Is the Anti-Injunction Act Jurisdictional?

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An issue that has been raised in the constitutional challenges to the Patient Protection and Affordable Care Act (PPACA) is whether the litigation is premature and barred by the Anti-Injunction Act (AIA) until the disputed PPACA provisions have gone into effect, on the grounds that the litigation would restrain the assessment or collection of a tax. Whether the AIA bars the litigation depends in part on whether it is jurisdictional and therefore deprives federal courts of jurisdiction when it applies. Despite dictum to the contrary in earlier decisions, a more recent line of Supreme Court authority, which addresses what requirements for being in court are jurisdictional, calls into question the continuing validity of jurisdictional characterization for the AIA.

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Introduction

The Fourth Circuit's recent decision in *Liberty University v. Geithner*,[1] rejecting a constitutional challenge to some provisions of the Patient Protection and Affordable Care Act (PPACA),[2] held the challenge was barred by section 7421(a) of the code, the Anti-Injunction Act (AIA),[3] on the grounds that the purpose of the challenge was to restrain the assessment of a tax.[4] Even though the government did not, rely on the AIA as an obstacle to the litigation in the Fourth Circuit,[5] the court concluded that the AIA stripped it of jurisdiction[6] and dismissed the case:

> The parties concede, as they must, that, when applicable, the AIA divests federal courts of subject-matter jurisdiction. The Supreme Court has explicitly so held. *See Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962).[7]

It is clear that the Court in *Williams Packing* said "the object of section 7421(a) is to *withdraw jurisdiction* from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes."[8] But does that 1962 characterization of the AIA withstand scrutiny under the Supreme Court's more recent holdings to the effect

[1]No. 10-2347 (4th Cir. 2011), *Doc 2011-19031, 2011 TNT 175-12*.
[2]P.L. 111-148.
[3]Section 7421(a) provides that with some listed exceptions, "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."
[4]*Liberty University*, slip op. at 7.
[5]*Id.* at 14-15. The government had relied on the AIA in the district court but abandoned that argument in the Fourth Circuit. The Fourth Circuit ordered supplemental briefing on the issue of the applicability of the AIA, and both parties argued the AIA was inapplicable. In reaching its conclusion on the applicability of the AIA, the Fourth Circuit seems to have been persuaded by an amicus brief filed on behalf of two former IRS commissioners in a parallel case pending in the D.C. Circuit. *See, e.g.*, *Liberty University*, slip op. at 29, 42 (citing brief). *See* Brief of Amici Curiae Mortimer Caplin & Sheldon Cohen in Support of Appellees and Affirmance, *Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir. July 1, 2011). This amicus brief relied on *Williams Packing* for the principle that the AIA is jurisdictional. *Id.* at 16.
[6]*Liberty University*, slip op. at 7.
[7]*Id.* at 16.
[8]370 U.S. at 5 (emphasis added).

that "drive-by jurisdictional rulings of this sort . . . have no precedential effect?"[9]

Beginning with a decision in 1998, the Supreme Court has engaged in a campaign to enforce a more precise and narrower understanding of which requirements for pursuing litigation are properly characterized as genuinely jurisdictional requirements, as opposed to falling into some other, nonjurisdictional category, such as elements of a cause of action or what the Court has characterized as claim processing rules. In light of that recent, and clearly very purposeful, focus by the Court on narrowing the concept of jurisdictional requirements, there is a substantial question whether *Williams Packing*'s characterization of the AIA as withdrawing jurisdiction remains correct.

The issue has particular importance given that the government is not asserting, in connection with the litigation over the constitutionality of the PPACA, that the AIA bars the challenges. It seems particularly anomalous that a provision whose purpose is to protect the government from unwanted litigation concerning taxes should be applied when the government does not invoke the provision's protection and instead desires that the litigation proceed.

It seems clear the government is as eager for a prompt resolution of the constitutional issues relating to the PPACA as the challengers are. Unsupported dictum from a 1962 decision should not be used to thwart the prompt judicial review that the government seeks no less than the challengers without a careful analysis of the proper jurisdictional status of the AIA in light of the Supreme Court's recent guidance on the meaning of genuinely jurisdictional requirements. When the principles set forth in this recent line of cases are applied to the AIA, there is a strong case for the conclusion the AIA is not genuinely jurisdictional and is therefore subject to being waived by the government.

