

ACA at the Supreme Court: Instant commentaries

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Is a penalty a tax? Expect to hear the question come up again

- On first impression, it appears that the justices are unlikely to hold that the Anti-Injunction Act bars its review of the constitutionality of the individual mandate and its related penalty under the Affordable Care Act. That said, first impressions can be wrong when it comes to reading the tea leaves set forth by the Supreme Court.
- We're going to see a lot of questioning over whether a penalty is considered to be a tax or not. Today was only the beginning, and the solicitor general has to walk a tightrope on this issue, because the government is arguing that the penalty under the Affordable Care Act is not a tax for purposes of the Anti-Injunction Act but is a tax for purposes of constitutional analysis.
- The Anti-Injunction Act bars litigation over a tax that has yet to be assessed. That said, Justice Ginsburg made it clear that the Court need not reach the question as to whether application of the Anti-Injunction Act could be waived by the government if the Court were to rule that the penalty under the Affordable Care Act is not a tax and, therefore, the Anti-Injunction Act not applicable.
- It's clear to me that the justices are very well-prepared and asking all the right questions. I don't see that the Anti-Injunction Act will get in their way of deciding this case. — [James Napoli](#), a *Proskauer Rose* senior counsel specializing in employee benefits who sat in on today's arguments

Very likely the Court will rule now on ACA's merits

For all the excitement outside the Supreme Court, the courtroom this morning was surprisingly subdued, as the justices considered the somewhat dry issue of the Anti-Injunction Act (AIA). Indeed, a few of the justices appeared dangerously close to nodding off. That said, it appeared from the questions this morning that the justices are not eager to delay ruling on the merits of the constitutional challenge to the Affordable Care Act (ACA). Many of the justices questioned whether the AIA is, in fact, jurisdictional, and if they could accept the government's position that the Anti-Injunction Act does not prevent a decision on the merits at this point. The bottom line is that it looks very likely that the Court will not delay a ruling on the constitutionality

of the mandate until the provision goes into effect in 2014. For the American people, and the state leaders who are already working to implement the Affordable Care Act in the states, this is good news. — [Elizabeth Wydra](#), *chief counsel, Constitutional Accountability Center*

Only surprise was the 'cold' bench

On an argument day that can best be described as the calm before the storm, it quickly became clear that the Supreme Court would reach the constitutional issues everyone cares about. That is, regardless of how the justices resolve the hyper-technical issue of whether the Anti-Injunction Act is "jurisdictional," this law — which prevents people from challenging taxes before they're assessed or collected — does not apply to the Obamacare litigation. There were also hints that the Court was skeptical of the government's backup merits argument that the individual mandate was justified under the Constitution's taxing power. Perhaps the only surprising aspect of today's hearing was how "cold" the bench was; it's rare for the justices to allow advocates to speak at length without interruption, but that's what they generally did today. That's yet another indication that the Court will get past the AIA appetizer to the constitutional entree. — [Ilya Shapiro](#), *senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review*