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## The Anti-Injunction Act and the Individual Mandate

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## The Anti-Injunction Act and The Individual Mandate

By Steve R. Johnson



Steve R. Johnson

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The Supreme Court will soon hear challenges to the constitutionality of the individual mandate of the healthcare reform legislation. It is important that this pivotal case be decided on the merits. However, it is possible that a closely divided court may hold that the Anti-Injunction Act and the Declaratory Judgment Act preclude substantive review.

Johnson urges Congress to eliminate that threat by amending the acts so that they do not apply to the litigation. The amendment should be simple, quick, and uncontroversial, which would allow it to decisively remove the possibility that resolution of the national controversy would be derailed on procedural grounds.

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The Supreme Court will soon consider challenges to the constitutionality of the so-called individual mandate portion of the Patient Protection and Affordable Care Act of 2010 (PPACA).<sup>1</sup> It is important for the nation that the Court render a decision on the merits. This could be derailed, however, were the Court to dispose of the case by holding that the Anti-Injunction Act (AIA)<sup>2</sup> and the Declaratory Judgment Act (DJA)<sup>3</sup> preclude pre-enforcement review. Disposition on those grounds would subject the federal government, states, businesses, and individuals to years of additional uncertainty, inconvenience, and expense.

Fortunately, that threat to resolution on the merits can be easily and expeditiously removed. This report urges Congress to amend the AIA and the DJA to provide that they do not apply to, or prevent pre-enforcement judicial review of, suits challenging the constitutionality of the individual mandate. That could be done rapidly and simply. Because both supporters and opponents of the individual mandate now favor on-the-merits Supreme Court review, there should be little or no political controversy as to enactment of the amendments. Moreover, the amendments would not require elaborate drafting — two sentences of language (one each for the AIA and the DJA) would suffice.

Parts I and II of this report provide background. Part I describes the individual mandate, challenges that have been made regarding the validity of the mandate, and the results of litigation to date. Part II describes the AIA and DJA and recounts arguments advanced as to their applicability or inapplicability to the individual mandate context.

Part III explains the need for amendment of the AIA and the DJA. It notes that there is a genuine possibility that the Court may hold that the acts preclude pre-enforcement review of the constitutionality of the individual mandate and that this outcome would harm the country. Disposing of the cases on AIA and DJA grounds would delay for years on-the-merits resolution of the legality of the individual mandate. That delay would protract our

<sup>1</sup>P.L. 111-148 (2010). The vehicle by which the Court will consider the challenges is *Florida v. Dept. of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *Doc 2011-17561*, 2011 TNT 158-14, cert. granted, 80 U.S.L.W. 3198 and 3199 (Nov. 14, 2011).

<sup>2</sup>Section 7421.

<sup>3</sup>28 U.S.C. section 2201.

agony of uncertainty about what our national health policy will be, and it would create great practical difficulties for the federal government, state governments, businesses, and individuals. That is an unacceptable risk given how easily the risk could be obviated by short, simple, and uncontroversial amendments to the AIA and DJA.

Part IV addresses how to effect those statutory amendments. It considers, and rejects, possible objections to statutory amendment.

### I. Background

The wisdom and the legality of the PPACA are among the most important political and legal issues on the contemporary scene. With some exceptions, the individual mandate provision of the act requires all individuals to obtain "minimum essential [medical insurance] coverage" for each month.<sup>4</sup> Those who fail to do so must include with their annual federal income tax payment a "shared responsibility payment." This is denominated as a "penalty" by the act.<sup>5</sup> The amount of the penalty cannot exceed \$3,000 for 2014, the first year for which the provision will be effective.<sup>6</sup>

Both supporters and opponents of the PPACA recognize the centrality of the individual mandate to the act. Congress found that "the requirement is an essential part of this larger regulation of economic activity."<sup>7</sup> Congress believed that without the individual mandate, many individuals would wait to buy insurance until they needed care, exacerbating problems in medical care delivery and finance.<sup>8</sup> Were the individual mandate removed, the viability of the entire act would be in question.<sup>9</sup>

The individual mandate is highly controversial. Critics have assailed it as being beyond the authority of Congress, an unconstitutional assertion of power. States, businesses, and individuals have initiated numerous suits contesting the provisions' validity. The decided cases have not always reached the merits, being decided instead on jurisdictional or prudential grounds, such as lack of standing or lack of ripeness.<sup>10</sup>

<sup>4</sup>PPACA, section 1501, codified at section 5000A.

<sup>5</sup>Section 5000A(b).

<sup>6</sup>The details of the individual mandate are described in Jeffrey H. Kahn, "The Operation of the Individual Mandate," *Tax Notes*, Aug. 1, 2011, p. 521, *Doc 2011-14545*, 2011 TNT 148-4.

<sup>7</sup>42 U.S.C. section 18091(a)(2)(H).

<sup>8</sup>*Id.* at section 18091(a)(2)(I) and (F).

<sup>9</sup>"Congress found that the [individual mandate] provision is an essential cog in the Affordable Care Act's comprehensive scheme to reform the national markets in health care delivery and health insurance." *Thomas More Law Center v. Obama*, 651 F.3d 529, 534 (6th Cir. 2011), *Doc 2011-14236*, 2011 TNT 126-9.

<sup>10</sup>E.g., *Virginia v. Sebelius*, 656 F.3d 253 (4th Cir. 2011), *Doc 2011-19032*, 2011 TNT 175-13; *Baldwin v. Sebelius*, 654 F.3d 877

(Footnote continued in next column.)

When the courts have reached the merits, they have faced an array of arguments against the individual mandate and other provisions of the PPACA.<sup>11</sup> The two principal battlegrounds are whether enactment of the provisions was within the authority of Congress under the commerce clause<sup>12</sup> or under the taxing and spending clause<sup>13</sup> of the Constitution.

