

Constitutional Implications of an “Individual Mandate” in Health Care Reform

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July 10, 2009



*The Federalist Society
for Law and Public Policy Studies*

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CONSTITUTIONAL IMPLICATIONS OF AN “INDIVIDUAL MANDATE” IN HEALTH CARE REFORM

As part of comprehensive legislation to change the health care system in the United States, several key congressional leaders – and President Obama -- are proposing a new federal law to require every American to purchase health care insurance coverage, a so-called “individual mandate.” Failure to comply with this mandate to purchase health insurance would subject a person to fines, penalties, or excise taxes. This individual mandate, if passed, would be an unprecedented federal directive that might call into question the constitutionality of such an action under Congress’s taxation or interstate commerce “regulatory” authority, as well the ramifications of such a mandate under the First Amendment’s “free exercise” protections and Fifth Amendment protections against governmental “takings.”

An “individual mandate” to buy health insurance has been a component of most health care reform plans proposed over the years, starting with President Bill Clinton’s 1993 health care reform proposal. The policy justification for an individual mandate is based on the premise that if everyone had health insurance, health care costs would be equally spread among everyone, and the individual cost for health insurance would be reduced. Such cost reductions would arguably take place because “free riders” – individuals without health insurance – would no longer have the cost of their health care borne by individuals with health insurance.¹ This cost-shift arguably takes place because health care providers – doctors and hospitals – who provide free or uncompensated care to the uninsured “shift” the cost of providing that care to insured or paying patients.² The hospital or doctor then “shifts” the cost of that unpaid-for-care to paying, insured patients in the form of higher charges in order to cover the cost of uninsured patients. According to the individual mandate advocates, if everyone were required to have health insurance this cost-shifting would be eliminated or substantially reduced.

The “individual mandate” policy rationale is similar to the policy justification for requiring all drivers to maintain automobile insurance as a pre-requisite to maintaining a driver’s license. Nearly every state now has a law mandating auto insurance for all drivers. But the primary purpose of the auto insurance mandate was to provide financial protection for people that a driver may harm, and not necessarily for the driver himself. And the auto insurance mandate is a quid pro quo for having the state issuing a privilege: in this case a driver’s license. Still, despite the auto insurance mandate, nearly 15 percent of drivers are believed to be driving without valid auto insurance.³

The State of Massachusetts adopted an individual health insurance mandate when it passed its own state health care reform legislation in 2006. The Massachusetts Health Care Reform Plan required all adults in Massachusetts to obtain health insurance by July 1, 2007. If an individual did not buy insurance – or have employer-based coverage or qualify for coverage under Medicare or another government plan – the state could impose a financial penalty on that individual of up to 50 percent of the cost of a health insurance plan. Health insurance coverage must be reported by an individual on their state income tax filing. A “religious exception” exists under the Massachusetts health reform act for individuals whose religious beliefs would preclude them from seeking health care that would be paid for by a health insurance policy.

A legal challenge to the Massachusetts individual health insurance mandate argued, among other things, that the Massachusetts individual mandate law is an illegal taking of property. In March 2009 a Superior

Court judge found in favor of the Massachusetts Department of Revenue and dismissed the suit. An appeal is pending.

In a policy options paper on health care reform released by the Senate Finance Committee on May 11, 2009, Chairman Baucus proposed that all Americans should “have a personal responsibility requirement to obtain health insurance coverage.” The Baucus proposal would make health insurance coverage not only a personal responsibility but a federal, legal obligation as well. More specifically, a health care reform act put forth by the Senate Health, Education, Labor and Pensions Committee (“Senate HELP Committee”) includes an individual mandate and an employer-mandate requiring employers to purchase health care insurance for their employees.⁴

Under the Baucus proposal, any health insurance coverage purchased by an individual or provided by an employer would have to meet certain minimum federal requirements. If an individual failed to purchase or obtain health insurance, he would be subject to an excise tax equal to 25-75% of the cost of the federally-approved “lowest cost option” health insurance. To ensure compliance, individuals would have to document each year on their federal tax return that they had the required “minimum coverage” for themselves and each dependent family member.

