

Debate over tax law marks start of health care case

Justices signal that old law is no barrier to current case

By Tracy Jan – March 26, 2012

WASHINGTON — The showdown on the future of President Obama's signature health care law opened Monday with Supreme Court justices rapidly firing questions that appeared to indicate they would allow the case to proceed despite an arcane 1867 tax law that threatened to postpone the highly anticipated court challenge until 2015.

As the debate took place inside the tightly packed courtroom, demonstrators for and against the 2010 law expanding health care coverage picketed at the base of the court steps. The fate of tens of millions of uninsured Americans and questions of states' rights and individual liberty are not all that hang in the balance; so do the political fortunes of Obama and the candidates seeking the Republican nomination.

The most pivotal debate - whether the unpopular mandate requiring individuals to purchase health insurance is constitutional - will be heard on Tuesday, the second of three days of hearings.

Monday's hearing amounted to a 90-minute linguistic tussle to determine whether the penalty for not following the law's mandate amounts to a tax to raise revenue, or is simply a means of enforcing the health care requirement.

The 1867 law prohibits litigation on a tax before it is collected, and the health insurance mandate does not go into effect until 2014, with the first penalties for not carrying insurance to come in 2015.

Washington attorney Robert Long, appointed by the court, argued that the tax law applies to this case because the penalties incurred by people who refuse to buy health insurance would be assessed and collected in the same manner as a tax.

But the tax law does not apply to penalties designed to get people to comply with the law rather than to raise revenues, said Justice Ruth Bader Ginsburg. "This is not a revenue-raising measure," Ginsburg said, "because, if it's successful, nobody will pay the penalty and there will be no revenue to raise."

Both the attorneys representing the government and those representing the 26 states suing the government maintain that the tax law does not bar the court from moving forward on the case.

As the back-and-forth among justices and attorneys played out, dozens of the law's supporters marched outside while chanting, "Care for you, care for me, care for every family" and holding signs that said "Protect the law."

A few feet away, protesters against the law included a lone man with a canvas satchel emblazoned with the American flag slung across his shoulders. He carried a handwritten sign saying: "Can you hear us now? 72 percent say 'No to Obamacare.' "

The justices are not expected to rule on the landmark case — for which an unusual six hours of oral arguments have been scheduled — until June, in the heat of the presidential campaign. If upheld, the law represents the greatest expansion of the country's social safety-net programs since Medicare and Medicaid in the mid-1960s.

The candidates vying for the Republican nomination seek to use the court challenge to their advantage as they duke it out over who is most likely to defeat Obama in November and repeal the health care overhaul, which they refer to as “Obamacare,” a derisive term that Obama has now embraced.

Rick Santorum, a former Pennsylvania senator, appeared outside the court yesterday to say why front-runner Mitt Romney would be the GOP’s worst choice. Romney was governor of Massachusetts in 2006 when he signed a state law — the first that mandated individuals purchase health insurance — on which national health reform was based.

“There’s one candidate who is uniquely disqualified to make the case,” said Santorum, referring to Romney. “It’s the reason I’m here and he’s not.”

Romney has repeatedly said that if elected, he would repeal the law, which he recently called a “liberal pipe-dream” that is quickly becoming a “national nightmare.”

Andrea Saul, a Romney spokeswoman, responded to Santorum’s attacks yesterday by saying, “Senator Santorum is becoming increasingly shrill as his campaign hopes fade.”

Amy Whitcomb Slemmer, an attorney and executive director of Health Care For All in Massachusetts, praised Romney for his leadership in Massachusetts in providing greater access to health care and said she would be “terribly disappointed” were he to repeal the federal law.

“Our experience in Massachusetts is that this law is life-saving and we hope the rest of the country gets to benefit from the work we’ve done here in passing health reform,” she said. “To repeal means that we as a country would be OK with having 50 million people being uninsured.”

She and other attorneys following the court case said, based on Monday’s arguments, it appears probable that the Supreme Court will decide the mandate penalty is not a tax, so the justices can rule on the law’s constitutionality this spring.

The gravity of the legal questions being deliberated inside the ornate courtroom was often punctured with moments of levity.

Justice Sonia Sotomayor asked Long to lay out the “parade of horrors” if the court decides the penalty for the uninsured is not a tax and the case goes forward. Justice Antonin Scalia responded, “There will be no parade of horrors because all federal courts are intelligent.” To which Long responded: “I would say that not all people who litigate about federal taxes are necessarily rational.”

On Tuesday the court will move on to the key question: whether Congress has the constitutional power, under the interstate commerce clause, to impose the requirement that individuals purchase health insurance because health care markets cross state lines.

“That issue will be the most interesting,” said M. Miller Baker, who co-heads the appellate practice group at McDermott Will & Emery’s Washington office. “It’s the heart of the case, and the closest in terms of which way it might come out. Today was the procedural day, the warm-up. Tomorrow, we get to the substance. It could go either way.”

The line for Monday’s hearing started last week, with many people paying surrogates hundreds of dollars to hold their spots. On Tuesday, the public will again queue up before dawn to secure a coveted seat inside the courtroom. Reporters, armed with only pens and notepads, will be ushered in single-file into closely packed wooden chairs, with the view of the justices obstructed in many seats by thick marble columns and heavy red velvet drapes. And since television cameras are barred from the courtroom, a sketch artist will do his best to capture the scene in colored pencil.