Thus far, four federal circuit courts have issued on-the-merits decisions in cases involving challenges to the individual mandate. On June 29 a divided panel of the Sixth Circuit in *Thomas More* concluded that the individual mandate cannot be sustained under Congress's taxing power but that it is facially constitutional under the commerce clause.<sup>14</sup> On August 12 a divided panel of the Eleventh Circuit held that the individual mandate cannot be upheld under either the commerce clause or the taxing and spending clause.<sup>15</sup> On September 8 a divided panel of the Fourth Circuit held that the AIA bars pre-enforcement challenge to the individual mandate.<sup>16</sup> On November 8 a divided panel

(9th Cir. 2011), *Doc 2011-17540*, 2011 TNT 157-15; *New Jersey Physicians Inc. v. President of the United States*, 653 F.3d 234 (3d Cir. 2011); *Butler v. Obama*, 2011 WL 4526079 (E.D.N.Y. 2011); *Peterson v. United States*, 774 F. Supp.2d 418 (D.N.H. 2011); *Kinder v. Geithner*, 2011 WL 1576721 (E.D. Mo. 2011).

<sup>11</sup>The less frequent attacks have involved contentions that the provisions transduce the 10th Amendment; contravene the Religious Freedom Restoration Act; constitute an unapportioned direct tax on employers; interfere with state sovereignty and inhibit the states' performance of their governmental functions; represent improper commandeering of state resources by the federal government; and violate the establishment, free exercise, equal protection, free speech, and necessary and proper clauses of the Constitution. In one "kitchen sink" complaint, the plaintiffs included claims that the PPACA infringes on First Amendment freedom of association rights; Fifth Amendment due process liberty rights; Ninth Amendment privacy rights; and "rights emanating from the First, Third, Fourth, Fifth, and Ninth Amendments" as to confidentiality of medical information. *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp.2d 903, 905 (N.D. Ohio 2011).

<sup>12</sup>U.S. Const., Art. I, section 8, cl. 3.

<sup>13</sup>U.S. Const., Art. I, section 8, cl. 1.

<sup>14</sup>*Thomas More*, 651 F.3d 529, *aff'g* 720 F. Supp.2d 882 (E.D. Mich. 2010), *Doc 2010-22007*, 2010 TNT 196-15.

<sup>15</sup>*Florida v. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *Doc 2011-17561*, 2011 TNT 158-14, *aff'g in part & rev'g in part* 780 F. Supp.2d 1256 (N.D. Fla. 2011), *Doc 2011-2175*, 2011 TNT 21-8, *clarified by* 780 F. Supp.2d 1307 (N.D. Fla. 2011), *Doc 2011-4650*, 2011 TNT 44-18 (holding the individual mandate unconstitutional). However, the court held that the individual mandate is severable such that its invalidity does not require invalidating the entire PPACA.

<sup>16</sup>*Liberty Univ. Inc. v. Geithner*, 2011 WL 3962915 (4th Cir. 2011), *Doc 2011-19031*, 2011 TNT 175-12, *vacating and remanding* 753 F. Supp.2d 611 (W.D. Va. 2010), *Doc 2010-25502*, 2010 TNT 231-12 (holding the individual mandate constitutional). On the same day, the Fourth Circuit rejected on standing grounds a suit brought by Virginia against the individual mandate. *Virginia v.*

(Footnote continued on next page.)

of the D.C. Circuit held that the AIA does not bar pre-enforcement review and that enacting the individual mandate was within the power of Congress under the commerce clause.<sup>17</sup>

The main two reasons the Supreme Court grants certiorari — the importance of the case and the existence of a split among circuits — both are present.<sup>18</sup> Given that, and given that the United States as well as other parties have requested review, it was not a surprise that the Supreme Court agreed to hear the matter. Oral argument is scheduled for March 2012.

## II. Threat to On-the-Merits Decision

The parties challenging the individual mandate typically seek both declaratory and injunctive relief: a judicial declaration that the provision is unconstitutional and an injunction against implementation and enforcement of the mandate by the federal government. The DJA and the AIA imperil the ability of the courts to grant that relief.<sup>19</sup> The subparts below describe those two statutes and summarize the divergent views that have been articulated thus far as to their applicability to the individual mandate.

### A. Anti-Injunction Act

The earliest version of the AIA was enacted in 1857.<sup>20</sup> The current version provides, in general, that “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.”<sup>21</sup> The act reflects the realization that “taxes are the life-blood of government, and their prompt and certain availability an imperious

need.”<sup>22</sup> Accordingly, the act’s principal purpose is “the protection of the Government’s need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference.”<sup>23</sup>

There are more than a dozen enumerated statutory exceptions to the above prohibition, but none of them applies to the situation at hand. Also, there are two judicially created exceptions. First, under *Williams Packing*, suit may be brought, notwithstanding the AIA, if the plaintiff establishes both that under the most liberal view of the law and the facts, it is clear the government cannot prevail on the merits of the dispute and that the plaintiff faces irreparable harm for which no adequate remedy at law exists.<sup>24</sup> Second, under *South Carolina*, suit may be maintained if Congress has failed to provide an allegedly aggrieved party a legal avenue by which to contest the legality of the tax in question.<sup>25</sup>

As its text makes clear, the AIA precludes courts from hearing only those cases that are brought to restrain assessment or collection of a federal “tax.”<sup>26</sup> A central substantive issue in the individual mandate cases is whether the mandate is proper as a “tax” under the taxing and spending clause. At first blush one might think that if the challengers prevail in their contention that the mandate does not involve a tax under that clause, they necessarily also will escape prohibition of their suit under the AIA. That is not necessarily so, however, because the word “tax” need not have the same meaning for constitutional purposes as for statutory purposes.<sup>27</sup>

This fact is illustrated by a pair of cases decided on the same day by the Supreme Court. The plaintiffs in the two cases had been subjected to exactions, denominated as taxes, under a child labor

*Sebelius*, 656 F.3d 253, *vacating and remanding* 728 F. Supp.2d 768 (E.D. Va. 2010), *Doc* 2010-26522, 2010 TNT 239-8 (holding the individual mandate unconstitutional).