Under the Baucus proposal, exemptions from the coverage requirement would be allowed for religious objections that are “consistent with those allowed under the Medicare program.” Other exemptions from the “excise tax” would exist for reasons of financial hardship.

In the Senate HELP Committee draft legislation, the Internal Revenue Code would be amended to require that every individual have “qualifying” health insurance coverage. If an individual cannot demonstrate “qualifying coverage” on an annual basis as defined in the act and by the Secretaries of Health and Human Services and the Treasury, an annual federal tax will be assessed against that individual. The HELP Committee draft legislation would delegate to the Secretaries of the Treasury and HHS the authority to annually set the federal tax for being uninsured. The proposed legislation would also authorize the Internal Revenue Service to compel health care insurers and employers to report to the IRS health care coverage provided to individuals. The HELP Committee draft exempts from the individual mandate certain members of Indian tribes and individuals for whom affordable health care coverage is not available or who meet certain financial hardship tests.

Although not in favor of such an individual mandate during the presidential campaign, President Obama signaled his support for an “individual mandate” in a June 2, 2009 letter to Finance Committee Chairman Baucus and Senator Edward Kennedy, Chairman of the Senate Health, Education, Labor and Pensions Committee.

“I understand the Committees are moving towards a principle of shared responsibility -- making every American responsible for having health insurance coverage, and asking that employers share in the cost. I share the goal of ending lapses and gaps in coverage that make us less healthy and drive up everyone's costs, and I am open to your ideas on shared responsibility.”

If enacted by Congress, a federal individual health insurance mandate would be, as one commentator observed, “an unprecedented expansion of government power and intrusion into the American health care system.”⁵

It is worth noting that the architects of the Social Security Act harbored grave doubts about its constitutionality, which was ultimately settled on the taxing power of the United States.⁶ However, in contrast to an individual mandate, federal benefits are attached to Social Security and Medicare taxes and there is a specific “contract” involved between the current payment of taxes and future government benefits. No such relationship would exist with the individual health insurance mandate. Additionally, while one can “opt-out” of receiving Social Security and Medicare benefits -- although one must still pay Social Security and Medicare taxes -- none of the individual mandate proposals provide for an “opt out” other than for yet undefined religious objections. Interestingly, a suit being led by former House Majority Leader Richard Armey is challenging a federal regulation that suggests that opting out of Medicare will put a person’s Social Security benefits at risk.⁷

If an individual mandate is passed, it seems likely that courts will be faced with claims from individuals who can afford to purchase health insurance, but who will protest that they should be free to determine whether their earnings are best used for other purposes. Other people may protest they cannot afford to purchase coverage at a price that has been increased by federally-mandated benefits that they neither want nor would choose on their own. Although the point has not been conclusively litigated, arguably state governments – unlike the federal government -- have greater, plenary authority and police powers under their state constitutions to mandate purchase of health insurance. So the Massachusetts state legal authority for an individual mandate – even if upheld -- is not necessarily available in the context of a federal mandate.

The Congressional Budget Office acknowledged the unprecedented nature of an individual mandate when assessing the Clinton health care reform proposal of 1993:

“A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An individual mandate has two features that, in combination, make it unique. First, it would impose a duty on individuals as members of society. Second, it would require people to purchase a specific service that would have to be heavily regulated by the federal government.”⁸

The CBO further observed that the only analogous mandate on individual behavior from the federal government on this level would be the registration provisions under the Selective Service Act. The authority to impose a selective service system and military draft, however, is founded under the Congressional Article I power to raise and support armies.

