Wednesday, August 17, 2011

Health care law should be upheld

Erwin Chemerinsky is dean of and distinguished professor of law at of UC Irvine, School of Law.

The decision last Friday by the 11th U.S. Circuit Court of Appeals to declare unconstitutional the individual mandate in the federal Affordable Health Care Law makes it inevitable that the U.S. Supreme Court will decide the issue in its coming term. In a 207 page opinion with an 88 page dissent, the 11th Circuit held that Congress lacked the constitutional authority to require that individuals either purchase health insurance or pay a tax penalty. *State of Florida ex rel. Atty. Gen. v. U.S. Department of Health and Human Services*, 2011 WL 3519178 (11th Cir. Aug. 12, 2011).

About six weeks ago, the 6th U.S. Circuit Court of Appeals came to the opposite conclusion, and in a 2-1 decision upheld the individual mandate in the federal health care law. *Thomas More Law Center v. Obama*, 2011 WL 2556039 (6th Cir. June 29, 2011). A petition for certiorari already has been filed in this case and the split among the circuits would seem to ensure that the Supreme Court will hear and decide the case.

The split among the lower courts leads to the inference that this is a close constitutional question and that the Supreme Court, like the lower courts, is likely to be closely divided along ideological grounds. To this point, four federal district court judges have upheld the law and three have struck it down, with one circuit now on each side. With one exception, all Democratic appointees have voted to upheld the law (11th Circuit Judge Frank Hull was appointed by President Bill Clinton and voted on Friday to strike it down). Likewise, with one exception, all Republican appointees have voted to strike the law down (6th Circuit Judge Jeffrey Sutton was appointed by President George W. Bush and voted in June to uphold the law.)

Why believe that the Supreme Court will be any different than the lower courts and not see the health care bill through a partisan political lens? The conventional wisdom, not surprisingly, is that the Court will decide 5-4 with, as is now so often the case, Justice Anthony M. Kennedy casting the deciding vote.

The problem with this prediction is that it looks at the issue entirely in terms of ideology and not as a matter of constitutional law. From that perspective, the vote on the Supreme Court should not be nearly so close. Under the law followed since 1937, the individual mandate in the federal health care law is clearly constitutional.

First, the individual mandate is constitutional under Congress' power, pursuant to Article I, Section 8 of the Constitution to regulate commerce among the states. Since 1995, the Supreme Court has used a three-part test for determining whether a federal law is constitutional under the commerce power. Under the third prong of this test, Congress may regulate economic activity which taken cumulatively across the country has a substantial effect on interstate commerce.

The split among the lower courts leads to the

inference that this is a close constitutional question and that the Supreme Court, like the lower courts, is likely to be closely divided along ideological grounds.

There are thus two questions in assessing whether the individual mandate is within the scope of the commerce power. First, is Congress regulating economic activity? Second, if so, looked at in the aggregate, is there a substantial effect on interstate commerce?

It is the former that opponents of the law, including the 11th Circuit on Friday, have focused on. They argue that it is unprecedented for Congress to require an economic transaction and that if Congress can require purchasing of health insurance, there is no stopping point in terms of what Congress can force people to buy.

The key flaw in this argument is its failure to recognize that literally everyone will at some point need to use the health care system. Children must be vaccinated to attend school. If a person contracts a communicable disease, the government can require that it be treated. If a person is in a car accident, the ambulance will take him or her to the nearest emergency room for treatment.

Therefore, everyone faces an economic choice: whether to purchase health insurance or to self-insure. Either is economic activity. Congress is regulating this economic choice by imposing a penalty on those who choose to self-insure in order to create a system where all can have access to the health care system. Opponents of the health care law say that if it is upheld, then the government can force people to buy an American car or to eat broccoli. But a person can opt not to drive or not to eat vegetables; no one realistically can opt out of health care.

The second question then becomes whether taken cumulatively, the law has a substantial effect on interstate commerce. Health related spending was $2.5 trillion in 2009, or 17.6 percent of the national economy. In the last case to deal with the scope of Congress' Commerce Clause power, *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court held that Congress constitutionally could criminally prohibit and punish cultivation and possession of a small amount of marijuana for personal medicinal use. If Congress has the power to prevent Angela Raich from growing a small amount of marijuana to offset the ill effects of chemotherapy, then surely it has the authority to regulate a two trillion dollar industry. Moreover, *Gonzales v. Raich* reaffirmed that Congress need only have a rational basis for believing that it is regulating economic activity, which has a substantial effect on interstate commerce, and certainly at least that exists here.

Although the discussions and decisions about the constitutionality of health care have focused primarily on the Commerce Clause, there is an alternative basis for upholding the law: Congress' broad power to tax and spend for the general welfare.

Those who do not obtain health insurance must pay a penalty, calculated as a percentage of income and administered through the tax collection system. The penalty applies only to those who have income exceeding an amount specified by statute and is calculated solely based on this income. In 2016, for example, the payment by a taxpayer who does not obtain coverage will never be greater than either 2.5 percent of the taxpayer's household income above the income tax filing or a flat dollar amount ranging from $695 to $2085, depending on family size.

Simply put, the federal health care law imposes a tax on those who do not purchase insurance to generate revenue that the federal government can use to address the significant cost of providing health care for taxpayers without adequate insurance. The only objection is that the law does not specifically use the word "tax." But as the Supreme Court often has recognized, labels do not determine constitutionality. Whether the law uses the word "tax" is irrelevant in assessing whether this is an action, which fits within the scope of Congress' very broad power to tax and spend for the general welfare. Besides, the legislative history is clear that members of Congress on both sides of the political aisle saw this as a tax and used the words "tax" and "penalty" interchangeably.

Thus, the health care law should be upheld as a valid exercise of congressional power under either the commerce power or the taxing and spending power. If this

issue had not become so intensely partisan, it would be easy to predict the result in the Supreme Court.