The Individual Mandate: A Reply to the Cato Institute's Report on Health Care Reform

by Maggie Mahar

In "*Bad Medicine*" the Cato Institute white paper exploring "The Real Costs and Consequences of the New Health Care Law," Cato senior fellow Michael Tanner declares the individual mandate "perhaps the single most important piece of health care legislation." By insisting that citizens have insurance --or pay a penalty-- Congress has taken an "unprecedented" step, says Tanner. Like many who object to the mandate, he argues that "The government has never required people to buy any good or service as a condition of lawful residence."

In fact, that isn't quite true.

But before getting to what the federal government has or hasn't required of its citizens in the past, let me say that I agree with Tanner on his first point: the individual mandate is the lynchpin at the center of the Accountable Care Act (ACA).

Why the Individual Mandate Is Central to Reform

Without the mandate, we could not require that insurers sell coverage to everyone, regardless of pre-existing conditions. In the past, some insurers have refused to cover adults and children who are very sick. In other cases, they set the premiums so high that a middle-class person who had the bad luck to be struck down by a crippling disease could not afford the coverage. Sometimes insurers even canceled coverage if a customer became ill, arguing that he or she had concealed the disease when applying for the insurance.

Under the new law, insurers won't be allowed to shun the sick. They are required to cover anyone who applies for a policy, charging all customers in a given community the same price for the same coverage. (The only exception: smokers and older customers will pay higher premiums.)

But what does this have to do with the mandate? If the law didn't insist that everyone have "minimal coverage" (or pay a financial penalty), many young, healthy Americans might well wait until they were injured, or seriously ill , before signing up for a policy—safe in the knowledge that no insurer could refuse them, or charge an exorbitant premium. If that happened, insurers would find themselves covering a pool made up largely of the ielderly, the disabled, and the chronically ill.. Premiums would sky-rocket.

If we are going to try to provide health insurance for all citizens, the healthy must join the pool—or pay a penalty that will help defray the cost of covering everyone else. Recently, when I was speaking at a conference, a medical student asked me: "Why should a healthy person help pay for someone who is sick?" I replied, "There but for fortune. . . " He nodded, and seemed satisfied.

The very idea of health insurance is predicated on the notion that none of us knows who will be laid low by accident or disease and when. The great advantage of insurance is that it spreads the risk over a large group of people exposed to the contingencies of fate. It is worth remembering that most disease and injuries can be traced to the accidents of one's gene pool (accounting for 30% of premature deaths), social circumstances (15%), "environmental factors" (such as air quality where you happened to grow up) (5%) , or being in the wrong place at the wrong time, whether on the highway, playing a sport, riding a horse, or crossing a street.

By paying premiums, we also "pre-pay" for the routine care that we all need. This, too, serves a larger social good. If we ensure that everyone has access to preventive care, with no co-pays (something the new law guarantees), it is less likely that someone will need long-term acute care at some point in the future—treatment that the rest of us would wind up funding through taxes, higher insurance premiums or higher hospital fees.

But while Tanner and I agree that the mandate is central to the legislation, he does not share my view that it is essential because we hope to approach universal coverage. While discussing the individual mandate, Tanner never mentions that it is a prerequisite for covering everyone.. By his lights, universal coverage doesn't appear to be a major goal. (Later in the report, Tanner explains that it just isn't doable. Under reform, he contends, insurers will continue to "cherry-pick" healthy patients by "locat[ing] their offices on the top floor of a building with no elevator; or provid[ing] free health club memberships while failing to include any oncologists in their network." (I will reply to this argument when I come to that section of *Bad Medicine*. But, here, I can't resist asking just one question: "Elevator or no, just who *visits* their insurance company?")

From Tanner's point of view, the mandate lies at the heart of the legislation because it is one way that the new law "rewrites the relationship between the government and the people," while raising "serious constitutional questions."

This brings me to the argument that the attorneys general of some nineteen states are making, as they file challenges to the Patient Protection and Affordable Care Act, while making the constitutionality of the mandate a key issue in every case. Many agree with Tanner that the mandate is "unprecedented": "**The government has never required people to buy any good or service as a condition of lawful residence**."

In fact, that is precisely what Congress did, back in 1792.

