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Obamacare and the Individual Mandate: Violating Personal Liberty and Federalism

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With enactment of the Patient Protection and Affordable Care Act (PPACA),[1] Congress is imposing a mandate on citizens, effective January 1, 2014, to purchase a federally approved level of health insurance.[2]

Summary. Under Section 1501, individuals will be assessed a monetary penalty if they do not purchase a health insurance plan that meets the federal definition of "minimum essential benefits." Congress finds, in Section 1501(a), that health care is inextricably connected with interstate commerce thus claiming a constitutional power to require that citizens purchase a specified level of coverage. The penalty for failure to make such a purchase is to be the *greater* of a flat dollar amount or a percentage of income, phased in from 1 percent to 2.5 percent of income by 2016. The penalty is to be phased in over a three-year period, with the flat dollar amount set at $95 in 2014, $325 in 2015, and $695 in 2016.[3]

The law also amends the Internal Revenue Code and provides a number of exemptions from the mandate to purchase insurance: incarcerated persons, illegal aliens, and foreign nationals. There is also a religious exemption for any person who is a member of a "recognized religious sect or division" with "established tenets or teachings" that would forbid that person from accepting public or private insurance.[4] "Health sharing ministries"—religious non-profit organizations where members contribute funds to cover the medical expenses of persons who need assistance—can also claim the exemption.

Exemptions from the monetary penalty are granted to members of Indian tribes and persons eligible for a "hardship" exemption, which would be determined administratively by the Secretary of the U.S. Department of Health and Human Services (HHS). The law also provides for an "affordability" exemption, which would apply to workers whose out-of-pocket costs would exceed 8 percent of their "household" income. Under Section 1502, the Internal Revenue Service is authorized to enforce the health insurance mandate and to collect the penalties.

Impact. The congressional mandate on American citizens to purchase health insurance is unprecedented.[5] It is one of the most controversial provisions of the new law,[6] setting off a record number of state lawsuits and launching a large number of state legislative countermeasures.[7] The Administration has also been inconsistent, with President Obama originally opposing an individual mandate[8] but then endorsing it. The President stated that the penalty was not a tax, but then Administration lawyers insisted it was, stressing that Congress's "sweeping" taxing power was "the linchpin" of their argument for the mandate's constitutionality.[9] Certain propositions are increasingly clear.

It Is an Unconstitutional Violation of Personal Liberty and Strikes at the Heart of American Feder-

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alism. In upholding Virginia's challenge to the constitutionality of the mandate on December 13, 2010, U.S. District Court Judge Henry Hudson wrote:

> A thorough survey of pertinent Constitutional case law has yielded no reported decisions from any appellate courts extending the Commerce Clause or the General Welfare Clause to encompass regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce or role in a global regulatory scheme. The unchecked expansion of Congressional power to the limits suggested by the Minimum Essential Coverage provision would invite unbridled exercise of federal police power. At its core, this dispute is not simply about regulating the business of insurance—or crafting a scheme of universal health insurance coverage. It's about an individual's right to choose to participate.[10]

Regardless of the wisdom of the policy, if a state wants to experiment with a health insurance mandate, as most do with auto insurance, it has the constitutional right to do so. But Congress, in this instance, is invading the traditional authority of the states in regulating health insurance within their own borders. As George Washington University Law Professor Jonathan Turley has written, "There is a legitimate concern for many that this mandate constitutes the greatest (and perhaps the most lethal) challenge to states' rights in U.S. history. With this legislation, Congress has effectively

1. Congress cannot build sound market-based health care reform on the foundation of a flawed health care law. Therefore, the health care law must be repealed in its entirety.

   The House of Representatives has taken a major step towards full repeal of the Patient Protection and Affordable Care Act (PPACA—otherwise known as "Obamacare"). Until full repeal occurs, Congress must continue to focus on the core failures and consequences of PPACA and block its implementation to allow time to achieve repeal and lay the groundwork for a new market-based direction for health care reform.
2. Patient Protection and Affordable Care Act of 2010, Public Law 111–148, and Health Care and Education Reconciliation Act of 2010, Public Law 111–152.
3. After 2016, the penalty amount is to be indexed to inflation. The total annual penalty for a noncompliant family is to be capped at 300 percent of the flat dollar amount for that year. Persons who are without health insurance for less than 90 days will not be penalized, but they would only be allowed one 90 day spell of uninsurance in any given year. See Hinda Chaikind *et al*., "Private Health Insurance Provisions in PPACA (P.L.111-148)," Congressional Research Service *Report for Congress*, April 15, 2010, p. 6.
4. The law references Section 1402(g)(1) of the Internal Revenue Code, which would apply to a sect that had been in continuous existence since December 31, 1950. This exemption would apply to the Amish, for example.
5. "The government has never required people to buy any good or service as a condition of lawful residence in the United States." The Congressional Budget Office, "The Budgetary Treatment of an Individual Mandate to Buy Health Insurance," *CBO Memorandum*, August 1994, p. 1.
6. Seventy percent of Americans oppose the individual mandate. See Henry J. Kaiser Family Foundation, "Kaiser Health Tracking Poll—August 2010," August 30, 2010, at *http://www.kff.org/kaiserpolls/8093.cfm* (January 12, 2011). Other polling has shown persistent public opposition.
7. Thus far over half of all the states, plus the 350,000-member National Federation of Independent Businesses (NFIB), have filed suit challenging the constitutionality of the mandate, while legislation opposing it has been introduced in 42 states. The NFIB claims that the mandate deprives its members of their liberty and property interests without due process of law in direct violation of the Fifth Amendment of the Constitution.
8. Michael Cooper, "It Was Clinton Versus Obama on Healthcare," *The New York Times*, November 16, 2007, at *http://www.nytimes.com/2007/11/16/us/politics/16facts.html* (January 12, 2011).
9. And it has been a spectacularly unpersuasive argument. "In concluding that Congress did not intend to exercise its powers of taxation under the General Welfare Clause, the Court's analysis begins with the unequivocal denials by the Executive and Legislative branches that the ACA [Affordable Care Act] was a tax. In drafting this provision, Congress specifically referred to the exaction as a penalty." Judge Henry E. Hudson, Memorandum Opinion, *Commonwealth of Virginia v. Kathleen Sebelius, Secretary of the Department of Health and Human Services*, 10CV188-HEH, December 13, 2010, p. 33.
10. *Ibid.*, p. 32.

