

# The Individual Mandate and the Constitution

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The Individual Mandate is the provision in the Patient Protection and Affordable Care Act which mandates that all individuals who can afford to do so purchase some minimally comprehensive health insurance. The individuals who are deemed capable of affording to do so are those who are above the poverty line and for whom the minimum coverage will not cost more than 8% of their monthly income.<sup>1</sup> For those who cannot afford to purchase health insurance according to these standards, there exist federal subsidies so that they too can be covered.

## WHY WE NEED THE INDIVIDUAL MANDATE

The Individual Mandate can be seen as the glue which stabilizes the rest of the Affordable Care Act.<sup>2</sup> It is an essential component of a health insurance market reform. In the existing market structure, individuals who can afford health insurance premiums, yet choose not to purchase insurance, place an undue burden on the rest of society when they become ill. The ACA ensures that all individuals have the opportunity to access health insurance. One way in which this is done is by prohibiting the insurance industry from doing three important things which it has traditionally done.

1. **Experience rating:** the industry has recently offered lower premiums for groups of low risk individuals which entices those individuals to purchase that specific insurance plan, while simultaneously shifting a greater cost on higher risk groups, which most often include vulnerable populations. The new regulations dictate changing to community rating which means that everyone pays the same premiums for the same plans.<sup>1</sup>

2. **Rescission:** in the past, health insurance companies have been able to retroactively rescind coverage of individuals, thus leaving those who have been utilizing the insurance with huge bills to be paid.<sup>1</sup>

3. **Guaranteed Issue:** health insurance companies can no longer discriminate based on sex, race or pre-existing condition, etc. For decades, small businesses have enjoyed guaranteed issue, meaning that they could not be turned down for health insurance simply because they had expensive employees. Guaranteed issue will now extend to individuals as well, meaning that women and those with pre-existing conditions who found it challenging to impossible to acquire health insurance in the past will now have access to plans.<sup>1</sup>

All of these changes represent successes for both individuals who need coverage and for society as a whole; however, they all rely on the individual mandate. Without the individual mandate, an unhealthy person could wait until they were quite sick before buying insurance at the last possible

moment. Because of community rating, they would pay the same premium as everyone else. Because of guarantee issue, their illness—no matter how expensive—would not preclude them from getting insurance coverage. While this may seem like a cynical approach, even a small percentage of the population operating this way could completely destabilize and potentially bankrupt the entire system. Bankrupting the system would mean that those paying in would lose coverage. For these reasons, the individual mandate is an integral part of reform and is inextricable from the Affordable Care Act.

Opponents of the individual mandate present it as an attack on individual freedom. They argue that the individual mandate is requiring forced participation in a market, a requirement which is said to violate one's personal liberties and qualify as unconstitutional. We will look at the individual mandate from three different angles. We will evaluate the individual mandate not as 'mandate', but as what it really is: a tax. We will explore the Commerce Clause of the Constitution, which is the basis of law for the ACA. And finally we will explore some of the arguments against the Constitutionality of the mandate, which have been successful in courts of law in Virginia and in Florida.

## A TAX

The individual mandate was placed into law in order to ensure stabilization of the health insurance industry so that it will now offer better plans at cheaper premiums to more consumers. It was not included as an attempt to infringe on personal liberties. This becomes abundantly clear when one looks at the repercussions for not having health insurance. Beginning in 2016, the IRS will collect a fine equally \$695 or 2.5% of income, whichever is greater.<sup>2</sup> The Affordable Care Act explicitly indicates that no criminal actions may be pursued and no liens may be placed on individuals who do not pay this fine. This essentially means that, on a fundamental level, the government will not do much to enforce this law so choosing to disobey on principal will not lead to punishment or burden. One journalist points out, correctly, that the most economical choice would be to not pay for health insurance and simply pay the fine (which is less than a typical premium) until one gets sick.<sup>2</sup> It is of course doubtful that many will opt for this path. The individual mandate can be viewed as a tax because you either pay a premium and help yourself while also stabilizing the system or you pay the IRS. When positioned this way, the Constitutionality of the individual mandate seems unquestionable as it is clearly and explicitly within the rights of Congress to legislate taxes on

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the American people.

