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Fate of health-care law likely to be decided by Supreme Court

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Perhaps the only issue on which opponents and supporters of the health-care law can agree is that its fate will probably be decided by the Supreme Court.

The two-dozen cases wending their way through the court system contest the law on a number of issues, but most center on whether Congress has the power to require virtually all Americans to obtain health insurance. The issue comes before a court evenly divided between liberals and conservatives, with moderate conservative Justice Anthony M. Kennedy often holding the deciding vote.

So how might the justices rule? Both sides can point to precedents that bolster and hurt their chances on two key questions.

The first is whether Congress has the authority to impose the individual mandate through its constitutional power to regulate commerce. The law's opponents argue that the Constitution's commerce clause applies only to economic activity and that the failure to buy insurance is a form of inactivity. They also contend that there is no legal precedent for empowering Congress to force Americans to buy a product on a private market.

The administration counters that because virtually everyone will need health care at some point in his or her life, a person's decision not to buy insurance is actually a decision about how to pay for that eventual care. In other words, you can pay for your care now (through health insurance premiums), or you can pay for it later when you get sick, either out of your own pocket or with help from, say, the government or a hospital that covers the cost of care for the uninsured. Either way, you are making an economic decision that has an aggregate impact on commerce that Congress has the power to regulate.

Previous Supreme Court decisions lend some support to the administration's line of reasoning. In a 1942 case, the court ruled that the government could force an Idaho farmer who was growing wheat for his

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personal use to destroy it because it exceeded production quotas that had been instituted to keep wheat prices from falling too low.

In 2005, the court determined - in an opinion that included Kennedy and four traditionally liberal justices - that the commerce cause empowered Congress to prohibit a person from growing marijuana for medical use in compliance with California state law because it affected the market for illegal marijuana that the federal government was seeking to shut down.

But Georgetown University law Professor Randy E. Barnett, who represented the losing side in the case, said: "Nobody commanded them to grow marijuana. So this case does not answer the question of whether Congress can mandate economic activity. There are simply no cases that address this, and therefore you can't answer that question by looking at what the justices have said in the past because they've never been asked."

Instead, he said, it makes sense to look to the reluctance of conservative justices to expand the government's powers under the commerce clause in other recent cases, such as a 1995 one in which Congress had sought to regulate handguns in schools and a 2000 decision involving the Violence Against Women Act.

Meanwhile, even in the medical marijuana case, the only consistently conservative judge who concurred with the ruling - Antonin Scalia - did not agree that the commerce clause applied. Rather, Scalia argued that the deciding factor was Congress's constitutional authority to enact laws "necessary and proper" to the execution of its enumerated powers.

This is a second major argument on which the administration is mounting its defense: Even without its commerce clause authority, government lawyers argue, Congress has a right to impose the individual mandate under this necessary and proper clause.

In addition to Scalia's reasoning in the marijuana case, supporters of the law take comfort in the court's ruling this year in *United States v. Comstock*, concerning Congress's authority to keep certain sexually dangerous mentally ill people in prison

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beyond their sentences. Conservative Chief Justice John G. Roberts Jr. joined the four liberals on the court in a majority opinion that "suggests a pretty loose standard" through which Congress can exercise powers under the necessary and proper clause, said Wake Forest University law Professor Mark Hall.

Kennedy and Samuel A. Alito Jr., another conservative, each issued concurring opinions that, although calling for a stricter standard, could still be helpful to the government's case in the health-care lawsuits, Hall said. Only Scalia and fellow conservative Clarence Thomas dissented.

Here again, however, legal scholars differ. "*Comstock*!" scoffed Barnett. "Comstock has a ton of escape doors for any justice who doesn't want to be bound by it."