

## **The Mandate That Individuals Buy Health Insurance: ----Necessary and Proper or Unconstitutional Requirement?**

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### **Abstract**

Health care is the diagnosis, treatment, and prevention of disease, illness, injury, and other physical lesion or mental impairment in human beings. A health system is the organization of people, institutions, and governments that provide health care services to meet the health needs of target populations.

*Keywords: Health Insurance; Unconstitutional Requirement; diagnosis.*

### **Introduction**

Health care is the diagnosis, treatment, and prevention of disease, illness, injury, and other physical lesion or mental impairment in human beings. A health system is the organization of people, institutions, and governments that provide health care services to meet the health needs of target populations. Health systems vary from country to country. Canada, New Zealand, Germany, Japan, Norway and Sweden are some countries who have sound health care systems. In the US, the 33th President Harry Truman was the first of several presidents to call for a health system to cover all Americans, but this goal was not achieved until during Barack Obama's presidency. In March 2010, Congress passed Obama's health proposal --- Patient Protection and Affordable Care Act (PPACA) and Obama signed it into law. Regarding PPACA, different people have different opinions. It gets faithful supporters, while it also has ardent opponents (Rourke 2).

In fact, the divergence of "Obamacare," which has been debated both in Congress and in the courts, is not only concerned with political opinions, but with moral outlook as well. Given the US Constitution's brevity and vagueness, it

is open to interpretation, which again leads to divergence. The PPACA requires that people who do not have health insurance and whose income is above the poverty level purchase a policy with a certain prescribed level of coverage from a private or government source. It will cost up to 8% of the individual's monthly income and those who fail to buy it will be fined heavily (Rourke 2).

The supporters' legal basis comes from the Constitution. In Article I the Constitution states: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (USConst., art. 1, sec. 8, cl. 3). Also important is this sentence: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof" (US Const., art. 1, sec. 8, cl. 18). The supporters think Congress has the authority to make this a "proper and necessary" law. While the opponents regard this interpretation as a wrong elucidation and unreasonable requirement. For they think that the mandatory order that individuals buy something or be fined violates the interstate commerce clause and infringes on one's freedom rights (Rourke 2).

Oregon Attorney General John Kroger is a firm supporter of PPACA. He addressed a speech named "The Constitutionality of the Individual Mandate" to the Senate Judiciary Committee. His arguments and proofs are as follow:

At the very beginning, he takes Oregon as an example and makes a brief introduction of the medical care situation that states currently face. A lack of health insurance coverage will increase individual's morbidity, mortality and financial burdens. Oregon and many other states have sought various ways to cover a wider range of medical care, while many of them have failed. Besides, the health care costs are skyrocketing and beyond the states' capacity. Moreover, even as a state strives and manages to afford it, the number of individuals without insurance is still increasing. Thus, the problem won't get solved until the federal government is counted (4).

Some of the opponents of the PPACA assert that the individual coverage provision oversteps Congress's Commerce Clause power. They have logical pitfalls that they are not aware of. According to them, the Commerce Clause empowers Congress to regulate only activity but not the "inactivity." The "inactivity" means to refuse to purchase health insurance by them, because they think the interstate commerce is refusing to agree with the minimum coverage provision. In addition, they fail to distinguish what is truly national and what is truly local accurately (5).

As for Mr. John Kroger, the PPACA's minimum coverage provision is constitutional.

I. In the first place, the minimum coverage provision is crucial to the success of health care reform and the overall stability of the nation's health insurance markets (5).

The U.S. is a country where people decide voluntarily whether to purchase health insurance or not. Adverse selection may occur in a place like this. People with high health risks are more likely to enroll in insurance plans and these people will purchase insurance only when they expect to get help. Adverse

selection will cause two main problems: 1. the higher the health risk, the more you pay; 2. insurers are worried about costs being unfair to people who have low health risks (5).

Fortunately, PPACA provides solutions to them: firstly, low-risk people pay less and high-risk people pay more; secondly, decreasing the chance of people lying about their health; thirdly, certain policies are made to keep high-cost individuals out of their plans and to limit the cost of plan (6).

The United States Constitution empowers Congress to “make all laws which shall be necessary and proper” to “regulate Commerce...among the several States.”[According to the Supreme Court,] Commerce Clause power includes the authority to “regulate those activities having a substantial relation to interstate commerce, i.e. those activities that substantially affect interstate commerce.” Cases like *U.S.v. Lopez* (1995), *United States v. Morrison* (2000), and *United States v. Morrison*(2010) can prove it (6).