<sup>17</sup>*Seven-Sky v. Holder*, 2011 WL 5378319 (D.C. Cir. 2011), *Doc* 2011-23522, 2011 TNT 217-19.

<sup>18</sup>*See, e.g.*, Petition for Writ of Certiorari of the United States, *HHS v. Florida*, 2010 WL 7634114, at 29-32 (Sept. 28, 2010) (describing the circuit split and identifying the issue as “a question of fundamental importance”).

<sup>19</sup>The AIA and the DJA also have loomed large in another current tax controversy: remedies for the IRS’s overcharging of communications excise taxes. *See, e.g.*, *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (*en banc*), *Doc* 2011-14478, 2011 TNT 128-14; Steve R. Johnson, “*Cohen*: Hard Cases Makes (Semi) Bad Law,” 31 *ABA Section of Tax’n News Quarterly* 12 (fall 2011).

<sup>20</sup>Another federal statute also is called the AIA: 28 U.S.C. section 2283. That other statute deals with federal courts enjoining state court proceedings. That other statute is not the subject of this report. For discussion of the other AIA, see Erwin Chemerinsky, *Federal Jurisdiction* 735-753 (2007).

<sup>21</sup>Section 7421(a).

<sup>22</sup>*Bull v. United States*, 295 U.S. 247 (1935); *see also* Edmund Burke, *Reflections on the Revolution in France* (“The revenue of the state is the state”).

<sup>23</sup>*Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974) (punctuation omitted); *see also* *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932).

<sup>24</sup>*Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6-7 (1962).

<sup>25</sup>*South Carolina v. Regan*, 465 U.S. 367, 373 (1984).

<sup>26</sup>Whether a particular exaction should be characterized as a tax or as something else matters for, and has been controversial in, many contexts, including tax versus penalty or other punishment, *e.g.*, *Waters v. Farr*, 291 S.W.3d 873 (Tenn. 2009), *Doc* 2009-17530, and tax versus fee, *e.g.*, *Ventas Finance I LLC v. Franchise Tax Bd.*, 81 Cal. Rptr. 3d 823 (Cal. App. 2008), *cert. denied*, 129 S. Ct. 1917 (2009), *Doc* 2008-17560; *Northwest Energetic Serv. LLC v. Franchise Tax Bd.*, 71 Cal. Rptr. 3d 642 (Cal. App. 2008), *Doc* 2008-2188.

<sup>27</sup>*But see* *Florida v. HHS*, 716 F. Supp.2d 1120, 1130-1131 (N.D. Fla. 2010), *Doc* 2010-22392, 2010 TNT 199-7 (seeming to suggest that the statutory and constitutional definitions of tax are essentially the same), *aff’d in part and rev’d in part*, 648 F.3d 1235 (11th Cir. 2011), *Doc* 2011-17561, 2011 TNT 158-14.

statute. In one case the plaintiff brought suit to restrain assessment of the exaction. The Supreme Court held that the exaction was a tax within the intendment of the predecessor of the AIA, which barred the suit.<sup>28</sup> The companion case, however, involved a post-payment refund suit, not a pre-assessment action. Thus, it was not barred by the predecessor of the AIA. Reaching the merits, the Court held that the exaction was not a tax for constitutional purposes and so was invalid.<sup>29</sup>

### B. Declaratory Judgment Act

The AIA may be problematic for the injunctive relief sought by plaintiffs challenging the individual mandate. The DJA may be problematic for the declaratory relief sought by those plaintiffs. The DJA withdraws authority from federal courts to grant declaratory relief in tax cases.<sup>30</sup> The courts typically hold that the AIA and the DJA are coextensive.<sup>31</sup> Accordingly, if the former precludes injunctive relief in a given case, the latter precludes declaratory relief in the same case.

As a result, courts usually refer only to the AIA, mentioning the DJA only briefly or not at all. The remainder of this report will follow that approach and will describe the issue whether the two acts preclude pre-enforcement review of the constitutionality of the individual mandate as "the AIA issue."

### C. Divergent Views on the AIA Issue

Some of the cases do not address the AIA issue. In other cases, however, the Justice Department raised the issue.<sup>32</sup> Below are set out some of the developments. For the most part, I avoid detailed descriptions of the parties' arguments and focus instead on the holdings reached.

A federal district court considered the AIA issue in *Goudy-Bachman* in January. The government maintained that the penalty for failing to maintain minimum insurance coverage is a tax for AIA purposes because the PPACA provides that it is to be "assessed and collected in the same manner as

an assessable penalty" under the Internal Revenue Code.<sup>33</sup> The court rejected this contention, holding that "the individual mandate itself is not a tax, nor is it intimately connected with the assessment or collection of a tax."<sup>34</sup> In so doing, the court distinguished between a tax, which "is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government,"<sup>35</sup> and a penalty, which "connotes a sanction or a punishment for an unlawful act or omission."<sup>36</sup>

In June the Sixth Circuit reached the same conclusion in *Thomas More*.<sup>37</sup> The court noted that Congress had called the exaction a penalty, not a tax.<sup>38</sup> The court dealt in two ways with the fact that the penalty was made assessable in the same manner as tax penalties. First, it found "the most natural reading of the provision [to be that it] refers to the mechanisms the Internal Revenue Service employs to enforce penalties, not to the bar against pre-enforcement challenges to taxes."<sup>39</sup> Second, the court noted that the same provision denies the use of some of the IRS's most potent collection tools when the individual mandate penalty has not been paid.<sup>40</sup> Finally, the Sixth Circuit reasoned that the purpose of the AIA would not be imperiled by allowing the challenge to go forward. "Because the minimum coverage provision does not come into effect until 2014 (and the penalty could not be assessed or collected until at least a year later), this lawsuit will hardly interfere with the Government's need to assess and collect taxes as expeditiously as possible."<sup>41</sup>

But the Fourth Circuit took a contrary view in September in *Liberty University*. The district court in

<sup>28</sup>*Bailey v. George*, 259 U.S. 16 (1922).

