THE DAILY CALLER

Reporter's Notebook: Obamacare's second day at the court features brilliant advocacy, cautious optimism

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By Ilya Shapiro

Tuesday's Supreme Court oral arguments, which focused on the individual health insurance mandate, began with pomp and ended with circumstantial evidence that the individual mandate is in constitutional jeopardy.

I won't recap every nuance of the argument, but here's a flavor of it and why I left the courtroom cautiously optimistic.

Even getting into the courtroom was a much harder ticket than it was the first day of arguments — at least for the savvy members of the Supreme Court bar, for whom there's a separate line (which I have been using, thanks to the generous line-standing of Cato and Daily Caller interns).

Once in there, the room quickly filled with senators — I noted a quorum of the judiciary committee — congressmen, public officials (including Health & Human Services Secretary Kathleen Sebelius) and assorted other legal luminaries.

It was a veritable Washington who's who. The politicians preened for the press, the press craned their necks to note the attendees for their coverage, and we bar members, even those of us who frequent the court, took in the spectacle. Something was different today: To paraphrase Joe Biden, this case was a big deal, and everyone knew it.

Solicitor General Donald Verrilli did not start well, enduring a nervous, awkward opening and then a barrage of questions picking apart the government's position that it could require people to buy health insurance because everyone is already in the health care market, and because uncompensated care shifts costs onto taxpayers:

JUSTICE SCALIA: Why aren't those problems that the Federal Government can address directly?
…
JUSTICE KENNEDY: Can you create commerce in order to regulate it?
…
CHIEF JUSTICE ROBERTS: So, can the government require you to buy a cell phone

because that would facilitate responding when you need emergency services?
…
JUSTICE ALITO: Do you think there is a market for burial services? … Suppose that you and I walked around downtown Washington at lunch hour and we found a couple of healthy young people and we stopped them and we said: You know what you're doing? You are financing your burial services right now because eventually you're going to die, and somebody is going to have to pay for it, and if you don't have burial insurance and you haven't saved money for it, you're going to shift the cost to somebody else. Isn't that a very artificial way of talking about what somebody is doing?

By this point the government's head appellate advocate was on his heels, dodging increasingly skeptical queries, until Justice Kennedy delivered what in poker would be seen as the key "tell":

JUSTICE KENNEDY: I understand that we must presume laws are constitutional, but, even so, when you are changing the relation of the individual to the government in this, what we can stipulate is, I think, a unique way, do you not have a heavy burden of justification to show authorization under the Constitution?

Although you can't hear it on the audio recording, the audience gasped.

Kennedy was supposed to be the swing vote — particularly given the criticism from Roberts, Scalia, and Alito — and here he was putting the burden on the government to describe the justification for a sweeping new power.

Moreover, Justice Scalia — whom many thought was in play in light of his concurring opinion in Raich v. Gonzalez, the 2005 medicinal marijuana case ratifying an expansive use of federal power under the Necessary and Proper Clause — was now firmly off the table. Among other lines of questioning, it was Scalia who raised the now-clichéd broccoli mandate and that, with respect to any law executing an enumerated power, "in addition to being necessary, it has to be proper."

I watched Scalia closely throughout Verrilli's argument: The constant scowling, grimacing, and just plain astonishment was striking.

The chief justice also turned out to disappoint those who thought his concurrence in United States v. Comstock — the last big Necessary and Proper Clause case, albeit not one involving commercial regulation — indicated an openness to uphold the mandate:

CHIEF JUSTICE ROBERTS: But once we say that there is a market and … as you would say, that people are already participating in it, it seems to me that we can't say there are limitations on what Congress can do under its commerce power, just like in any other area — given significant deference that we accord to Congress in this area, all bets are off, and you could regulate that market in any rational way.

Justice Alito was no better for the pro-Obamacare side, repeatedly asking the solicitor general to "express a limiting principle" to his operative legal theory. Here's the answer he ultimately got:

GENERAL VERRILLI: First, with respect to the comprehensive scheme. When Congress is regulating — is enacting a comprehensive scheme that it has the authority to enact that the Necessary and Proper Clause gives it the authority to include regulation, including a regulation of this kind, if it is necessary to counteract risks attributable to the scheme itself that people engage in economic activity that would undercut the scheme. It's like — it's very much like Wickard [the 1942 wheat-farming case that defined the outermost limits of federal power under modern Commerce Clause jurisprudence] in that respect. Very much like Raich in that respect. … Considering the Commerce Clause alone and not embedded in the comprehensive scheme, our position is that Congress can regulate the method of payment by imposing an insurance requirement in advance of the time in which the — the service is consumed when the class to which that requirement applies either is or virtually most certain to be in that market when the timing of one's entry into that market and what you will need when you enter that market is uncertain and when — when you will get the care in that market, whether you can afford to pay for it or not and shift costs to other market participants.

I still don't know what that all that means, other than that it seems to be a definition of health insurance that begs the question of why that's a principled — as opposed to factual — distinction. As Scalia put it, "it's a basis that explains why the government is doing this, but is it … a basis which shows that this is not going beyond what … the system of enumerated powers allows the government to do."

In any event, Paul Clement was masterful — perhaps the best-ever argument by the nation's best Supreme Court lawyer — and Mike Carvin was his typical hard-charging self. The states' and private plaintiffs' attorneys, respectively, thus showed again and again the unprecedented and limitless nature of the government's assertion of federal power.

They took some heat, to be sure, from the four liberal justices, along with requests from Roberts to address some of the government's points more directly, but nothing like what Verrilli faced.

The solicitor general simply failed to articulate the limiting principle to the government's theory that at least four justices (and presumably the silent Justice Thomas) were seeking. This failure is shocking, because it was the "gotcha" question that any first-year law student would have known to expect.

That's why news outlets, most notably CNN's Jeffrey Toobin, were all saying the individual mandate was in trouble. While we should never read too much into oral arguments, the odds now remarkably favor a decision striking down Obamacare's key component.

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 individual mandate.