The Original "Individual Mandate," Signed by President George Washington

In a provocative piece of legal research titled: "The Original Individual Mandate, Circa 1792," and published less than two weeks ago on *Health Reform Watch*, Seton Hall Law School's Bradley Latino explains: "The Militia Acts of 1792, passed by the Second Congress and signed into law by President Washington, required every able-bodied white male citizen to enroll in his state's militia and mandated that he 'provide himself' with various goods for the common weal:

"'[E]ach and every free able-bodied white male citizen of the respective States . . . shall severally and respectively be enrolled in the militia . . . .provid[ing] himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein . . . and shall appear so armed, accoutred and provided, when called out to exercise or into service.'"

"This was the law of the land until the establishment of the National Guard in 1903," Latino explains. "**For many American families, compliance meant purchasing-and eventually re-purchasing-multiple muskets from a private party. Being required to purchase a musket was "no small thing," Latino continues**. "Although anywhere from 40 to 79% of American households owned a firearm of some kind, the Militia Act specifically required a military-grade musket. That particular kind of gun was useful for traditional, line-up-and-shoot 18th century warfare, but clumsy and inaccurate compared to the single-barrel shotguns and rifles Americans were using to hunt game. A new musket, alone, could cost anywhere from $250 to $500 in today's money. Some congressmen estimated it would cost £20 to completely outfit a man for militia service—about $2,000 today.

"Perhaps the most surprising aspect of the militia mandate," he adds, "is how uncontroversial it was. For instance, although the recently-ratified Bill of Rights was certainly fresh on Congress' mind, **not one of militia reform's many opponents thought to argue the mandate was a government taking of property for public use. Nor did anyone argue it to be contrary to States' rights under the Tenth Amendment**. Rather, the mandate was criticized as an unfair burden upon the poor, who were asked to pay the same amount to arm themselves as the rich." [Unlike the Health Reform law, the mandate did not offer subsidies. Nor did it allow citizens to pay a penalty in lieu of buying a musket.]

"Indeed," Latino notes, "the Militia Acts did nothing to defray costs, although a few years later Congress did appropriate funds to pay militia members for the use of their time and goods—in effect subsidizing the purchases." He adds: "In fact, in light of the Militia Acts, **the individual mandate to purchase goods or services to protect oneself and one's neighbors can readily be described as "deeply rooted in the history and traditions of the United States**. . . . The debate needs to be altered to accommodate this history." (After appearing on Health Reform Watch, Latino's piece was cross-posted on *The Health Care Blog* (THCB), where I found it. Hat-tip to Matthew Holt and THCB staff. I also read *Health Reform Watch*, but not as regularly as I should.)

Latino then comes to the crux of his argument: "As I continue researching the Militia Acts and the militia system, what surprises me most, and **what seems most relevant to the current populist arguments against healthcare reform in general, is how invested Americans once were in the idea of personal sacrifice**. My favorite quotation comes from James 'Left Eye' Jackson, an anti-federalist-leaning congressmen who was no friend of the Washington Administration:

"'Though it may prove burthensome to some individuals to be obliged to arm themselves, yet it would not be so considered when the advantages were justly estimated . . . . [A]s this nation is rising fast in manufactures, the arts and sciences, and from her fertile soil may expect great affluence, she ought to protect that and her liberties from within herself.'"

Unlike Latino, I am not a student of the law; nor am I a constitutional scholar. I have no idea whether the Militia Acts would hold up as a precedent in court. But I do think that **this is a wonderfully relevant piece of our cultural history. It reminds us of the responsibility that President Washington and other founders believed that we as citizens have, to "protect oneself and one's neighbors," even if that means requiring us to purchase the thing that will defend us—be it a musket, or an insurance policy**.

I would argue that leaving 32 million Americans uninsured "threatens" our economy and our society, just as surely as an attack from abroad. When many don't receive the care they need, productivity drops, resentments between the haves and the have-not's widen—and all of us are exposed to the risks associated with living in an unhealthy and divided population.

(**To be continued**: When I complete this post, I will briefly consider what constitutional experts say about the legal issues, then turn to Tanner's objections to asking all Americans to secure insurance that meets what the law describes as "minimum essential coverage" and, finally, his argument that young, healthy Americans will opt to pay the penalty rather than joining the rest of us in the insurance pool).