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Judges sharply challenge healthcare law

Skeptical questions from three federal judges in Atlanta suggest they may be ready to declare unconstitutional all or part of the healthcare law promoted by the Obama administration and passed last year by Congress.

By David G. Savage, Washington Bureau

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Reporting from Atlanta

If the Obama administration had any doubt that its signature healthcare law faces a severe challenge in court, it was erased soon after Chief Judge Joel Dubina opened the proceedings here.

"I can't find any case like this," Dubina said. "If we uphold this, are there any limits" on the power of the federal government?"

Judge Stanley Marcus chimed in: "I can't find any case" in the past, he said, where the courts upheld "telling a private person they are compelled to purchase a product in the open market.... Is there anything that suggests Congress can do this?"

After nearly three hours of argument Wednesday, the three-judge panel of the 11th Circuit Court of Appeals seemed prepared to declare at least part of last year's law unconstitutional.

The law's requirement that nearly everyone buy health insurance by 2014 is the question at the heart of the constitutional challenge. The argument that the mandate exceeds Congress' power initially was waved aside by many legal commentators, but it has now sharply divided the federal courts.

Three federal district judges have upheld the law and two have ruled it unconstitutional. Three cases have reached appeals courts, with a fourth appellate panel scheduled to hold a hearing in September.

The current case has gathered the most attention because it involves 26 state attorneys general — all Republicans — who jointly challenged the law. In addition, the 11th Circuit is considered among the most conservative of the federal appellate courts. If any of the appeals courts strikes down the law, the case almost certainly would land at the Supreme Court, perhaps during the election year. The 11th Circuit has been seen by legal experts as one of the more likely to rule against the administration.

The questions from the bench quickly confirmed that advance billing, as acting U.S. Solicitor Gen. Neal Katyal faced off against former Bush administration Solicitor Gen. Paul Clement. Katyal argued that healthcare was unique and unlike the purchase of other products, like vegetables in a grocery store.

"You can walk out of this courtroom and be hit by a bus," he said, and if an ill or injured person has no insurance, a hospital and the taxpayers will have to pay the costs of his emergency care.

Katyal argued that Congress could reasonably decide that because everyone will probably need medical care at some time in their lives, everyone who can afford it should pay part of the cost. And he said the courts should uphold the law under

Congress' broad power to regulate commerce in this country.

Congress could clearly require that a person who shows up at a hospital without insurance buy it on the spot, he said, and requiring the purchase in advance should not be the decisive difference.

Clement said, "In 220 years, Congress never saw fit to use this power, to compel a person to engage in commerce."

Judge Frank Hull, the third member of the appellate panel, repeatedly asked the lawyers about the possible effect of striking down the mandate while upholding the rest of the law. She said the government had exaggerated the importance of the mandate because other provisions of the new law would mean that most of the 50 million people currently without insurance would be covered after the law took effect.

Usually, when passing a complex law, Congress includes a provision known as a severability clause that says that if one part of the law is struck down, the rest can stand. The House included such a provision in its healthcare bill, but it was not included in the Senate version. And in the last-minute scramble, the House adopted the Senate's version.

Both sides agreed that the court faced an all-or-nothing decision.

Katyal called the individual mandate the cornerstone of the law's aim to regulate and reform the insurance market. The law requires insurers to take patients with preexisting conditions. That rule could not work if people could wait to buy insurance until they had a heart attack or were diagnosed with cancer, he said.

Clement also said the judges should strike down the entire law. "You can't separate out the mandate. We take the position the whole thing falls," Clement said.

In addition to the argument over the law's individual insurance mandate, the appeals court also considered a challenge by the states to the requirement that they pay more in the future for healthcare for low-income people under Medicaid. That part of the new law amounts to an unconstitutional burden foisted on them by Congress, Clement argued.

Clement said Congress gave the states "no choice" but to go along with the expansion of Medicaid. He said Florida estimated it would spend \$574 million more in 2019 because of the expanded rolls.

The Medicaid claim has not won any support from other federal judges, but Dubina said the states had "a pretty strong argument" they were being forced to pay millions of dollars more to enroll low-income residents.

Administration lawyers say the law calls for the federal government to pay 90% of the added costs of enrolling additional Medicaid patients. They also note that the Supreme Court has never struck down a law on the grounds that it forces states to do something in exchange for federal funds.

Judicial rulings on the health law have largely been along partisan lines. Dubina, from Alabama, was first appointed to the bench by President Reagan and was elevated to the appeals court by President George H.W. Bush. His daughter, Rep. Martha Roby of Alabama, is a conservative Republican who ran for office on a pledge to repeal the healthcare law.

Hull, from Georgia, was appointed by President Clinton. The third member of the panel, Marcus, from Florida, was first appointed as a district judge by Reagan, but Clinton appointed him to the appeals court.

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