**For Constitution Daily**

**The Court tees up the health mandate**

**By Lyle Denniston**

Amid sure signs that the Supreme Court Justices are deeply interested in the constitutionality of the new health care law’s key sections, and definite signs that they have been studying up for the task, they moved on Monday to get beyond the preliminaries and get set for Tuesday’s crucial two-hour hearing.

In a hearing yesterday that lasted just under 90 minutes, the Court seemed unwilling to postpone by as much as three years their ultimate encounter with the mandate that would require virtually all Americans to obtain health insurance or pay a penalty. That elevated the importance of Tuesday’s review of the mandate.

The first of three days of argument on the Affordable Care Act was on the complex subject of courts’ authority even to hear the challenge. The first lawyer the Justices heard told them they had no authority to decide the issue of the mandate’s validity, because none of the challengers had a legal right to challenge it in court. From every indication, they did not seem to take that advice.

There were many questions about what the mandate is, and how it would work, but an observer could not reliably draw any conclusions about where the Justices stand – except that it was very apparent they had dug deeply into the written briefs, and knew what the arguments are.

The opening day had to do mainly with the scope of an 1867 law, the Anti-Injunction Act, that flatly bars anyone from suing in any court to try to stop the federal government from collecting tax revenues. On the theory that the mandate and its attached penalty are together a form of tax, Washington attorney Robert A. Long, Jr., told the Court at the beginning that “there is no reason to think that Congress made a special exception” from that Act for the mandate and penalty.

But it was soon evident that most of the Justices harbor deep doubts about whether those provisions are tax laws at all. If they conclude that they are not, then the 1867 law will be beside the point, and the mandate’s constitutionality will be directly at issue.

Even if they are found to be a kind of tax measure, the hearing indicated, that may still not prevent the Justices from the constitutional question. They pondered three or four different ways that courts could hear a tax case without encouraging a rash of lawsuits trying to stop the Treasury from gathering tax money. In the context of the Affordable Care Act case, that was an important development, because it added to the impression that the Court was on its way to getting beyond the procedural hurdle of the 1867 law.