<sup>29</sup>*Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922). The Court held that the measure was not a tax, because it was intended not to raise revenue but to coerce employers to comply with child labor regulations.

<sup>30</sup>28 U.S.C. section 2201(a). The lower federal courts are courts of limited jurisdiction. They have only the powers and jurisdiction that Congress chooses to confer on them. *E.g.*, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

<sup>31</sup>*Cohen*, 650 F.3d at 727-731; *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 299 (4th Cir. 2000); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir. 1996).

<sup>32</sup>As seen below, the DOJ has since abandoned the position that the AIA bars pre-enforcement review of the constitutionality of the individual mandate.

<sup>33</sup>Section 5000A(g)(1); *see* section 6671(a) (dealing with assessment of tax penalties).

<sup>34</sup>*Goudy-Bachman v. HHS*, 764 F. Supp.2d 684, 695 (M.D. Pa. 2011), *Doc* 2011-1639, 2011 TNT 17-18.

<sup>35</sup>*United States v. Reorganized CF&I Fabrications of Utah Inc.*, 518 U.S. 213, 224 (1996).

<sup>36</sup>*Goudy-Bachman*, 764 F. Supp.2d at 695-696 (citing *Reorganized CF&I*, 518 U.S. at 224, and *United States v. LaFranca*, 282 U.S. 568, 572 (1931)).

<sup>37</sup>*Thomas More*, 651 F.3d at 539-540.

<sup>38</sup>*See* section 5000A.

<sup>39</sup>*Thomas More*, 651 F.3d at 540.

<sup>40</sup>The PPACA provides that the IRS may not attempt to collect the individual mandate penalty by placing liens on an individual's property or by levying on his property. Nor may the IRS bring criminal charges for failure to pay the penalty. Section 5000A(g)(2)(B). The only available collection options are deducting past-due penalties from future tax refunds and bringing a collection suit. For a discussion of normal IRS collection mechanisms, *see* David M. Richardson et al., *Civil Tax Procedure*, ch. 14 (2008).

<sup>41</sup>*Thomas More*, 651 F.3d at 540.

that case had rejected the government's AIA argument.<sup>42</sup> The circuit court reversed. The court reasoned that the AIA should be constructed broadly, that the "penalty versus tax" distinction is antiquated, that the substance of a measure controls over its form and nomenclature in deciding whether it is a tax, and that the individual mandate enforcement provision has the substance of a tax.<sup>43</sup>

A concurrence in *Liberty University* agreed with the opinion of the court on the AIA issue.<sup>44</sup> A dissent disagreed.<sup>45</sup> The *Goudy-Bachman* district court reconsidered its earlier position in light of the Fourth Circuit's holding, but it reaffirmed its conclusion that the AIA does not apply.<sup>46</sup>

The action is not just in judicial opinions, however. Briefs and other filings by parties also have been significant. The Fourth Circuit directed the plaintiff-appellants and the defendant-appellee to file supplemental briefs on the AIA issue. They did so in May. Both *Liberty University* and the DOJ argued against the applicability of the AIA. The university contended that the enforcement mechanism does not constitute a tax, that the act does not bar constitutional challenges, and that the *Williams Packing* exception applies.<sup>47</sup> The government maintained that the structure and legislative history of the relevant statutes reveal the AIA to be nonapplicable.<sup>48</sup> As noted above, however, the Fourth Circuit rejected both the plaintiffs' arguments and the government's arguments. It held that the AIA does indeed apply and thus reversed the district court's decision.

Between the time the *Liberty University* supplementary briefs were filed and the time the Fourth Circuit rendered its decision, another important event occurred. In July two former IRS commissioners, Mortimer Caplin and Sheldon Cohen, filed an amici curiae brief with the D.C. Circuit, arguing that the AIA and the DJA apply and prevent pre-

enforcement judicial review of the individual mandate. They rejected the penalty versus tax distinction, the "constitutional challenges are exempt from the prohibition" contention, and inferences from the structure of the PPACA and the tax code. They argued that holding the AIA and the DJA inapplicable would undermine effective tax administration.<sup>49</sup>

Most recently, a panel of the D.C. Circuit considered the issue. The majority acknowledged the former commissioners' amici brief, but they reasoned that Congress did not intend "tax" in the AIA to include levies that are labeled as penalties and are unrelated to revenue measures.<sup>50</sup> The lengthy dissent, however, saw the AIA as more than an inconvenient technicality and concluded that it bars pre-enforcement review for some of the same structural, purposive, and precedential reasons as had been persuasive to the *Liberty University* court.<sup>51</sup>

### III. Desirability of Amending the Statutes

Part II set out the numerous conflicting views on the AIA issue. The majority of courts have held that the AIA and the DJA do not apply in this context, and I agree that this is the better view of the issue.

Nonetheless, I believe that the AIA issue should be preempted through legislation rather than decided through litigation. Without preemptive legislation, (1) when the Court hears the AIA issue, there is a less than 50 percent but still appreciable chance that the Court will hold that the AIA and the DJA bar pre-enforcement review of challenges to the individual mandate and (2) such a result would be unacceptably harmful to the country. This risk should not be taken. It can be avoided through easy statutory changes.

#### A. Possibility the Acts Will Be Held to Apply

Given the DOJ's current position on the AIA issue, whichever individual mandate case(s) the Supreme Court ultimately hears, the two sides will agree on the issue. But that will not prevent the Supreme Court from considering it and possibly holding against both parties on the issue.

