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Judges Ponder "Privatized Social Safety Net" in Health Care Law Arguments

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Just down the street from the U.S. Capitol where the **health care** overhaul was written, three appeals court **judges** on Friday probed whether the landmark measure signals a new direction in social policy and if it's up to courts to "get in the middle" of that movement, as **Judge** Brett Kavanaugh, a Republican appointee, put it.

"This could be the blueprint for a **privatized social safety net,**" mused Kavanaugh, whose comments were somewhat surprising given that he is a former aide in the President George W. Bush administration and a member of the conservative Federalist Society.

He placed the **health care law** (PL 111-148, PL 11-152) in the context of a historical policy progression beginning with the New Deal era of the 1930s and continuing with the Great Society of the 1960s.

It is a "delicate act to declare an action of Congress unconstitutional," Kavanaugh -- who dominated the appeals court session -- also said. But he sent no firm signals on whether he would support doing that.

The hour and 55 minutes of oral **arguments** came in a challenge to the **law** in the U.S. Court of Appeals for the District of Columbia. It was filed by four individuals who are supported by a conservative religious legal group, the American Center for **Law** and Justice. Their suit was dismissed Feb. 22 by District **Judge** Gladys Kessler, who ruled that the **law** was constitutional. They appealed.

This particular challenge to the **law,** which goes fully into effect in 2014, comes like a caboose on a train of appeals court hearings and decisions during the past few months in connection with the **health care law.** It was the fourth appeals court to hear a suit on the merits of the **law.** And it's unclear whether this challenge will make it to the Supreme Court in time to be considered with those from other appeals courts; one already is there, though justices haven't yet said whether they will hear it.

Appeals **judges** have split. So far, the 11th Circuit appeals court has declared the individual mandate in the **law** unconstitutional but let the **law** stand. The 6th Circuit appeals court has upheld the **law.** In the 4th Circuit, in Richmond, the appeals court threw out two cases, one because it determined that the commonwealth of Virginia did not have the legal right to sue and the second due to a federal **law** that bars courts from hearing cases on taxes before they are collected.

Arguments Friday did examine whether the **law's** fee for people who don't get insurance is a tax or a penalty. And **judges** also appeared to be taking seriously the possibility that they might not even have jurisdiction over the **law** after a suit filed by Liberty University was thrown out earlier this month in the 4th Circuit appeals court in Richmond.

Kavanaugh said he had a "major concern" that the tax **law** might prevent the case from being heard on its merits until 2015, when the penalty will begin to be collected on tax forms of individuals who don't have health insurance.

But Kavanaugh and two senior federal **judges,** Laurence Silberman and Harry Edwards, again and again returned to the policy issue that lies at the basis of the **law:** the requirement that individuals have health insurance. Silberman was appointed by President Ronald Reagan, and Edwards -- who appeared friendly to the **law,** telling a lawyer for the plaintiffs at one point that "your **argument** is not making sense" -- was appointed by President Jimmy Carter.

The government argues that the mandate is necessary because **health care** poses a unique form of commerce. It says the requirement is necessary to make the market stable or there won't be enough healthy people in the risk pool. "You can't buy insurance on your way to the hospital," said Beth Brinkmann, deputy assistant attorney general, who argued the case on behalf of the Justice Department.

Earlier cases on the appeals level were argued by acting solicitor general Neal Kumar Katyal, who has since left the government to return to private practice.

Kavanaugh sparred with Brinkmann on whether a next step in regulation of economic activity might be to force Americans to save more for retirement in the interests of preserving the Social Security and Medicare systems. She said it would depend upon the "empirical evidence of the effects on interstate commerce." Kavanaugh said that if the **argument** on behalf of the **health care law** is accepted he could see little difference.

Silberman told Brinkmann that the government's "most difficult problem" is the limiting principle, or how it confines the individual mandate to regulation of **health care** and not expand that power further to other products.

Edward L. White III, the lawyer arguing for the plaintiffs, said Congress always has used incentives rather than inducements to produce desired behavior, from the purchase of bonds to support the war effort during World War II to the "cash for clunkers" program in 2009 to help bail out the ailing auto industry.

Kavanaugh pointed out that the individual mandate was part of a larger scheme, since it was tied to guaranteed issue -- a requirement in the **law** that people be allowed to enroll regardless of pre-existing conditions -- and community rating, which means the same premiums are assessed regardless of health condition. Those policies "won't work without the individual mandate attached," he said. "We know that from the states that tried it."

White said that Congress created a situation in which people are compelled to participate against their will and said one of the plaintiffs, Charles Edward Lee, is an example because he believes in faith healing.

He compared the individual mandate to always have insurance to checking into a hotel "you can never leave." Congress can't "force people into private commerce and to buy a product from a private company for the rest of their lives," said White.

But Kavanaugh wondered how the court should go about making a decision when there aren't direct precedents in the **law** for a "novel execution of congressional power."

At the conclusion of the **arguments** he thanked both sides for "excellent **arguments** and an extremely challenging set of issues," and also thanked the supporters and opponents of the **law** who filed amicus briefs in the case, which included AARP, the American Nurses Association, the Cato Institute, Chamber of Commerce, and more.