

Ronald L. Trowbridge, guest columnist: Defining health-care law may determine its fate

RONALD L. TROWBRIDGE Guest columnist

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What most Americans do not know about the current legal challenges against Obamacare: The constitutional resolution depends exclusively on how the case for adjudication is written.

Texas Attorney General Greg Abbott says often that if the case is presented as a judgment about the individual mandate requiring individuals to purchase a certain private-sector product or service, “we win.” If, on the other hand, the case is presented as a matter of whether the federal government can control health care, as it does with Medicare, “we lose.”

Georgetown law professor Randy Barnett, counsel for Angel Raich in the Supreme Court’s Raich case, coined what he called “the dirty little secret of constitutional law” — whether a petitioner will find relief in federal court “depends on which accurate description a court chooses to accept.” He sums up: A “court may rule however it wishes simply by choosing how to describe the right.”

It is this court’s discretion on how to phrase the constitutional issue that makes U.S. District Judge Henry Hudson’s recent rendering so vital to the case. He refused to dismiss a Virginia lawsuit challenging the constitutionality of the federal health care law.

Note that he focused on the issue of the individual mandate, not on the matter of whether the federal government can control health care. “While this case raises a host of complex constitutional issues, all seem to distill to the single question of whether or not Congress has the power to regulate —and tax —a citizen’s decision not to participate in interstate commerce. Neither the U.S. Supreme Court nor any circuit court of appeals has squarely addressed this issue.” He who frames the argument wins the case.

Of equal critical importance, Hudson also granted the Virginia petition standing. This could have gone the other way for Virginia.

To have standing, a case must be “ripe” — that is, there must be “harm” or “imminent harm.” But the Department of Justice argued that the individual mandate will bring no possible harm until the law kicks in come 2014. No individual will be forced to buy health insurance or otherwise pay a fine until that date. Hudson ruled, however, that the case is ripe now.

But the issue of the constitutionality of the individual mandate will still be a close call, and here’s why.

In the Raich case in 2005, in which Angel Raich argued that she grew marijuana in her own back yard for personal medical use only, the Supreme Court nonetheless ruled that her action violated the Commerce Clause. Even the usually conservative Justice Antonin Scalia sided against Raich, concurring with the majority that Raich’s personal noneconomic, noncommercial activities, “taken in the aggregate, substantially affect interstate commerce.”

In other words, if Raich grows pot and thousands of others do the same thing, eventually in the aggregate pot has the potential to become involved in interstate economic activity.

Will the individual mandate of health insurance fall within the aggregate of interstate commerce?


Randy Barnett believes that the constitutional battle over health care will likely center on the Necessary and Proper Clause in Article I, Section 8 of the Constitution, which reads: Congress has the authority “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.”

No one can predict with certainty how the constitutionality of the health care law will be resolved. But Hudson’s focus on the individual mandate and his granting of standing is the best of all possible starts for finding the individual mandate unconstitutional. And as the new law has no severability clause, if any part of the law is found unconstitutional, the whole bill goes down.

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