The AIA issue goes to the subject matter jurisdiction of the federal courts to hear this question.<sup>52</sup>

<sup>42</sup>*Liberty Univ.*, 753 F. Supp.2d at 627-629 (concluding that the individual mandate enforcement provision is a regulatory penalty, not a tax for purposes of the AIA).

<sup>43</sup>*Liberty Univ.*, 2011 WL 3962915, at \*4-\*14.

<sup>44</sup>*Id.* at \*16 (Wynn, J., concurring).

<sup>45</sup>*Id.* at \*23-\*35 (Davis, J., dissenting).

<sup>46</sup>*Goudy-Bachman v. HHS*, 2011 WL 4072875, at \*7 n.9 (M.D. Pa. 2011), Doc 2011-19603, 2011 TNT 180-17.

<sup>47</sup>Supplemental Brief of Appellants, *Liberty Univ. v. Geithner*, 2011 WL 2135094 (4th Cir. May 31, 2011). In the other Virginia case, the court found that the other judicial exception, the *South Carolina* exception, applies, thus displacing the AIA. *Virginia*, 702 F. Supp.2d at 604-605.

<sup>48</sup>Supplemental Brief of Appellees, *Liberty Univ. v. Geithner*, 2011 WL 2135095 (4th Cir. May 31, 2011). The brief stated: "On further reflection, and on consideration of the decisions rendered thus far in the [PPACA] litigation, the United States has concluded that the [AIA] does not foreclose the exercise of jurisdiction in these cases." *Id.* at \*2.

<sup>49</sup>Corrected Brief of Amici Curiae Mortimer Caplin and Sheldon Cohen in Support of Appellees and Affirmance, *Seven-Sky v. Holder*, 2011 WL 2847595 (D.C. Cir. 2011).

<sup>50</sup>*Seven-Sky*, 2011 WL 5378319, at \*3.

<sup>51</sup>*Id.* at \*17-42 (Kavanaugh, J., dissenting).

<sup>52</sup>E.g., *Thomas More*, 651 F.3d at 539. *But see* Patrick J. Smith, "Is the Anti-Injunction Act Jurisdictional?" *Tax Notes*, Nov. 28, 2011, p. 1093, Doc 2011-22319, or 2011 TNT 229-7.

Courts have an "independent obligation" to investigate the limits of their subject matter jurisdiction.<sup>53</sup> That obligation exists even if the parties overlook the issue, fail to press it, or agree that jurisdiction exists.<sup>54</sup> A court's obligation to examine its subject matter jurisdiction operates whenever that jurisdiction is "fairly in doubt,"<sup>55</sup> as it is here.

It is for that reason that the Fourth Circuit decided as it did in *Liberty University* despite the absence of disagreement among the parties regarding the AIA issue, and it is for that reason that the Supreme Court allocated an hour of the upcoming oral arguments to the AIA issue.

Most judges who have addressed the issue have concluded that the AIA and the DJA do not preclude pre-enforcement judicial review of the individual mandate.<sup>56</sup> I believe that those judges are correct.<sup>57</sup> So I hope that were the Supreme Court to consider the AIA issue, it would embrace the majority view.

That result is hardly a foregone conclusion, however. The question is close enough that a genuine chance exists that a majority of the justices would take a view contrary to mine and to that of most lower court judges to have addressed the issue. I say this for three reasons.

First, such an outcome is far from unprecedented. The Supreme Court has often reached results out of keeping with the majority view of the lower courts. All of us no doubt can recall examples of this. I content myself here with one example.

For decades it had been controversial whether the reach of the federal tax lien is circumscribed by state laws rendering tenancy-by-the-entirety interests exempt from attachment by creditors when only one of the spouses is liable on the debt. A nearly unbroken line of federal district court and

circuit court cases going back several generations had held that the federal tax lien was so circumscribed.<sup>58</sup> Indeed, the IRS itself had so ruled several times.<sup>59</sup> Opinions on the issue differed within the IRS, however, so the IRS continued to litigate it in some cases. Eventually, the matter reached the Supreme Court. Overturning the long line of lower court cases, the Supreme Court held that the federal tax lien does attach despite state law.<sup>60</sup>

Second, the approach of the Supreme Court to the AIA has varied over time. The Court has sometimes read the scope of the act's prohibition quite broadly but at other times has taken a narrower view of the act's sweep.<sup>61</sup> One cannot say with certainty which spirit would animate the justices when they hear challenges to the individual mandate. This whole area is highly charged legally, politically, and ideologically. Should one or more justices wish to find a narrower ground of decision, they might latch onto the AIA issue. That could affect the outcome of the case given the widely shared expectation that the vote of the justices will be close.

Third, views expressed thus far show that the question is close.<sup>62</sup> Those views include the Fourth Circuit's holding in *Liberty University*, the amici brief of two former IRS commissioners, the fact that

<sup>58</sup>For discussion of this issue, see Steve R. Johnson, "After *Dryc*: The Likely Attachment of the Federal Tax Lien to the Tenancy-by-the-Entireties Interests," 75 *Ind. L.J.* 1163 (2000); Steve R. Johnson, "Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien," 60 *Mo. L. Rev.* 839 (1998).

<sup>59</sup>*See United States v. Craft*, 535 U.S. 274, 300 and n.9 (2002), *Doc 2002-9398*, 2002 *TNT* 75-9 (Thomas, J., dissenting) (citing IRS guidance documents on the issue).

<sup>60</sup>*Id.* at 282-289 (O'Connor, J., writing for the Court).

<sup>61</sup>For instance, the Court sometimes has emphasized the "sweeping terms" of the statute's "literal" language. *E.g.*, *Alexander v. Americans United Inc.*, 416 U.S. 752, 760 (1974). Yet, as noted in Part II.B, *supra*, in *Williams Packing and South Carolina*, the Court created judicial exceptions not evident from the statute's literal language.

