THE DAILY CALLER

Reporter's Notebook: Obamacare's first day at the Supreme Court: The calm before the storm

By Ilya Shapiro
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On an argument day that can best be described as the calm before the storm, the Supreme Court gave every indication that it would indeed have to decide the constitutionality of Obamacare's centerpiece, the individual mandate.
But before reaching the issue of whether the federal government can constitutionally require people to buy health insurance, the Court must grapple with whether such a claim can even be heard in light of an obscure statute called the federal tax Anti-Injunction Act (AIA).

The AIA, first enacted in 1867 to facilitate tax-collection and protect courts from dubious tax protesters, bars lawsuits seeking to enjoin "any tax" before that tax is assessed or collected. One would think that such a law would have no application to the Obamacare litigation because there are no taxes at issue: the individual mandate is a command to do something and the penalty enforcing it is a punishment for not complying with that command.

Accordingly, all but one of the courts to take up the issue have found the AIA to be inapplicable. Indeed, the Atlanta-based U.S. Court of Appeals for the Eleventh Circuit, whose ruling is the one before the Supreme Court, didn't even consider it.

Moreover, the government itself has long conceded that the AIA is inapplicable here. Still, out of an abundance of caution, and because the AIA may be a jurisdictional bar that the government cannot waive — itself a preliminary issue to this preliminary issue — the Supreme Court appointed an amicus curiae ("friend of the court") to argue for the position that the AIA bars these suits.

Alas, the justices weren't all that friendly to their appointed amicus, Robert A. Long, repeatedly expressing skepticism at his claim that the individual mandate (or at least its penalty) was the sort of "tax" contemplated by the AIA. **(RELATED: Full coverage of the health care law)**
"Congress has nowhere used the word 'tax,'" Justice Stephen Breyer asserted, adding that "this is not in the Internal Revenue Code 'but for purposes of collection [a requirement for AIA application].' And so why is this a tax?"

"The Tax Injunction Act [a statute modeled on the AIA] does not apply to penalties that are designed to induce compliance with the law, rather than to raise revenue," observed Justice Ruth Bader Ginsburg. "And this is not a revenue-raising measure because, if it's successful … nobody will pay the penalty, and there will be no revenue to raise."

The AIA "does very clearly make a difference … between tax and penalties," said Justice Sonia Sotomayor. "It's very explicit."

Breyer then remarked that all of the legal precedent where the AIA barred suits against "penalties" involved penalties that were defined as taxes or that were used to enforce substantive tax provisions. (For more on this point, whether Breyer was thinking of it or not, see Cato's AIA amicus brief.)
Interestingly, this anti-AIA skepticism bled into skepticism about the government's fallback constitutional argument — backing up its more familiar one regarding the mandate being

“necessary and proper” to a lawful regulation of interstate commerce — that the individual mandate was justified under the Constitution’s taxing power.

“[Solicitor] General [Donald] Verrilli, today you are arguing that the penalty is not a tax,” began Justice Samuel Alito. “Tomorrow you are going to be back and you will be arguing that the penalty is a tax,” provoking a rare laugh in a rather muted and technical hearing.

While constitutional tax analysis is a different animal than the statutory application of the AIA — as recognized even by the one lower court that held the AIA to bar suit — Verrilli (the government’s lawyer) admitted that the Supreme Court had never found something to be a tax under the taxing power that was not a tax for AIA purposes.

Justice Elena Kagan asked whether not buying insurance would constitute breaking the law even if people paid the “penalty,” Verrilli repeated twice that if people “pay the tax” (emphasis his), they would not be lawbreakers.

“Why do you keep saying tax?” Breyer interjected.

Despite the Court’s having spent much of today discussing the hyper-technical issue of whether the AIA is “jurisdictional” — “don’t you want to know the answer?” Justice Kennedy joked when Verrilli advised the Court that it could avoid ruling on this point — it quickly became clear that the justices would set aside their legalistic doubts enough to entertain the heart of the matter presented.

In other words, it would be quite surprising based on the argument we heard if the Court does not get past this AIA appetizer to the constitutional entrées yet to come. Perhaps the only surprising aspect of the hearing was that we saw a relatively “cold” bench.

Given a group of justices known for record-setting rapid-fire questioning, it was somewhat disquieting to see advocates actually being able to complete their thoughts and elaborate their arguments!

Perhaps the Court is as anxious to get to tomorrow’s main event as the rest of us.

Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review, is covering this week’s arguments for The Daily Caller. He filed briefs on each of the four issues before the Supreme Court in the Obamacare litigation, including the Anti-Injunction Act.