

## THE HEALTH CARE LAW'S INDIVIDUAL MANDATE

### WHAT IS THE INDIVIDUAL MANDATE?

In the new health care law there is a requirement that everyone must have health care insurance or face a financial penalty from the IRS. Section 1501 of the Patient Protection and Affordable Care Act states that there is now a "requirement to maintain minimum essential" health care insurance where each "individual shall... ensure that the individual... is covered." This section immediately sparked a debate about the scope and strength of the federal government's role in society and its power to compel citizen action.

Congress included the individual mandate to offset the effects of two other policies in the bill that would have crippled the health care insurance industry without the mandate. This first policy is called "guaranteed issue," which means that insurers can no longer refuse to cover people because of preexisting conditions. The problem with guaranteed issue without a mandate is that people will wait until they are sick to buy insurance, obviously not a feasible structure. The second policy is called "community rating," which means that insurers are not allowed to charge a different rate for people based on their individual conditions. The insurers must rate a certain community and charge the same rate across the community. This policy removes insurers' ability to offset the higher costs from guaranteed issue by charging higher rates to less healthy people.

Congress needed a way to push a big pool of relatively healthy people to buy insurance but not consume the services. Enter the individual mandate. By and large the people who do not have insurance right now are people who do not want it. Medicaid covers the poor and Medicare covers the elderly. Most, but not all, employees can get some form of insurance from their employer. However, there is a sliver of the population that is relatively healthy and chooses to forego coverage. The individual mandate requires those people to buy insurance in order to finance the expanded coverage under guaranteed issue and the price controls from community rating. The individual mandate is both a subsidy that transfers costs from the sick to the healthy and a generational subsidy that transfers costs from the relatively healthy younger population to the relatively less healthy middle and older generations. However, just because Congress thinks using the mandate as a subsidy is a good idea, doesn't mean they have the constitutional power to do it.

### NOTABLE & QUOTABLE

"[Hillary Clinton] mandates that everybody buy health care. She'd have the government force every individual to buy insurance and I don't have such a mandate ... Well, if things were that easy, I could mandate everybody to buy a house, and that would solve the problem of homelessness. It doesn't."

- Then-Senator **Barack Obama** on the campaign trail comparing his health care proposal to Senator Hillary Clinton's, February 28, 2008

"[W]hat Congress cannot do under the Commerce Clause is mandate that individuals enter into contracts with private insurance companies for the purchase of an expensive product from the time they are born until the time they die."

- State of Florida v. U.S. Department of Health and Human Services, 11th Circuit Court of Appeals (1)

## CONSTITUTIONAL CONCERNS

There are two parts of the Constitution to consider when deciding whether the individual mandate is constitutional: one is the Necessary and Proper Clause and the other is the Commerce Clause. In court, the Obama administration has argued that the mandate is constitutional because it is a “necessary and proper”

piece of the broader health care law. The judicial Left has long argued that so long as the goal of the overall legislation is constitutional, in this case regulating and providing health care, that the Necessary and Proper Clause confers power on Congress to accomplish the goals of the overall legislation. As discussed above, the mandate clearly plays a pivotal role in facilitating the legislative scheme. The Judicial Right has countered saying that the clause does not provide new powers but that Congress must have both means and ends that are constitutional. So far, the district and appellate courts have been mixed on whether the Necessary and Proper Clause confers new authority for Congress to issue the individual mandate.

The second question is whether the Commerce Clause gives Congress the power to issue the mandate. Article I, Section 8 of the Constitution says that Congress has the power “to regulate Commerce ... among the several States” (2). This clause has a long and winding history. The Supreme Court originally interpreted it to mean that Congress could regulate interstate waterways, transportation and commerce. In the early 20th Century, the Court expanded it to include fully intrastate activities that affected interstate commerce, like working conditions and wages. The clause was later expanded without limit to anything that touched or affected interstate commerce. It was not until 1995 that the Court again recognized a limit to Commerce Clause power (3). Since then Congress and the Court have continued to explore the bounds of this authority.

The individual mandate raises a novel question under the Commerce Clause: whether Congress can regulate economic inactivity. By its very nature the mandate seeks to compel people who aren't in the health insurance market to enter the market and consume a good. The Obama administration argues that these people will eventually consume health care and thus Congress has the power to control when and how they use that good. However, this is not technically true. There must certainly be a small number of individuals who will choose to pay out of pocket, use homeopathic remedies or go to another country for their health care. Consuming health care and carrying health care insurance is not the same thing. So far the district and appellate courts have been split of whether Congress has the power to force citizens to purchase a product from a private company.

### Suggestions for Further Reading

- the Constitutionality of the Health Care Law's Individual Mandate: An Oxford-Style debate, The Brookings Institution, A Government Studies Event, March 2, 2011, available at [http://www.brookings.edu/events/2011/0302\\_health\\_care\\_law.aspx](http://www.brookings.edu/events/2011/0302_health_care_law.aspx).
- Commandeering the People: Why the Individual Health Insurance Mandate in Unconstitutional, Professor Randy Barnett, Georgetown University Law Center, NYU Journal of Law & Liberty, Vol. 5, 2010, Georgetown Public Law Research Paper No. 10-58, September 22, 2010.
- The Constitutionality of the individual mandate, The Federalist Society 13th Annual Faculty Conference, Event Audio and Video, January 7, 2011, available at [http://www.fedsoc.org/publications/pubid.2077/pub\\_detail.asp](http://www.fedsoc.org/publications/pubid.2077/pub_detail.asp).

### Endnotes:

1. Florida v. U.S. Dep't of Health and Human Serv., Nos. 11-11021 & 11-11067 at 167 (11th Cir. Aug. 12, 2011).
2. U.S. Const. art. I, § 8 cl. 3.
3. United States v. Lopez, 514 U.S. 549 (1995). The case struck down a law regulating firearms in a school zone as outside the bounds of Congress's Commerce Clause power.

*Since the early 20th Century, the Supreme Court has expanded Congress' Commerce Clause power dramatically, only recognizing a constitutional limit to that power in a handful of recent cases.*

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