<sup>62</sup>*See, e.g.*, Neil S. Siegel, quoted in Matthew Dalton and Marie Sapirie, "Supreme Court to Consider AIA's Applicability to Healthcare Law," *Tax Notes*, Nov. 21, p. 935, *Doc 2011-23896*, or 2011 *TNT* 220-1. Let me quantify this in familiar terms. When a tax professional renders an opinion on whether a given position should be sustained, the comfort level of the opinion writer will be expressed in one or another of a set of well-known formulations. *See, e.g.*, Robert P. Rothman, "Tax Opinion Practice," 64 *Tax Law* 301, 327 (2011) (quantifying tax opinion confidence levels). I believe that were the Supreme Court to hear the AIA issue, the chance that it would hold pre-enforcement review to be precluded would meet a "realistic possibility of success" standard but not a "more likely than not" standard. In other words, I see the chance as over 33 percent but under 50 percent. Given the stakes described in Part III below, a 1-in-3 chance of derailing a decision on the merits is unacceptably high.

<sup>53</sup>*E.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

<sup>54</sup>*E.g.*, *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011); *Sosna v. Iowa*, 419 U.S. 393, 398 (1975). *But see Helvering v. Davis*, 301 U.S. 619, 639-640 (1937) (accepting an express waiver of the AIA by the United States).

<sup>55</sup>*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945 (2009).

<sup>56</sup>Prof. Randy Barnett has been quoted as saying: "I think it's highly significant that only two federal judges [the Fourth Circuit panel majority in *Liberty University*] of all the 13 or so federal judges who have looked at it have been persuaded [that the AIA applies]. That suggests it's a problematic argument." *See Marie Sapirie, "Will the Anti-Injunction Act Apply to the Individual Mandate?" Tax Notes*, Oct. 3, 2011, p. 17, *Doc 2011-20685*, or 2011 *TNT* 190-1. The number of judges in both camps has increased since this observation was made.

<sup>57</sup>To fully develop the reasons for this belief would be a lengthy undertaking and is beyond the scope of this report. If the legislative changes proposed by this report are expeditiously made, it will be unnecessary for anyone to fully elaborate his position on the applicability of the AIA and the DJA in this context.



the DOJ originally took a position contrary to its current position, and the conviction of the solicitor general that the AIA issue has enough substance that the Court should ask the parties to brief it.<sup>63</sup>

## B. Harm if On-the-Merits Decision Is Derailed

It would be a tragedy if the Court were to use the AIA issue to avoid deciding the merits of challenges to the individual mandate. It would take many years for the constitutional challenges to the PPACA to reach the Supreme Court through an alternative route, and unacceptable damage would be inflicted on the country during the period of that delay.

**1. Delay.** If the Supreme Court were to hold that the AIA and the DJA bar hearing the merits of the constitutional challenges to the PPACA now, when next could the Court hear those merits? The merits could reach the Court in either of the two ways, but both would entail long delay.

The individual mandate doesn't go into effect until 2014. The returns on which those who do not have minimum coverage would have to report the penalty would be their 2014 federal income tax returns, which would be filed in 2015. One alternative would be for the individual to pay the penalty in 2015 and then file a refund claim with the IRS seeking return of the penalty on the ground of its constitutional infirmity. Six months later (unless the IRS earlier denied the refund claim),<sup>64</sup> the payer could file a refund suit in either federal district court or the Court of Federal Claims.<sup>65</sup> The other alternative would be to file a return reporting the penalty but omitting payment of it. The individual would wait for the government to file a suit to collect the unpaid amount,<sup>66</sup> and then defend the suit on the ground that the provision is unconstitutional.

Either way, there would be lengthy delay. Nothing could happen until 2014 returns were filed in 2015. Thereafter, there would be months of return processing time followed by years for litigating at the trial level, followed by years at the appellate

court level, followed by years at the Supreme Court level. Realistically, it could be 2020 or later before a Supreme Court decision.

Indeed, by behaving strategically, the government could delay a decision even longer, theoretically forever. Most Americans do not relish the thought of tangling with the IRS, so most would obtain the minimum coverage. Some of those who don't would simply pay the penalty quietly. In relative terms, therefore, there might not be that many non-payers. Were the numbers small enough, the IRS could simply grant their refund claims or not refer the cases to the DOJ for prosecution. By that expedient, there would be no cases to eventually bubble up to the Supreme Court. That scenario is unlikely but cannot be entirely discounted.

**2. Harms.** The longer the validity of the PPACA remains unresolved, the greater the harms this country will suffer. In urging the Supreme Court to hear *Florida*, a business organization plaintiff in the case spoke of the "harmful uncertainty currently pervad[ing] the Nation" as to this issue and the shared need of both public officials and private individuals for a decision that "will eliminate the legislative contingency clouding their personal, business, and regulatory decisionmaking."<sup>67</sup> Specifically:

until this Court decides the extent to which the [PPACA] survives, the entire Nation will remain mired in doubt, which imposes an enormous drag on our economy. Individuals, employees, and States will lack a firm understanding of their rights and duties when planning their affairs. Providers of health insurance will have no idea what rules will govern their industry. Government officials will not know what regulatory measures need to be developed. Everyone will needlessly put off significant decisions that may be affected by the resolution of these contingencies.<sup>68</sup>

Among those "significant decisions" are hiring decisions. It has been suggested that uncertainty about employment costs associated with the PPACA is a significant factor discouraging businesses from hiring additional workers.<sup>69</sup>

<sup>63</sup>Because the government agrees with plaintiffs on the AIA issue, the DOJ also suggested that the Supreme Court consider appointing an amicus to file a brief taking the contrary position on the issue. See Petition for Writ of Certiorari by State of Florida et al., *Florida v. HHS*, 2011 WL 4500702, at 33-34 and n.7.

<sup>64</sup>See section 6532(a)(1).

<sup>65</sup>Section 7422(a); 28 U.S.C. section 1346; see *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 10 (2008), *Doc 2008-8381*, 2008 TNT 74-10 (confirming that the AIA does not preclude refund suits).

