported from Japan and promoted by the U.S. government during the Great Depression to control erosion, kudzu itself has grown uncontrollably and now covers and suffocates millions of acres in the southeastern U.S.
3. For a wall chart of the 159 programs, see Center for Health Transformation, at *http://www.healthtransformation.net/galleries/wallcharts/159%20Agencies%20Map.pdf* (January 24, 2011).
4. "The Case Against Obamacare: A Health Care Policy Series for the 112th Congress," The Heritage Foundation, 2011, at *http://www.heritage.org/research/projects/the-case-against-obamacare#ref1*.
5. The majority of governors have already written President Obama to ask for relief from the Medicaid provisions of Obamacare. Janet Adamy, "GOP Governors Seek Leeway to Cut Medicaid Rolls," *The Wall Street Journal*, January 7, 2011, at *http://online.wsj.com/article/SB10001424052748703730704576066273744261318.html?mod=googlenews_wsj* (January 24, 2011).
6. "Earmarks and Limitations in Appropriations Bills," Congressional Research Service *Report* No. 98-518, December 2004, p. 2.

complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[8]

The White House routinely proposes zero funding for many federal programs. In 2010, the Office of Management and Budget published an overview of President Barack Obama's efforts to defund disfavored federal programs, stating:[9]

> In his 2010 Budget, President Obama sought to end or reduce 121 programs for a one-year savings of approximately $17 billion, of which $11.5 billion was on the discretionary side of the Budget. The Congress then acted and approved cuts that produced a net savings of $6.8 billion, nearly 60 percent of the discretionary cuts proposed…
>
> …for the 2011 Budget, the Administration is proposing 126 terminations, reductions, and savings of more than $23 billion in 2011 alone. The proposals include 78 discretionary terminations and reductions….

So when a repeal is blocked, defunding is the obvious next approach. In the case of Obamacare, that is tricky because the law is designed to be difficult to uproot, just like a plant with an elaborate root system. This paper details some of the "how to" questions relating to defunding.

The Tangled Kudzu of Obamacare's Bureaucracy

Obamacare was designed to be the governmental equivalent of kudzu—growing everywhere, propagating by multiple means, and sinking in its roots and becoming impossible to control. Although it is legislatively possible to enact a single provision that no public funds shall be used to implement any portion of this health care law, it would be difficult, if not impossible, to convince the Senate or President to approve such a sweeping provision.

Therefore a series of defunding restrictions can be aimed at specific provisions—an approach compounded by the vast number of provisions in the law. Piecemeal provisions can be adroitly packaged with other legislation desired by the Senate and the White House—an un-admired but common tactic in the Congress.

It may be impossible to identify each specific item that should be defunded because nobody knows just how many new bureaucracies are being created under the new law. As concluded by the Congressional Research Service, "The precise number of new entities that will ultimately be created pursuant to PPACA [Obamacare] is currently unknowable, for the number of entities created by some sections is contingent upon other factors, and some new entities may satisfy more than one requirement in the legislation."[10]

The same CRS report also notes that this bureaucracy has a weak spot, namely that "in practical terms, many of these entities will not be able to function until their members are appointed and funds are appropriated or made available for the entities to operate." That explains why Obamacare uses funding gimmicks that try to restrict the ability of the current Congress to defund it. In effect, it is as though the lame duck Congress were still in charge of funding decisions, despite how the voters ejected many of them from office.

Obamacare Tries to Strip Congress of Power to Defund

One of Obamacare's most egregious insults to the rule of law is its effort to take away the power of the current Congress, future Congresses, and future

7. U.S. Constitution, Article I, Section 9: "No money shall be drawn from the treasury, but in consequence of appropriations made by law."
8. James Madison, *The Federalist* No. 58.
9. Office of Management and Budget, *Terminations, Reductions, and Savings: Budget of the U.S. Government, Fiscal Year 2011*, at *http://www.whitehouse.gov/sites/default/files/omb/budget/fy2011/assets/trs.pdf* (January 24, 2011).
10. Curtis W. Copeland, "New Entities Created Pursuant to the Patient Protection and Affordable Care Act," Congressional Research Service *Report* No. R41315, July 8, 2010, at *http://thf_media.s3.amazonaws.com/2010/pdf/R41315.pdf* (January 24, 2011).

