

March 26, 2012

Supreme Court Arguments Day One: The Anti-Injunction Act

This morning, the Supreme Court heard 90 minutes of argument on whether the Anti-Injunction Act of 1867 (AIA) bars litigation against the individual mandate portion of the Affordable Care Act (ACA) until 2015. While it is nearly impossible to predict how the justices will treat the AIA, a cautious reading of today's argument suggests the Court will proceed to a determination on the constitutional questions presented by the legal challenges to the ACA. Transcripts and audio recordings of this morning's argument can be found [here](#).

(http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=11-398-Monday)

Three different paths around AIA came up during argument: (1) the AIA does not bar the Court from hearing tax issues before enforcement; (2) the AIA blocks some tax challenges, but does not bar challenges to taxes such as the individual mandate penalty; and (3) the AIA does not apply because the penalty is not a tax. Some of the justices' questions suggested several ways to distinguish the penalty from a traditional tax as covered by the AIA. Justice Scalia questioned the role of Health and Human Services in applying the penalty, and Justices Breyer and Ginsburg seemed to suggest that the penalty was not a tax because it was not intended to raise revenue and, if effective in its purpose, would raise no revenue at all.

Arguments of Court-Appointed Amicus Curiae

One of the more unique aspects of the ACA lawsuit is that both the challengers to the law and the United States agree that the AIA does not bar the litigation. As such, the Supreme Court appointed distinguished appellate lawyer Robert Long to argue on behalf of the jurisdictional bar.

Mr. Long argued that AIA bars pre-enforcement litigation for all tax legislation and Congress gave no indication that it intended the mandate to be exempt from this requirement. In establishing that the penalty is a tax under AIA, he noted that the penalty would be collected by the Internal Revenue Service and that it had all the common characteristics of a tax.

The highlight of the day arose when Justice Kagan questioned Mr. Long's interpretation of the individual mandate, asking if he was not "trying to rewrite the statute in some way." Mr. Long conceded that the statute was not "a perfect model of clarity." Audible laughter was heard in the courtroom – seemingly agreeing with the point.

Arguments of the United States

Solicitor General Donald Verrilli argued that the AIA is inapplicable because the penalty *is not* a tax as defined in the AIA. This argument runs contrary to what the United States is expected to argue tomorrow; that the penalty *is* a permissible tax within Congress' taxing power. Justice Alito noted the contradiction in these arguments, but Solicitor General Verrilli urged that the difference was not a contradiction because the constitutional question and the jurisdictional question under the AIA are two very different legal issues.

Arguments of the Challengers

Gregory Katsas, representing those challenging the law, argued that the AIA did not apply because plaintiffs were challenging the individual mandate, not the penalty imposed for failure to comply with the mandate. Chief Justice Roberts appeared unconvinced by this argument, stating that the mandate and penalty could not be separated because the mandate would be "completely toothless" without the penalty.