<sup>66</sup>See sections 5000A(g) and 7403(a).

<sup>67</sup>Petition for Writ of Certiorari of National Federation of Independent Business, *National Fed. of Independent Bus. v. Sebelius*, 2011 WL 4479107, at \*11 (Sept. 28, 2011).

<sup>68</sup>*Id.* at \*11-\*12.

<sup>69</sup>The president of the Federal Reserve Bank of Atlanta said: "Prominent among [the factors impeding hiring] is the lack of clarity about the cost implications of the recent health care legislation. We've frequently heard strong comments to the effect of 'my company won't hire a single additional worker until we know what health insurance costs are going to be.'" Dennis P. Lockhart, "Business Feedback on Today's Labor

(Footnote continued on next page.)



The self-interested statements of a litigant are of course subject to skepticism. Significantly, however, courts have reached similar conclusions. As one district court observed:

Responsible individuals, businesses, and states will have to start making plans now or very shortly to comply with the Act's various mandates. Individuals who are presently insured will have to confirm that their current plans comply with the Act's requirements and, if not, take appropriate steps to comply; the uninsured will need to research available insurance plans, find one that meets their needs, and begin budgeting accordingly; and employers and states will need to revamp their healthcare programs to ensure full compliance.<sup>70</sup>

Other courts have expressed similar views.<sup>71</sup> Given the stakes, delaying final resolution of the legality of the PPACA would be highly disadvantageous.

#### IV. Amending the Statutes

There are three virtues that should commend to policymakers the statutory amendments suggested in this report: amendment would be simple, non-controversial, and decisive. After developing these points, this part considers, and rejects, possible objections to the proposal.

##### A. Simple

Two sentences of legislative language would suffice to defuse the AIA issue. One sentence would amend section 7421 (the AIA) to provide that it does not apply to suits challenging the validity of the individual mandate provision of the PPACA. The other sentence would correspondingly amend section 2201 (the DJA).

This would be purely ad hoc legislation, so it would not have to be reflected in the United States Code.<sup>72</sup> To take a parallel, the effective date and transitional rules portions of session laws typically are not codified.

If fears of unintended consequences rear their heads, the sentences could be yet more circum-

scribed. For example, the sentences could be limited to protecting only suits brought before a specified date or pending in the courts as of a specified date. Selection of the date would ensure that current cases could proceed free of the AIA and DJA specter — which would provide enough vehicles for the Supreme Court to decide the merits of the individual mandate — without concern for what might be in complaints not yet written.<sup>73</sup>

##### B. Uncontroversial

There appears to be no political force that would oppose taking the AIA and the DJA out of the individual mandate picture. The DOJ now agrees with the state and private plaintiffs that the Supreme Court should resolve doubts about the validity of the PPACA. And, although it urges the Supreme Court to direct briefing of the AIA issue, DOJ has changed its view of that issue.

Assuming that the DOJ reflects the views of the administration and its congressional allies, both sides of the political aisle want Supreme Court review to go forward. That being so, passage of the amendments should be easy and without controversy. The amendments could be attached as riders to other bills or could be offered as free-standing legislation. It would be heartening, in this gridlocked Congress, to see something pass.

##### C. Decisive

Individual legislators could express their opinions on the AIA issue, of course, but that would count for little. Post-enactment statements by legislators, even sponsors of the provisions at issue, typically are given little or no weight by the courts.<sup>74</sup> Legislation, however, would resolve the question immediately and decisively.

##### D. Unobjectionable

I can think of no substantial objection to the amendments proposed in this report. Four possible objections are considered below: effect on tax administration, separation of powers, retroactivity, and adverse inference.

**1. Tax administration.** As noted previously, Caplan and Cohen, in their amici brief to the D.C. Circuit, argued that the AIA and the DJA should be held to apply in the individual mandate context. A contrary holding, they feared, would undermine tax administration.<sup>75</sup>

Market" (Nov. 11, 2010), available at [http://www.frbatlanta.org/news/speeches/lockhart\\_111110.cfm](http://www.frbatlanta.org/news/speeches/lockhart_111110.cfm); see also UBS Investment Research (Sept. 19, 2011), at 1, available at <http://www.ubs.com/investmentresearch> ("arguably the biggest impediment to hiring (particularly hiring of less skilled workers) is healthcare reform").

<sup>70</sup>U.S. *Citizens Ass'n*, 754 F. Supp.2d at 908.

<sup>71</sup>E.g., *Thomas More*, 720 F. Supp.2d at 882; *Virginia*, 702 F. Supp.2d at 607-608.

<sup>72</sup>A duly enacted but uncodified session law, of course, is just as legally binding as a duly enacted statute codified in the U.S. Code.

<sup>73</sup>Theoretically, such a provision could be challenged on due process grounds. However, the easily satisfied rational basis standard of review would apply, and the selective treatment would be upheld.

<sup>74</sup>E.g., *Bread Political Action Comm. v. FEC*, 455 U.S. 577, 582 n.3 (1982).

<sup>75</sup>Corrected Brief, *supra* n. 49, at \*12-\*13.

Frankly, I doubt that the slope would be as slippery as the former commissioners fear. I doubt that a holding by the Supreme Court that the AIA and the DJA do not apply in the individual mandate context would metastasize into license for injunctions against routine tax administration.

Wherever the truth lies as to that, however, the former commissioners' concerns about tax administration should not be grounds for concern about the statutory amendments proposed in this report. These amendments would be ad hoc and highly targeted. By their terms, they would not apply in the general tax context.

**2. Separation of powers.** When a legislature attempts to dictate to courts how they are to interpret statutes, objections sometimes have been raised that the separation of powers principle is traduced.<sup>76</sup> That should not be problematic for the amendments proposed here. The amendments would not purport to tell courts how to interpret the AIA or the DJA. Instead, they would change the substantive content of the laws, which plainly is within the purview of Congress.

