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High court's open-minded GOP appointees may give health care a chance

Democratic appointees on board with Obama

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A curious thing about this week's Supreme Court hearings on President Obama's health care law is that while nobody doubts how the four Democrat-appointed justices will decide, there is no such certainty on how the Republican appointees will rule in the case, which will go a long way toward defining the scope and limits of government power in the 21st century.

For the past 70 years, liberal-minded justices have taken more uniform views of how far federal power extends while the lines are much more jumbled when it comes to conservative jurisprudence, court watchers say.

Virtually everyone agrees that the four Democrat-appointed justices will move to uphold the law. Few doubt that Justices Sonya Sotomayor and Elena Kagan, appointed by Mr. Obama, will join Justices Ruth Bader Ginsburg and Stephen G. Breyer, appointed by President Clinton, in upholding as constitutional the mandate that individuals obtain medical insurance and the massive Medicaid expansion.

But among the five other justices, conservative stalwart Clarence Thomas is the only one viewed as a sure vote against the mandate and possibly other parts of the law.

So court watchers are left scratching their heads over Justices Anthony M. Kennedy, Antonin Scalia, Samuel Anthony Alito Jr. and Chief Justice John G. Roberts Jr. While these four are generally regarded as conservatives, conservative jurisprudence isn't as ideologically predictable on the issues the case raises.

"There's two types of conservatives," said Russell Wheeler, a court scholar at the Brookings Institution. "There's the judicial restraint school that says unless the bill is outlandish, we're not going to second-guess Congress. And there's this other view that says the court should be an active examiner of what Congress did because Congress will overstep its boundaries."

Era of deference

At issue in the health care case is whether the Constitution's grant to Congress of the power to regulate interstate commerce covers what Mr. Obama and his Democratic allies wrote in the Affordable Care Act.

The original language of the Constitution does not seem to grant Congress such an expansive power - a point raised by one of the appeals court judges, who, nevertheless, upheld the law, saying the Supreme Court itself had expanded the document's purview that far.

The key break came in 1942, in Wickard v. Filburn, where the court said Congress can ban wheat production even if it is grown for private consumption. The court reasoned that someone producing for his own supply was withdrawing himself from the commercial trade of wheat and thereby affected the market. Thus a decision not to engage in commerce was "commerce."

Conservatives generally made their peace with the decision in the decades that followed, accepting a much more active federal government that grew dramatically in scope through the 1950s and 1960s. By the 1980s, conservatives deferred to Congress, complaining that justices were being too activist and legislating from the bench.

"The default conservative position after the '60s and '70s was that judges should be more restrained and defer more to the popular, political branches," said Ilya Shapiro, senior fellow at the Cato Institute.

Narrowing commerce clause

But now, as conservatives call on the court to overturn Mr. Obama's signature domestic achievement, they want the court not to defer to the popular branches.

The push is being led by a new type of conservative that has emerged in recent years, scholars say. These conservatives emphasize what the Founding Fathers intended when they wrote the Constitution and want the court to interpret the commerce clause as it did before 1942.

Take Justice Scalia and Justice Kennedy.

They have left behind a trail of rulings that generally indicate more restrictive views of Congress' authority to regulate commerce, both agreeing with U.S. v. Lopez in 1995 and U.S. v. Morrison in 2000, in which the court limited the government's commerce clause power.

In Lopez, the court denied that the commerce clause gave Congress the power to legislate public schools as gun-free zones; in Morrison, the justices said the Violence Against Women Act was not within the scope of the clause's powers.

But in the court's last major test of the commerce clause, the 2005 case Gonzales v. Raich, Justices Kennedy and Scalia handed more muscle to the government than some conservatives would like, agreeing with the majority that growing marijuana for personal use is economic activity that Congress can regulate.

To supporters of the law, Justice Scalia's decision is a dead giveaway that he will uphold it.

"If he's honest, there's no way he can vote to strike down the Affordable Care Act," said Ian Millhiser, a policy analyst for the Center for American Progress. "There is no wriggle room in his Raich opinion."

'Necessary and proper'

But opponents point out that Justice Scalia wrote a more nuanced separate opinion. He said that because Congress has the power to ban marijuana, the Constitution's "necessary and proper" clause, which states that Congress can enact laws enabling it to carry out its constitutional duties, means it accordingly has the power to regulate intrastate commerce in marijuana.

"If Scalia and Kennedy believe the individual mandate is not constitutional and want to vote that way, there's nothing in Raich that would prevent them from doing so," said Ilya Somin, a law professor at George Mason University. "You wouldn't have to change a jot or tittle in Raich."

But both sides agree that Justice Kennedy is even more likely to uphold the law.

He didn't offer any clarification in the Raich case, instead joining the majority opinion. Even though he agreed with Lopez, he took pains to write a concurring opinion in which he stressed that the federal government has wide authority to regulate economic activity.

As the longtime swing vote on the court, Justice Kennedy once again is generally expected to serve as the pivot on which the outcome rests.

"If he votes to uphold, I could see the chief justice joining him possibly," Mr. Shapiro said. "I can't see that if Kennedy votes to strike down that, the chief justice or anyone else would go to the other side."

As legal analysts on both sides sift through pages of opinion from decades of cases, trying to guess where the justices will land and pick out tidbits of hope that the court will side with them, they have fewer clues from Chief Justice Roberts and Justice Alito, who joined the court in 2005 and 2006, respectively.

The only major signal recently comes from the 2010 case U.S. v. Comstock, in which all the justices except Justices Thomas and Scalia allowed a broader application of the "necessary and proper" clause - a likely reason why the administration is especially focusing on that particular federal power in its arguments.

The court ruled that because Congress can ban child pornography, the "necessary and proper" clause allows it to keep child pornographers off the streets longer by committing some of them beyond when they would otherwise be released.

While Justices Alito and Kennedy offered narrower rationales than the other justices for their decision, Chief Justice Roberts didn't - and could have been sending a signal, Mr. Millhiser said.

“If Roberts is going to take the opinion he did in Comstock, it is not possible for him to strike down the Affordable Care Act unless he wants to engage in pure hackery,” Mr. Millhiser said. “The law was so much further on the margins of congressional power than the Affordable Care Act.”