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defined an uninsured 18-year-old-man in Richmond as an interstate problem like a polluting factory. It is an assertion of federal power that is inherently at odds with the original vision of the Framers."[11]

It Threatens Increased Numbers of Uninsured, More Cost-Shifting, and Further Market Destabilization. Even with the mandate, the Congressional Budget Office estimates that in 10 years 23 million Americans will remain without insurance.[12] Given the combination of the law's health insurance rules—the elimination of pre-existing condition restrictions and guaranteed issue and the compressed ratio of ratings between older and younger enrollees—and the relatively light mandate penalties,[13] there will be incentives for millions of Americans, facing much higher insurance premiums than they are today, to go without coverage. Faced with paying a light penalty and a heavy premium, they would have every incentive to pay the light penalty and sign up for insurance if they get sick and drop out of coverage when they get well. This will induce a severe case of adverse selection, as the less stable pools are disproportionately populated with older and sicker enrollees, resulting in a deadly cost spiral.

It Invites an Enforcement Nightmare. As a candidate, President Obama opposed the individual mandate for health insurance in part because he considered it unenforceable.[14] IRS Deputy Commissioner for Services and Enforcement Steven Miller indicated that mass auditing of American citizens was not envisioned but that the IRS would withhold tax refunds if persons could not demonstrate that they purchased federally approved levels of insurance coverage.[15]

A New Direction. Under current law, federally funded hospitals must treat ("stabilize") persons entering hospital emergency rooms. Current law thus encourages "free riders," persons who forgo health insurance coverage and then use hospital emergency rooms to secure highly expensive care that they often cannot afford. These uncompensated care costs are then shifted to taxpayers who end up paying extra to cover the costs of the uninsured through higher taxes and private insurance premiums, including the added costs of the "free riders."[16]

While no one expects Congress to deny access to hospital emergency room care to those who do not have the financial capacity to pay their health bills, PPACA will make matters worse. Not only does the new law mandate a massive expansion of Medicaid—itself a major contributor to existing emergency room overcrowding—but it could very well result in rapidly aging, ailing, and unstable pools in the existing health insurance markets. As Harvard economist Martin Feldstein says, "The resulting rise in cost to insurance companies as the insured population becomes sicker would raise the average premium, strengthening that incentive."[17]

11. Jonathan Turley, "Is the Health Care Mandate Constitutional?" *USA Today*, March 31, 2010, at *http://www.usatoday.com/news/opinion/forum/2010-03-31-column31_ST_N.htm* (January 12, 2011).
12. The Congressional Budget Office estimates that the penalty would yield $17 billion over the period 2010–2019. Douglas W. Elmendorf, Director, Congressional Budget Office, letter to Nancy Pelosi, Speaker, U.S. House of Representatives, March 20, 2010, Appendix, Table 4.
13. The structure of fines and penalties was based on the President's 2010 proposal. During their consideration of the bill, Senators stripped criminal sanctions, including jail terms, against recalcitrant citizens.
14. Cooper, "It Was Clinton Versus Obama on Healthcare."
15. Martin Vaughan, "IRS May Withhold Tax Refunds to Enforce Health-Care Law," *The Wall Street Journal*, April 15, 2010, at *http://online.wsj.com/article/sb10001424052702304510000457418608245546624 68.html?mod+wsj_latestheadlines* (January 12, 2011).
16. For an excellent description of the legal and regulatory situation, see John S. O'Shea, M.D., "The Crisis in Hospital Emergency Departments: Overcoming the Burden of Federal Regulation," Heritage Foundation *Backgrounder* No. 2050, July 9, 2007, at *http://www.heritage.org/Research/Reports/2007/07/The-Crisis-in-Hospital-Emergency-Departments-Overcoming-the-Burden-of-Federal-Regulation*.
17. Martin Feldstein, "Obamacare's Nasty Surprise," *The Washington Post*, November 6, 2009, at *http://www.nber.org/feldstein/washingtonpost_110909.html* (January 12, 2011).

The problems of the uninsured, including the "free rider" issue, are best addressed through a judicious combination of positive economic incentives, such as tax credits and vouchers for insurance, creative new mechanisms to facilitate coverage (such as automatic enrollment with a right to refuse coverage), and transparency in personal choice and consequences, such as an upfront signed acknowledgement of financial liability for refusing coverage.[18] This policy encourages the adoption of coverage and individual responsibility while not compromising Americans' personal freedom and responsibility.

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18. For further discussion of this policy, see Robert E. Moffit, "Choice and Consequences: Transparent Alternatives to the Individual Insurance Mandate," *Harvard Health Policy Review*, Vol. 9, No. 1 (Spring 2008), pp. 223–33.