mySA
San Antonio's Home Page

Justices clear taxing matter in health care reform

By Dan Freedman
Updated 12:04 a.m., Tuesday, March 27, 2012

WASHINGTON — The Supreme Court's examination of the health care law will focus next on the hard constitutional questions after a lead-off day spent on whether an obscure 1867 tax law delays a decision until 2015.

For the most part, the justices appeared content to cite several past Supreme Court precedents that provided exceptions to the 1867 law and leave it at that.

Justice Antonin Scalia, the court's longtime conservative champion, said that in cases when such issues are not clear, "courts are not deprived of jurisdiction," meaning the 1867 tax law should not short-circuit a ruling on health care.

"I find it hard to think that this is clear," Scalia said. "Whatever else it is, it's easy to think that it's not clear."

Today, the second day of a three-day oral argument marathon, the justices look at the guts of the dispute over the Affordable Care Act: Did Congress overstep constitutional limits when mandating that everyone (with few exceptions) have health insurance? The Constitution grants Congress the power to regulate interstate commerce, as well as pass taxing-and-spending provisions.

The Obama administration's top lawyer before the Supreme Court, Solicitor General Donald Verrilli, will argue the mandate easily falls within the Constitution's limits because health care for those who lack health insurance ultimately is paid for by taxpayers in general and those that do have health insurance.

Hospitals recoup losses for uncompensated care through a government funding mechanism and by charging higher rates to insurance companies, which in turn pass them on to policyholders nationwide.

Paul Clement, solicitor general under President George W. Bush who represents 26 states, including Texas, in a lawsuit against the health care law, will counter that never before has the government regulated "inactivity" — a decision not to buy health insurance, in this case.

One district court judge in Florida who struck the law down wrote that if the government can force individuals to purchase health insurance, it can dictate that they buy and consume broccoli.

The justices Monday appeared so disinterested in the tax question that they had time left over for the question they'll take up on Day 3, whether the health care law's expansion of Medicaid to help the uninsured amounts to unconstitutional coercion of the states. Ilya Shapiro, an opponent of the law at the Cato Institute here, described Monday's argument as “the calm before the storm.”

The justices “seem ready, willing, and able to reach the merit of the commerce clause claim,” said Randy Barnett, a Georgetown University law professor who represents the National Federation of Independent Businesses, which also is contesting the health care law.

Monday was “a preliminary matter,” said Texas Attorney General Greg Abbott, who is in court for all three days of arguments. “It really tees up the real issue for (Tuesday), which is the individual mandate ... the issue we've been wanting to raise all along.”

Abbott said he was confident the justices would rule on the main constitutional issues and not get sidetracked.

The 1867 law at issue Monday bars lawsuits against taxes until they are actually levied. The health care law's mandate says that individuals who do not have health insurance must pay what the law terms a penalty.

Since the penalty is administered by the Internal Revenue Service as part of the tax code, it operates as a tax and is therefore subject to the 1867 law, said Washington lawyer Robert Long.

Since neither the Obama administration nor the 26 states contesting the law want to see the high court's decision delayed, the justices took the extraordinary step of hiring Long to argue the case.

Two separate federal appeals courts ruled the Anti-Injunction Act does not apply, but a third appeals court in Richmond, Va., said it does.
On Monday, most of the justices appeared eager to find a way around the tax-law roadblock.

“Congress has nowhere used the word ‘tax’” in the law's section on the health insurance mandate, said Justice Stephen Breyer. “What it says is ‘penalty.' So why is this a tax?” Later, when Verrilli said people who pay the tax instead of buying health insurance are complying with the law, Breyer interrupted: “Why do you keep saying it's a tax?” Verrilli quickly corrected himself.

“If they pay the tax penalty, they're in compliance with the law,” he said.

Justice Samuel Alito, who is regarded as likely to rule the health care law unconstitutional, chided Verrilli for trying to have it both ways on whether failure to buy health insurance results in a tax or a penalty.

“Today you are arguing that the penalty is not a tax,” Alito said. “Tomorrow you are going to be back and you will be arguing that the penalty is a tax.”
Verrilli responded that the focus Monday was on reconciling the exact words of the two laws in question.