

## Blog Watch

« Scrutinizing New Health Regs

### Is The Individual Mandate A Tax?

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A number of right-leaning bloggers reacted to [news](#) that the Obama administration may change the way it legally defends the new health law's requirement that all Americans buy health insurance. The New York Times reported that the federal government may now argue it can impose the mandate through its tax authority, but White House officials (and Obama himself) had previously argued the mandate was constitutional under "interstate commerce" authority. Left-leaning writers were largely silent about the development. Other commentators wrote about reform in Massachusetts and the coming health insurance exchanges.

Previewing the kinds of arguments that health law opponents' offer against the interstate commerce reasoning, Eric Novac says on the [Heritage Foundation's blog](#): "The mandate, as it's known, has its origins in the Commerce Clause of the Constitution, which grants Congress the authority to regulate interstate commerce. And yet it doesn't take an Elena Kagan-level legal scholar (or even a fan of "Boston Legal" reruns) to see that the mandate, rather than regulating commerce, is this time being used to regulate the absence of commerce. Why does that distinction matter? Well, at the risk of sounding alarm if Congress can compel the purchase of a product – health insurance – under its authority to regulate the interstate market health care, then, using the same legal theory, what transaction can't it compel?"

[Cato's](#) Ilya Shapiro reacts to the administration's new position that relies on its tax authority: "This is huge. After months of arguing that cases like *Wickard v. Filburn* (Congress can regulate the wheat farmers grow for personal consumption) and *Gonzales v. Raich* (Congress can regulate personal growth of state-allowed medicinal marijuana) justify the requirement that every man, woman, and child buy a health insurance policy, government lawyers (and spokesmen) now say the mandate is just a regulation accompanying a lawful tax (the penalty you pay for not buying insurance)."

Randy Barnett of the [Volokh Conspiracy](#) says, "Let that sink in for a moment. If the Commerce Clause claim of power were slam dunk, as previously alleged, would there be any need now to change or supplement that theory? Maybe the administration lawyers confronted the inconvenient fact that the Commerce Clause has never in history been used to mandate that all Americans enter into a commercial relationship with a private company on pain of a 'penalty' enforced by the IRS. Since there is no Supreme Court ruling that such a claim of power is constitutional. In short, this claim of power is both factually and judicially unprecedented."

[Hot Air's](#) Ed Morrissey posts clips of Obama defending the mandate and writes, "That is exactly what the mandates do — regulate individual behavior in an area where the federal government has no jurisdiction and punish those who don't exhibit favored choices, in this case buying comprehensive health insurance regardless of whether it makes sense for anyone. The court will almost certainly take a dim view of the same attempt that the 1922 court struck down as a gross overreach by the government."

[Insure Blog's](#) Henry Stern laments: "As we've [already noted](#), there was never any doubt that the individual mandate is evil *because* it is a tax on simply living. There is no legal requirement to own or drive a car, or buy or sell property, or eat or drink. But there is now a tax on breathing."

Elsewhere, some bloggers opted to focus on other issues, including those stemming from the Massachusetts experience. [New Republic's](#) Jonathan Cohn responds to a critical [column](#) from Robert Samuelson about that state's health reform law.

Cohn argues: “if the lesson from Massachusetts is that “genuine cost control is avoided because it’s politically difficult” then fiscal disaster is inevitable. Health care costs are going to keep rising, no matter what we do. And if that’s the case, I would certainly prefer a world in which people don’t have to worry about paying their medical bills. It doesn’t cost a lot to make that happen; the incremental cost of insuring the uninsured is a small fraction of health care spending.”

[Wonk Room’s Igor Volsky](#) responds as well, pointing to innovative health systems like Geisinger in Pennsylvania, and concludes: “Samuelson is undoubtedly right about the political challenges to controlling health care spending but he’s underestimating the extent to which economic necessity shapes reality for politicians and providers.”

And legal expert Timothy Jost writes on the [Commonwealth Fund’s blog](#) about “key” issues for HHS to consider when implementing the new health insurance exchanges, including state participation in regional exchanges and how those exchanges would be designed, along with “hold[ing] down administrative costs.”

[The New Health Dialogue’s](#) Joanne Kenen interviews John Prible of the broker group Independent Insurance Agents and Brokers of America about the future of insurance brokers under health reform. Kenen explains, “Not all the states will design their exchanges the same way. In a state where the exchange looks more like an online telephone book with lots of choice and minimal explanation, a broker might indeed give a lot of value added. In a state that more actively selects which plans be in the exchange, and how easily consumers can compare them, brokers might be more superfluous.”

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