Under what Constitutional authority may the Congress act to mandate, individually, the purchase health insurance? One legal scholar has opined that the Constitution would permit Congress to legislate such a health insurance mandate using its Commerce Clause authority or its general taxing authority.⁹ According to Wake Forest Law School Professor Mark A. Hall, Congress could act under the Commerce Clause to legislate an individual health insurance mandate because “health care and health insurance both

affects and is distributed through interstate commerce, giving Congress the power to legislate an insurance mandate using its Commerce Clause powers.” Professor Hall further believes that, under the taxing and spending power, Congress could also craft an individual health insurance mandate by “using its taxing power to implement a ‘pay or play’ model to tax individuals that did not purchase insurance.” While Professor Hall concedes that Congress’s taxing power can be limited if a tax intentionally and directly burdens the exercise of a fundamental right, he believes that there does not exist any “fundamental right” to be uninsured.

If Congress were to invoke its Commerce Clause authority to support legislation mandating individual health insurance coverage, such an action would have to contend with recent Supreme Court precedent limiting unfettered use of Commerce Clause authority to police individual behavior that does not constitute interstate commerce: *United States v. Lopez*,¹⁰ invalidating the application of the Gun Free School Zones Act of 1990 to individuals and *United States v. Morrison*,¹¹ invalidating certain portions of the Violence Against Women Act. In the case of a mandate to purchase health insurance or face a tax or penalty, Congress would have to explain how not doing something – not buying insurance and not seeking health care services – implicated interstate commerce.

While most health care insurers and health care providers may engage in interstate commerce and may be regulated accordingly under the Commerce Clause, it is a different matter to find a basis for imposing Commerce Clause related regulation on an individual who chooses not to undertake a commercial transaction. The decision not to engage in affirmative conduct is arguably distinguishable from cases in which Commerce Clause regulatory authority was recognized over intra-state activity: growing wheat (*Wickard v. Filmore*)¹² or, more recently, growing marijuana (*Gonzales v. Raich*).¹³ Reliance on the Commerce Clause to justify the constitutionality of an individual mandate might be susceptible to an “as applied” challenge from individuals who (1) never access the health care system or (2) are able to pay for their health care without using insurance, because the government could not claim an impact on interstate commerce of providers and insurers as a result of uncompensated care.

An individual mandate also presents issues under the First Amendment’s Free Exercise Clause and the Fifth Amendment’s Taking Clause. Given the uncertainty with how an individual mandate would comport with religious beliefs regarding health care choices, the Senate Finance Committee policy outline suggests creating an exception to the health insurance mandate for “religious reasons.” It still leaves open, however, the question of whether the compelled purchase of health insurance constitutes the “taking” of private property under the Fifth Amendment. Given the novel nature of the individual health insurance mandate, a Fifth Amendment challenge can be expected. Requiring a citizen to devote a percent of his or her income for a purpose for which he or she otherwise might not choose based on individual circumstances could be considered an arbitrary and capricious “taking” no matter how many hardship exemptions the federal government might dispense.

With respect to enforcing the individual mandate through some “excise tax,” this would be a novel use of the federal excise tax authority. Most federal excise taxes have traditionally existed to raise revenue by taxing a sale or acquisition of an item or service (e.g., fuel, alcohol, firearms, ammunition, telephone calls, and “luxury items”). Most of these excise taxes exist as pure revenue raisers, but some arguably offset federal costs associated with environmental pollution remediation, such as the “oil spill liability” fuel tax on barrels of oil or the excise tax on “ozone depleting chemicals.” Imposing an excise tax on

conduct -- or the absence of certain conduct, such as failing to obtain health insurance -- would be a novel use of the excise tax authority. If a federal excise tax is imposed on individuals who do not purchase insurance, could it be imposed upon over-weight people who do not have a gym membership? Or cigarette smokers who do not sign up for a smoking cessation class?

