

The individual mandate and the impending Supreme Court challenge

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by Roger Collier

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The individual mandate is the single most controversial feature of the [Patient](#) Protection and Affordable Care Act (PPACA). Everyone who can afford coverage—unless an undocumented immigrant or exempted on religious grounds—is required to have it or pay a penalty of \$695 or 2.5 percent of income.

The rationale is straightforward: without a mandate, many people would wait until they needed care before buying insurance, driving up premiums for those with ongoing coverage, and potentially creating an “insurance death spiral” as the higher premiums lead to increasing numbers simply dropping their coverage. (This last part is basically what we have today, but will be magnified by PPACA’s ban on preexisting condition exclusions.)

The individual mandate was preferred for obvious reasons over the alternative of a general tax offset by credits for premiums paid. Democratic lawmakers had no wish to be blamed for imposition of a new tax—no matter how reasonable the arguments in its favor. In fact, as President [Obama](#) made clear in an ABC [television](#) interview: “I absolutely reject that notion [that the penalty is a tax].”

The individual mandate has now become the centerpiece in Republicans’ legal fight against reform. Suits challenging PPACA have been filed by the attorneys general of nineteen states (with the first, in Virginia, already being argued), with the constitutionality of the mandate a key issue in every case.

A recent *Health Affairs* includes articles affirming and denying the mandate’s constitutionality, by Timothy Jost and Ilya Shapiro respectively. Jost argues that the mandate is covered by the commerce clause of the Constitution, allowing the government to regulate interstate commerce—broadly defined as all economic activity—since a decision not to buy insurance has an economic impact on those who do have coverage. Shapiro argues that the government’s constitutional power cannot extend to a non-activity, like not buying insurance. Both authors also discuss whether or not the mandate penalty is really a tax and, if so, whether the government can impose it. Not surprisingly, Jost concludes that the penalty is a legitimate tax, and Shapiro concludes the opposite.

The Supreme Court’s eventual response is anyone’s guess, although reform advocates might well worry about the Court’s present conservative leaning. The timing of a Court ruling is equally uncertain; Jost notes that the Court might find the issue premature until the government attempts to impose the mandate penalty on specific individuals, something that will not happen until 2015 at the earliest, while Shapiro suggests that the Court may try to find a way to duck the constitutionality issue entirely.

All this uncertainty has important implications. States involved in the various legal challenges may drag their feet in setting up the insurance exchanges, possibly leaving the federal government to step in at the last minute. Insurers, already faced with actuarial problems, will face even more uncertainty in estimating enrollment from the currently uninsured (and typically healthier) population. And individuals, of course, will have their own gamble: risk the penalty or not.

What would be the possible impact of a Supreme Court finding of unconstitutionality? The federal government will lose anticipated penalty revenues of some \$10 billion a year. Insurance premiums for individuals and small groups will rise with the loss of enrollment of many younger and healthier individuals. Most important of all, the number of uninsured will be significantly higher than if the penalty were in force, somewhere between the CBO estimate (assuming mandate penalties) of 22 million and today’s 50 million.

The reactions of individual states to an unconstitutionality finding would presumably reflect their politics, with states to the right of center being able to claim a fundamental failure of reform, especially as premiums increase in the absence of new healthier enrollees. Left-leaning states might take the option, however, of imposing their own individual mandates consistent with their state constitutions—much as Massachusetts did in 2006, although possibly with a different, more effective structure that would further lower the number of uninsured. And that might make for some interesting comparisons.

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