## THE COMMERCE CLAUSE

Fundamentally, the Affordable Care Act is a market based reform. The power of reform of any market is given to Congress under the Commerce Clause of the U.S. Constitution. Article I, Section 8, Clause 3 of the U.S. Constitution states that Congress shall be empowered

*“To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes”<sup>3</sup>*

The Constitution gives Congress the power to make laws regulating commerce through the Necessary and Proper Clause in Article I, Section 8, Clause 18 which states that,

*“Congress shall have power...to make laws which shall be necessary and proper for carrying into Exchange the foregoing powers and all other powers vested by the Constitution”<sup>3</sup>*

The Commerce Clause was paired with the Necessary and Proper Clause many times in order to affect change. Social Security, the New Deal, Welfare programs and many other core programs in American history were introduced into law under the auspices of these combined clauses. The individual mandate, in this respect, is neither novel nor unclear. It is merely a ‘necessary and proper’ ingredient in the reform of the health insurance market, a reform that Congress has every power to oversee.<sup>5</sup>

## THE INACTIVITY ARGUMENT

It cannot be overlooked, of course, that arguments against the Constitutionality of the individual mandate and of the Affordable Care Act as a whole have gained momentum and have even been successfully argued in the court of law. To date, four cases involving the Constitutionality of the individual mandate have been tried. Eleven additional cases have been thrown out. All four cases have been tried on the state level and have yielded conflicting results, suggesting that we can expect the individual mandate to eventually make its way to the Supreme Court.<sup>4</sup> Two of the four cases ruled that the individual mandate was Constitutional and should be upheld. A Virginia judge ruled that the individual mandate was unconstitutional. A Florida judge also ruled that the individual mandate was unconstitutional; however, he also ruled that, because the individual mandate is such an integral part of the Affordable Care Act, the entire law was unconstitutional.<sup>4</sup>

What has been convincing these judges? Opponents have argued that the Commerce Clause grants Congress the power to regulate commercial and economic activity, not inactivity. They argue that mandating someone to participate in the health care market is a form of regulating an individual’s inactivity. In comparison, any person who buys a car is also mandated to buy auto insurance. The opponents of the individual mandate point to the fact that, while this may be true, no one is forced to buy the car initially and thus to participate in the first place.<sup>5</sup> Traditionally, the Commerce Clause has functioned on an “if...then” model: IF you play the game,

THEN you must follow the rules. Opponents argue that the individual mandate is the equivalent of forcing someone to play the game.

The Obama administration and many others have countered this argument by pointing to the fact that everyone is already playing the game. By virtue of being alive, we have health needs. They argue that it is impossible for anyone to opt out of the health care industry in any meaningful way. Even if a person were to refuse medical treatment for personal or religious reasons, they might still become a participant in the system in the event of an emergency or their own loss of competency. Because no one can truly opt out of the health care economy, everyone should assume themselves a part of that economy and be open to regulation concerning this point. Additionally, the commerce clause gives Congress the power to regulate any activity which substantially affects commerce. Health care is undoubtedly a commercial transaction so it would seem that the individual mandate falls within this scope.

## Conclusion

The individual mandate will most likely go to the Supreme Court; however, we should not expect the Supreme Court judges to be swayed by the “inactivity argument” or divide among party lines in a strict 5:4 vote.<sup>6</sup> The argument against the Constitutionality of the individual mandate is too weak. Even traditionally conservative justices such as Justice Anthony Scalia, have ruled in favor of regulation, broadening the power granted to Congress under the commerce clause.<sup>6</sup> The invalidation of the individual mandate would allow one to argue that we must, on the grounds of unconstitutionality, allow people to opt out of Social Security and repeal such fundamental institutions as the income tax. It seems quite obvious that the individual mandate is Constitutional, yet it remains to be seen how the Supreme Court will rule.

## References

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