The proponents of an individual mandate might have the best congressional authority argument through use of the taxing power. But proponents of an individual mandate are reluctant to call it a "tax." The Congressional Budget Office has previously opined that an individual mandate coupled with an excise tax would not be a "tax" so long as people have "choice" as to what health care coverage to purchase. If that CBO position is maintained, the individual mandate might not have to be treated as a "tax" for House and Senate parliamentary procedure purposes. But it is potentially problematic to use the taxing power as the Constitutional authority to enact an individual mandate, but not call it or its enforcement mechanism a "tax" for purposes of budget scoring rules.

The mechanisms of enforcement of an individual mandate would invite scrutiny as well. Enforcement through the federal tax system would be useless for those who have no income to be taxed and do not file tax returns or for those who have no tax liability. This suggests even more aggressive types of enforcement will be necessary. Sherry Glied, Ph.D., who was recently nominated by President Obama to become Assistant Secretary for Planning and Evaluation at the U.S. Department of Health and Human Services has warned, "[d]eveloping a system to promptly identify and penalize scofflaws will take effort and ingenuity, particularly in our diverse and mobile country. It may require a degree of intrusiveness and bureaucracy that some will find unpalatable."¹⁴

Currently, individuals without auto insurance are identified during traffic stops by police or when applying for or renewing a driver's license. Would such "effort, ingenuity, and intrusiveness" require hospitals and doctors to report to the federal government patients without health insurance presenting to their emergency rooms or offices? Or might it inspire enforcement mechanisms employed in child support cases such as the denial of certain government controlled licenses or withholding of tax refunds. As previously noted, the Senate HELP Committee draft bill suggests that insurance companies and employers would be required to file annually with the Internal Revenue Service the equivalent of a Form "W-4" or "1099" and report to the IRS all individuals with health insurance.

Health care reform legislation remains a high priority for the Obama Administration. In his June 2 letter to the Senate leadership he urged action no later than October of this year. Both the administration and Senate leadership have endorsed an "individual mandate" as a necessary component of any health care legislation. The imposition of such an individual mandate would be an unprecedented federal action by the Congress and careful consideration should be undertaken by members of Congress as to whether such legislation comports with the legislative authority delegated to Congress under the Constitution and whether an individual mandate further comports with protections under the Bill of Rights on "free exercise" of religion and against government takings.

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¹ Tanner, Michael “Individual Mandates for Health Insurance: Slippery Slope to National Healthcare,” Cato Institute (April 5, 2006).

² Hospitals that accept Medicare payments have a legal duty under federal law to provide emergency medical care to all people who present themselves at the hospital emergency room, regardless whether the person has health insurance. Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §1395dd.

³ Insurance Research Council, *Uninsured Motorists, 2008 Edition*, released in January 2009.

⁴ “Affordable Health Choices Act,” Section 161, Senate Health Labor and Pensions Committee Draft Mark-Up.

⁵ Tanner, p. 2.

⁶ For a history of the Social Security Act, see <http://www.socialsecurity.gov/history/perkins5.html>

⁷ *Brian Hall, et al v. Charles E. Johnson* (C.A 1:08-cv-01715- RMC, USDC D.C. – filed October 9, 2008). See also: http://www.medicarelawsuit.org/about_the_lawsuit.html

⁸ Hartman, Robert and van de Water, Paul, “The Budgetary Treatment of an Individual Mandate to Buy Health Insurance,” Congressional Budget Office memorandum, August 1994.

⁹ Hall, Mark A. “Legal Solutions in Health Reform: The Constitutionality of Mandates to Purchase Health Insurance,” prepared for the O’Neill Institute for National and Global Health Law Georgetown Law, available at www.oneillinstitute.org.

¹⁰ 514 U.S. 549 (1995)

¹¹ 529 U.S. 598 (2000)

¹² 317 U.S. 111 (1942).

¹³ 545 U.S. 1 (2005).

¹⁴ Sherry A. Glied, Ph.D., Universal Coverage One Head at a Time—The Risks and Benefits of Individual Health Insurance Mandates, *The New England Journal of Medicine*, can be found at <http://content.nejm.org/cgi/content/full/358/15/1540?query=TOC>