

The Question(s):

- Does the Supreme Court have jurisdiction to decide this case? Specifically, does 1867's Anti-Injunction Act ("AIA") prohibit any court from deciding the case at all?
- If the answer is that the AIA applies and limits the Court's jurisdiction, to what extent—if any—does the specific language of Obamacare's "individual mandate" provision apply?

Congress passed the AIA to prevent a person from interfering with tax assessments and collections. Put differently, the law would prevent an unhappy taxpayer from challenging a tax he or she found objectionable: its amount, rationale, collection procedure, frequency etc.

Here is the language of the AIA:

'No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed'

So, if the Court finds that the individual mandate section of Obamacare is a tax, then it would seem to follow that the Justices cannot hear the case. Not necessarily, because:

1. States are not "persons." If Congress wanted to prevent a State from challenging a tax law then it would have stated so.
2. Is the "individual mandate" even a tax? If it is, then why did Congress choose to separate collection of the penalty from the usual methods of collecting taxes? The AIA does not apply to any penalty for violations of the law—only infractions of tax law provisions.
3. Does [Congress'](#) use of the word "penalty" rather than the word "tax" affect the "individual mandate's" nature? If it isn't a tax, then why did Congress chose to enact the mandate's penalty through its [taxing and spending power](#)?
4. No person or state has been affected yet. Consequently, what grievance can the Court remedy? In other words, are they too early to have any standing?

So, it turns out [the Government](#) and Government and the 26 states and business organizations challenging the law [agree](#) that the Court should not use the AIA to throw this case out. Why? Because the Government wants this issue decided now. And, if the Court thinks the AIA applies we'll all have to wait a few more years before the mandate affects anyone, which would give them a grievance to redress before the Court. Years where doubts over Obamacare's constitutionality linger, and people gear up to bring new lawsuits. The challengers do not want the mandate considered a tax because they do not want their case thrown out of court.

The players and their positions:

a) **For U.S. Gov.,** [US Solicitor General Donald B. Verrilli, Jr.](#): The argues that while the individual mandate is technically a tax, the Court should create an exception in this instance. In other words, the individual mandate is a "special tax." Why? Because the Obama administration needs to a.) Use federal

tax and spending power to legitimize the mandate's legality yet b.) Refrain from calling it a tax too often because of the, what else, the Obama re-election push.

b) **For 26 States, The National Federation of Independent Businesses and four individuals, *Gregory G. Katsas of Jones Day***: Obamacare opponents argue that the individual mandate is not a tax, period. Essentially, challengers contend that labeling something a tax does not necessarily make it one. [\[1\]](#) To that end Obama could have labeled it “the wheatpuss provision”—it does not change the mandates purpose.

c) **Court Appointed Amicus: *Robert A. Long***: The Supreme Court appointed Mr. Long as an independent counsel with one purpose; to brief and argue that the AIA restricts a Federal Court to decide the case at all. The Court appointed an outside lawyer because separate courts in different Federal Circuit jurisdictions reached different conclusions, if any at all, about the AIA. And, because neither the government nor the challengers raised this issue in their appellate briefs they are not allowed to raise it for the first time before the Court today.

Prediction(s):

Scalia and Alito:

- The AIA is inapplicable because Congress never applied it to the States. Whether the individual mandate is a tax or not is therefore irrelevant for purposes of this specific argument.

Roberts and Thomas:

- The AIA does not apply in this instance because congress did not procedurally bar **all** cases from being heard by courts and, further, the individual mandate is not a tax. . The AIA is a claims-processing law. Moreover, the language “**for the purpose** of restraining the assessment or collection of any tax” clearly allows the Court to decide
 1. If the challenged provision is a tax and
 2. The provision's purpose

Kennedy and Ginsberg:

- The AIA applies and the Supreme Court may not decide further issues presented. This matter is not ripe for review and judicial restraint dictates that the Court wait to address its constitutionality.

Kagan and Sotomayor:

- The AIA applies in this instance, but the nature of Congress' individual mandate language place this provision in a separate and unique position: In short, an exception.

Now, watch me get them all wrong.

Do not forget that today the Justice's positions deal solely with this one issue (the AIA) and not with any other arguments.

[1] Congress needed to use its taxing and spending power to enact the law, but Mr. Obama probably understood that labeling the individual mandate a tax he might hurt his re-election prospects; This was naturally a top priority in March 2010.