Presidents to decide what level of funding—if any—its programs should receive. The law does this by including billions of dollars in actual appropriations of funds for future years.

Making years' worth of spending decisions in advance is an attempt to handcuff the current Congress and prevent it from determining current levels of spending.

As the CRS notes, Obamacare "contains two types of budgetary provisions in relation to the new entities created by or through the legislation. Several of the provisions directly provide funding (referred to as "direct spending"), bypassing the annual appropriations process, through techniques such as multi-year or permanent appropriations. Some of these provisions also impose other requirements or conditions."[11]

One example cited by the CRS in a related report[12] is an advance appropriation of $6 billion in Obamacare's Section 1322, requiring the Secretary of Health and Human Services (HHS) to establish a "Consumer Operated and Oriented Plan (CO-OP)," better known as the insurance "exchange" program. The statute does not specify how much of the $6 billion is designated for each fiscal year, presumably giving a blank check to Secretary Kathleen Sebelius to spend when and how she likes.

This CRS report[13] is entirely devoted to describing the extensive provisions whereby Obamacare strips the authority of current and future Congresses to make funding decisions. The CRS devotes eight pages to a table listing the billions of locked-in future spending. The two largest single amounts are an appropriation of $19.147 billion for FY 2014 and $21.061 billion for FY 2015 for the Children's Health Insurance Program (which existed before Obamacare).

It takes eight pages for CRS simply to list the PPACA provisions that seek to bypass the normal appropriations process. These go beyond standard appropriations for the current and following fiscal years, making spending decisions for as long as 10 years in the future—not only beyond the term of the last Congress, but also beyond the current term of President Obama. These include, among others: Section 2951 on "Maternal, Infant, and Early Childhood Home Visiting Programs" and Section 3021 on a "Center for Medicare and Medicaid Innovation" (including $10 billion for FY 2011 through FY 2019, and $10 billion for each subsequent 10-year fiscal period). The report also describes how billions are to be transferred—without approval of current or future officeholders—from Medicare into Obamacare accounts, such as in Section 3403.

Making years' worth of spending decisions in advance is an attempt to handcuff the current Congress and prevent it from determining current levels of spending. The entire balance of power is upset when President Obama need not work with current elected officials to fund his priorities, since he already got the prior Congress to make decisions that extend beyond its term. The ability of the new Congress to leverage and negotiate is thereby weakened.

The funds in Obamacare are not budget projections but actual appropriations of money. Obamacare goes far beyond any precedent for making appropriations for future years; it is an outrageous effort by the former Congress to bind the current and future Congresses in this way.

Because the last Congress did not do its job of enacting spending bills, current funding for all other government programs expires on March 4 and must be resolved by the current Congress. Yet, while neglecting everything else, the last Congress funded Obamacare. As the new Congress considers any further continuing resolution or permanent

11. *Ibid.*, p. 16.
12. "Appropriations and Fund Transfers in the Patient Protection and Affordable Care Act (PPACA)," Congressional Research Service *Report* No. R41301, June 28, 2010, at *http://healthlegislation.blogspot.com/2010/10/patient-protection-and-affordable-care.html* (January 24, 2011).
13. *Ibid.*

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funding for the rest of government, it can and should consider language removing the special advance appropriations that were given to Obamacare. Otherwise, even if the rest of government were shut down, Obamacare would remain active.

Another way to address the problem of vast advance appropriations for Obamacare might be to require that other important parts of government—perhaps even the White House's own budget—be funded only if money were transferred from Obamacare.

Cutting Off Backdoor Funding for Obamacare

The packaging of appropriations bills becomes crucial, since leverage is accomplished only by packaging whatever one wants in the same legislation as what somebody else desires. Although praiseworthy from a good government perspective, efforts to de-link certain programs—and place them in a larger number of more narrowly focused spending bills—might limit the leverage the House will have with the Senate and the White House. It is a tricky process with unclear results.

The typical approach—limitations language in appropriations bills—is important, but insufficient by itself to defund Obamacare. As noted by CRS, Congress may decide to "provide funds for some activities or projects under an agency, but not others. Precedents require that the language be phrased in the negative, for example, that 'none of the funds provided in this paragraph (typically an account) shall be used for' a specified activity."[14]

Congress has an important advantage if used skillfully. It can package bills as it wishes, lumping limitations language within funding bills that are considered "must-pass" and which contain other priorities important to the White House. Because the President must approve or veto bills in their entirety, he cannot reject this language without rejecting the other things he desires.

