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Years of Wrangling Lie Ahead for Health Care Law

By KEVIN SACK

By contradicting two prior opinions, Monday's court ruling in Virginia against the Obama health care law highlighted both the novelty of the constitutional issues and the difficulty of forging consensus among judges who bring differences in experience, philosophy and partisan background to the bench.

Judge Henry E. Hudson of Federal District Court in Richmond wrote with conviction that the law's requirement that most Americans obtain insurance goes "beyond the historical reach" of Supreme Court cases that limit federal regulation of commercial activity. During the last two months, however, two other federal judges ruled with equal force that the provision fell squarely within the authority Congress was granted under the Commerce Clause of the Constitution.

Ultimately, the Supreme Court will have to resolve the conflict, and many court watchers already expect a characteristically close decision. But what is now clear is that the challenges from dozens of states to the law's constitutionality can no longer be dismissed as frivolous, as they were earlier this year by some scholars and Democratic partisans.

"All the insiders thought it was a slam dunk," said Randy E. Barnett, a professor of constitutional law at Georgetown University who supports the health care challenges. "Maybe a slam dunk like weapons of mass destruction were a slam dunk."

The Supreme Court's position on the Commerce Clause has evolved through four signature cases over the last 68 years, three of which have been decided since 1995. Two of the opinions — Wickard v. Filburn in 1942 and Gonzales v. Raich in 2005 — established broad federal powers

to regulate even personal commercial decisions that, taken in the aggregate, may influence a larger economic outcome.

But two other cases — United States v. Lopez in 1995 and United States v. Morrison in 2000 — limited Congress's regulatory authority to "activities that substantially affect interstate commerce."

The central question before the courts has not been whether the health care market substantially affects interstate commerce, a point largely accepted by all sides. Rather, the issue has been a semantic one: determining whether the act of not obtaining insurance is best defined as activity or, as Virginia's solicitor general, E. Duncan Getchell Jr., has argued in the Richmond case, "inactivity" that is beyond Congress's reach.

Mr. Getchell, who argued the case for Virginia's attorney general, Kenneth T. Cuccinelli II, told Judge Hudson during an October hearing that if Congress could require the purchase of health insurance, there would effectively be no limits on federal power.

Justice Department lawyers have responded that individuals cannot opt out of the medical market because they never know when they might be hit by a bus and require treatment. The act of not obtaining insurance, they contend, is thus an active decision to pay for health care out of pocket. Such individual decisions, when taken together, can shift billions of dollars in uncompensated care costs to governments, hospitals and the privately insured, and thus can be regulated.

Judge Hudson, who was appointed by President George W. Bush, commented during the October hearing that the federal government's position would give Congress "boundless" authority to force Americans "to buy an automobile, to join a gym, to eat asparagus."

On Monday, he formalized that view. "This broad definition of the economic activity subject to Congressional regulation lacks logical limitation and is unsupported by Commerce Clause jurisprudence," he wrote.

Only two weeks earlier, Judge Norman K. Moon of Federal District Court in nearby Lynchburg, Va., found precisely the opposite. "Far from 'inactivity,' " wrote Judge Moon, who was appointed by President Bill Clinton, "by choosing to forgo insurance, plaintiffs are making an

economic decision to try to pay for health care services later, out of pocket, rather than now, through the purchase of insurance." A second Clinton-appointed judge has upheld the law as well.

Judge Hudson also rejected the federal government's secondary claim that it had authority to enact the insurance requirement under Congress's power to tax. That is because once the provision takes effect in 2014, the fine for not having insurance will be levied as an income tax penalty.

That claim put Justice Department lawyers in the awkward spot of insisting that the provision constituted a tax, even though President Obama and other Democratic leaders adamantly denied during the legislative debate that they were raising taxes. Judge Hudson gave weight to those denials, and to the final bill's use of the word "penalty" to describe the fines, a change from earlier versions.

Jack M. Balkin, a law professor at Yale who supports the act's constitutionality, noted that "there are judges of different ideological views throughout the federal judiciary" and said that the health care plaintiffs had helped their cause by filing lawsuits in conservative venues.

Judge Hudson seemed content with the knowledge that his opinion would be one of many. "The final word," he wrote, "will undoubtedly reside with a higher court."