**3. Retroactivity.** There has been some dispute about precisely when a law change is retroactive and when retroactivity is impermissible.<sup>77</sup> Amending the AIA and the DJA to render them inapplicable to suits already commenced would arguably be retroactive legislation.

That should not be a problem, however. First, the Supreme Court typically has been quite indulgent of retroactive tax legislation.<sup>78</sup> Second, retroactivity is most problematic when substantial reliance inter-

ests are at stake,<sup>79</sup> which would not be the case here. Third, who would object? Both sides want Supreme Court review to go forward. Unlike subject matter jurisdiction, retroactivity objections are waivable.

**4. Adverse inference.** Were the proposed amendments put forward and adopted, they would not influence how the acts should be construed in other cases; the amendments are targeted to one unique area.

What if the proposed amendments were put forward but were not adopted? Would the failure of enactment be viewed by the Supreme Court as evidence that Congress thinks that the acts *do* apply in the individual mandate context? I doubt it. First, the amendments should pass because they are uncontroversial. Second, for statutory interpretation purposes, the views of the enacting congresses (the congresses that passed the acts) are the ones that matter, not the views of subsequent congresses, which did not participate in the relevant "legislative moment."<sup>80</sup> Third, the courts understand that there are numerous reasons particular bills are not enacted, so they would not necessarily conclude that the failure was because Congress disliked the contents of the bill.<sup>81</sup> No adverse inference need be drawn.

## V. Conclusion

If the amendments proposed in this report are enacted, on-the-merits resolution by the Supreme Court of the validity of the individual mandate will not be derailed by the AIA issue. If they are not enacted, there is an appreciable chance that the Supreme Court will not consider the merits until 2020 or later. The harms from eight years of delay would be great. The risk is not worth taking.

<sup>76</sup>See, e.g., *Evans v. State*, 872 A.2d 539, 542 (Del. 2005) (per curiam) (holding unconstitutional such a state statute); Thomas A. Bishop, "The Death and Reincarnation of Plain Meaning in Connecticut," 41 *Conn. L. Rev.* 825, 851-857 (2009); Johnson, "Statutes Requiring Plain Meaning Interpretation," *State Tax Notes*, Sept. 14, 2009, p. 763, Doc 2009-19539.

<sup>77</sup>For example, in 2010 Treasury amended regulations under sections 6501(e) and 6229(c)(2) to provide that overstatements of basis can be within the six-year limitations period for assessment. Among the objections raised by opponents of that change is a claim that the amendment is impermissibly retroactive. The government maintains that the amendment is not retroactive. See Respondent's Reply Brief in Support of Respondent's Motion to Vacate Order and Decision, *Intermountain Insurance Serv. of Vail LLC v. Commissioner*, No. 25868-06, 2010 WL 6754789, at Pt. III (May 6, 2010), Doc 2010-10163, 2010 TNT 88-12. The Supreme Court has agreed to review a related case, so guidance on this point may be forthcoming. *Home Concrete & Supply LLC v. United States*, 634 F.3d 249 (4th Cir. 2011), Doc 2011-2674, 2011 TNT 26-7, cert. granted, 80 U.S.L.W. 3078 (Sept. 27, 2011), Doc 2011-17772, 2011 TNT 160-13.

<sup>78</sup>E.g., *United States v. Carlton*, 512 U.S. 26 (1994) (holding that a retroactive tax law change did not violate the due process clause).

<sup>79</sup>See generally Mitchell Rogovin and Donald L. Korb, "The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View From Within," 46 *Dup. L. Rev.* 323 (2008); Mitchell Rogovin, "The Four R's: Regulations, Rulings, Reliance, and Retroactivity: A View From Within," 43 *Taxes* 756 (1965).

<sup>80</sup>E.g., *South Carolina*, 465 U.S. at 375; *Bob Jones Univ.*, 416 U.S. at 741-742; *Snyder v. Marks*, 109 U.S. 189, 191 (1883). This principle runs counter to the reenactment and inaction canons of statutory interpretation, of course, but those canons are quite weak and usually amount to mere judicial window dressing. See generally Johnson, "The Reenactment and Inaction Doctrines in State Tax Litigation," *State Tax Notes*, Dec. 8, 2008, p. 661, Doc 2008-24362.

<sup>81</sup>Inertia, competing time demands, and the sense that particular legislation is unnecessary may explain legislative failure as often as does substantive disagreement. See, e.g., *United States v. Rodgers*, 461 U.S. 677, 703 n.31 (1983) (attaching no weight to failure of enactment of a bill because Congress rejected the measure "not necessarily because it disagreed with it, but more likely because it found it superfluous").

Congress should avail itself of the simple, uncontroversial, and decisive expedient of amending the AIA and the DJA to render them inapplicable to the current challenges to the validity of the individual mandate.<sup>82</sup>

In his dissent in the most recent individual mandate circuit court case, Judge Brett Kavanaugh argued at length that the AIA bars pre-enforcement review. But he added, "Unless Congress creates an exception for these Affordable Care Act cases — which Congress could still do at any atime — this suit cannot be decided by the federal courts until 2015."<sup>83</sup> Congress should accept that veiled invitation and spare the country potentially many years of harmful uncertainty.<sup>84</sup>

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<sup>82</sup>Some may assess the chance that the Supreme Court will reach the feared result to be at a lower level of probability than I do. In my view, given the magnitude of the potential harms, the proposed amendments would be a wise precaution at even a 20 percent or 10 percent level of probability.

<sup>83</sup>*Seven-Sky*, 2011 WL 5378319, at \*19. Of course, as noted previously, 2015 would be the earliest possible start of a later round of litigation. It would not conclude until years thereafter.

<sup>84</sup>*Cf. Bob Jones Univ.*, 416 U.S. at 745 (emphasizing that Congress is the proper body for creating exceptions to the AIA).