The minimum coverage provision is constitutional because it regulates activity that essentially affects interstate commerce and because it is an indispensable part of comprehensive management of interstate economic activity (7).

Sometimes, people do not purchase health insurance is because they could not afford it or for other reasons. But an individual’s decision may affect others’, and other people affect more in return. This is called aggregate effects. From the *Raich and Wickard* case, we know that the Supreme Court asserts that Congress has the authority to regulate these direct and aggregate effects. Besides, when the uninsured get sick, he or she is likely to seek help from health care system. However, even if they do that, approximately one third of the cost of that care is covered by the uninsured, which is still very expensive. Thus, many of the uninsured frequently delay seeking care, which increases morbidity and mortality. And the cost of treatment in an emergency room is more expensive, were they in an emergency medical condition. Furthermore, except for the direct impact listed above, there exists indirect impact, such as lost productivity due to poor health and personal bankruptcies due to health care costs and some of the limited health care resources shifting to emergency departments, rather than to preventative care. Luckily, PPACA deals with these problems and tries to find some solutions (8).

There is no doubt that the health care industry and the health care system are both economic activities in interstate commerce that belong to Congress’s Commerce Clause power to regulate. 17% of the United States economy is devoted to health care. In addition, the federal government has the tradition of participating in health care program, such as in Medicare, Medicaid and CHIP. Moreover, the core of the minimum coverage provision of PPACA is to create an affordable, accessible, and robust insurance network that all American citizens can rely on, which is real welfare of everyone. It can battle with the adverse selection, driving down average costs and dealing with pre-existing health conditions. Thus, it is a wise and reasonable choice and should be enacted as a “necessary and proper” regulation by Congress (9).

Kenneth T. Cuccinelli, II is the Attorney General of the Commonwealth of Virginia. He is an unswerving opponent of PPACA. He addressed a speech

named “The Mandate That Individuals Buy Health Insurance Unconstitutional Requirement” to the U.S. House Judiciary Committee. His general idea is that Congress oversteps its power endowed by the constitution in passing the individual mandate and penalty as part of the PPACA. His arguments and proofs are as follow (10):

First of all, the Commerce Clause gives Congress the power to regulate interstate commerce (10).

Ever after FDR’s New Deal, the interpretation of interstate commerce has been broader. Nevertheless, broader as its interpretation is, its judiciary meaning has always been focusing on economic activity. Individual’s refusing to purchase health insurance is a kind of “inactivity” and not an economic activity. Thus, the federal government does not have the power to mandate an individual to purchase health insurance. This mandate goes against the spirit of constitution’s protecting individual’s will freedom. Besides, the expansion of health care coverage makes people pay more taxes or purchase more insurance, which add to people’s burden (10).

Secondly, in the United States, the Supreme Court asserts in the *New York v. United States* (1992) that a state can seek the aid of the federal courts in resolving competing claims of state and federal power. The Constitution creates a federal government of limited powers, and the Tenth Amendment makes explicit that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Cases, such as, *Martin v. Hunter’s Lessee* (1816), *Wickard v. Filburn* (1942), *Printz v. United States* (1997), and *United States v. Morrison* (2000) all assert states’ reserved power. The medical industry makes up an important part of each state’s economy. Though the federal government has the power to regulate interstate commerce, it does not have the power to intervene intrastate economic affairs. In addition, the minimum coverage provision increases the state’s financial burden, thus infringes its rights and damages its interests (11).

Thirdly, the Constitution stipulates that the federal government has the taxing and spending power. The federal government claims that the penalty on people who refuse to purchase health insurance can be deemed as tax, so the penalty is constitutional. Nevertheless, the opponents have different opinions. They think “tax” and “penalty” are two total different concepts. In the *Department of Rev. of Mont. V. Kurth Ranch* (1994) and *La Franca* (1931) case, the Supreme Court proclaims that civil “penalties” is distinct from “taxes.” Penalty, whose aim is to prompt individuals to obey government regulations, is a punishment. While tax, aiming to strengthen government coffers, is money-collecting. By this take, the enforcement measure in the minimum coverage provision is penalty, not taxation. The taxing power argument is simply radical. Even if it could be assumed that the penalty is a tax, it would still need to pass muster under an enumerated power other than the taxing power so long as it is being used for regulation (12).

Last but not least, the *Child Labor Tax Case*, *Social Security taxes*, and the *estate tax* have the same principle which can be found in *Morrison*, that the Court has “always... rejected readings of ...the scope of federal power that would

permit Congress to exercise a police power.” They are valid excise on a voluntary activity. The taxing power argument of minimum coverage provision violates the voluntary principle and has no principled limits, and is therefore unconstitutional (13).

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