The normal strategy of using a "continuing resolution" during a stalemate favors the *status quo* because a continuing resolution only funds existing programs—and as a new program, Obamacare is not in the funding baseline. So the stalemate option would normally favor the foes of Obamacare,[15] except for the need to undo the advance appropriations mentioned previously.

Since appropriations bills typically apply to only one year, the limitations language expires at the end of each fiscal year and must be renewed. But to defund Obamacare entirely, Congress must also cover the backdoor approaches used by the executive branch to bypass the appropriations process, or to fund programs during a continuing resolution. These include:

- Transferring funds from other agencies or programs,[16]
- Using unobligated balances from previous years' appropriations,[17]

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14. Sandy Streeter, "Earmarks and Limitations in Appropriations Bills," Congressional Research Service *Report* No. 98-518, December 7, 2004, at *http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%26*2%3C4Q%5C_3%0A* (January 25, 2011).
15. This is one reason why it was so important that the December 2010 lame duck Congress did *not* pass the omnibus appropriations act that would have provided $1 billion to fund Obamacare. Because Congress resorted to a continuing resolution, Obamacare was not funded. See Brian Riedl, "UPDATED: Senate Omnibus Bill: Nearly 2,000 Pages of Runaway Spending and Pork," Heritage Foundation *Foundry* blog, December 15, 2010, at *http://blog.heritage.org/2010/12/15/senate-omnibus-bill-nearly-2000-pages-of-runaway-spending-and-pork/*.
16. The re-programming/transfer process is governed by provisions written into each appropriations bill, specifying the extent to which appropriated funds may be reallocated by an agency. See "Congressional Appropriations Process: An Introduction," Congressional Research Service *Report* No. 97-684, February 22, 2007, at *http://www.senate.gov/reference/resources/pdf/97-684.pdf* (January 25, 2011).
17. About $703 billion is available for re-appropriation, without counting against budget limits, from unspent appropriations made in prior years. See Office of Management and Budget, "Preparation, Submission, and Execution of the Budget," *Circular* No. A-11, July 2010, at *http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a_11_2010.pdf* (January 24, 2011).

- Awarding grants through other funding accounts, and
- Using creative funding streams that bypass Congress.[18]

Additional Paths to Pursue

Additional actions are needed to minimize the damage that Obamacare inflicts on America's health care, economy, and freedoms:

Expedited Review. Congress could shorten or remove some of the standard legal hurdles that delay the time when the U.S. Supreme Court may issue a final order on the constitutionality of Obamacare—especially the individual mandate. Now is an opportune time. No appellate court has yet issued an order, and because district court rulings have differed, neither side can claim to be advantaged or disadvantaged by expediting the appeals process. As a good government effort to remove major uncertainty, there is no legitimate reason why this effort should not attract bipartisan support in both houses of Congress.

Monitoring. Transparency and good government require that all executive branch efforts to advance Obamacare should be known to Congress and to the public. Creating a one-stop clearinghouse and reporting system—especially requiring timely and online disclosures—should have bipartisan support in both houses of Congress. This will prevent any stealth efforts to advance the law in the absence of approved funding.

Oversight. Although beyond the scope of this paper, heightened oversight by Congress and tracking of expenditures is necessary for any program that gives as much unfettered discretion to bureaucrats as President Obama has allocated. A key example is the hundreds of waivers granted by HHS Secretary Sebelius for Obamacare exemptions, based on vague standards that can easily be abused. Oversight should include monitoring and exposing how the Administration uses public money for its public relations campaign to change widespread opposition to Obamacare, such as $3,184,000 spent to produce and air pre-election advertisements on national television in September and October 2010.

The debate over Obamacare boils down to how one answers the following question: Should the federal government control America's $2.5 trillion health care sector? As shown by the robust negative public response, no lawmaker should answer "yes."

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18. A recent and dangerous trend is to exempt some bureaucrats from being controlled through Congress's power of the purse. The 2010 financial services bill creates the Bureau of Consumer Financial Protection and insulates it from congressional oversight by giving it a dedicated stream of funding directly from the Federal Reserve.