Several significant developments occurred after this report had been completed. First, the private parties in the Eleventh Circuit litigation filed their response[10] to the government's petition for certiorari in that case. They contend the AIA is not jurisdictional. In its subsequent reply brief,[11] the government, which does not contend that the AIA bars all the challenges to the PPACA, argued for the first time in Supreme Court filings that the AIA is jurisdictional. About two weeks later, the D.C. Circuit issued its decision in *Seven-Sky v. Holder*[12] upholding the PPACA, with a dissenting opinion addressing the AIA's jurisdictional status. Finally, on November 14 the Supreme Court granted the three certiorari petitions that had been filed in the Eleventh Circuit case. Those developments will be discussed at the end of this report.

'Drive-By Jurisdictional Rulings'

The recent Supreme Court decisions addressing how to determine which statutory requirements relating to pursuing litigation are properly characterized as genuinely jurisdictional requirements have emphasized that many prior decisions dealing with those issues, including decisions by the Supreme Court itself, have been overly broad and imprecise in characterizing particular requirements as jurisdictional, and have often made those characterizations when they had no effect on the outcome in the case. The Court has also emphasized that because of the drastic consequences of classifying requirements as jurisdictional, it is necessary to be more precise and careful in making those classifications than in the past.

The first case in the recent series of decisions by the Supreme Court on the proper understanding of jurisdictional requirements, *Steel Co. v. Citizens for a Better Environment*,[13] held that statutory requirements relating to a particular statutory cause of action represented merely elements of the cause of action, rather than prerequisites for the Court's jurisdiction. In response to the contention that a prior case, *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation Inc.*,[14] had characterized a supposedly similar statutory requirement as jurisdictional, the Court, in phrasing it would repeat in several of its subsequent opinions, said that "'jurisdiction,' it has been observed, 'is a word of many, too many meanings.'"[15] After noting that the relevant statutory provisions in the two cases differed in ways that made the jurisdictional characterization more plausible in the earlier case, the Court continued its analysis:

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[9]*Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998). I am one of the attorneys representing the taxpayer in a case pending in the Federal Circuit in which one of the issues is whether the variance rule in reg. section 301.6402-2(b)(1), which provides that refunds will be allowed only on grounds set forth in a refund claim, is properly characterized as jurisdictional under the Supreme Court's recent cases, when it is considered in conjunction with the rule in section 7422(a) that a refund suit may not be filed until a refund claim is submitted.

[10]Brief in Response for Private Respondents, *HHS v. Florida*, No. 11-398 (U.S. Oct. 14, 2011).

[11]Reply Brief for Petitioners, *HHS v. Florida*, No. 11-398 (U.S. Oct. 26, 2011).

[12]No. 11-5047 (D.C. Cir. 2011), *Doc 2011- 23522, 2011 TNT 217-19*.

[13]523 U.S. 83 (1998).

[14]484 U.S. 49 (1987).

[15]523 U.S. at 90.

> It is also the case that the *Gwaltney* opinion does not display the slightest awareness that anything turned upon whether the existence of a cause of action for past violations was technically jurisdictional — as indeed nothing of substance did. . . . The short of the matter is that *the jurisdictional character of the elements of the cause of action in* Gwaltney *made no substantive difference* (nor even any procedural difference that the Court seemed aware of), had been assumed by the parties, and was assumed without discussion by the Court. We have often said that *drive-by jurisdictional rulings of this sort* (if *Gwaltney* can even be called a ruling on the point rather than a dictum) *have no precedential effect*.[16]

Thus, ''drive-by jurisdictional rulings'' are cases in which the characterization of a particular statutory requirement as ''jurisdictional'' lacks careful analysis and does not affect the outcome of the case. As will be discussed, that was clearly the case for the statement in *Williams Packing* that the AIA withdraws jurisdiction.

There was a six-year gap between the first case in the series and the next one. *Kontrick v. Ryan*[17] held that a time limit in the federal bankruptcy rules was a claim processing rule rather than a jurisdictional requirement. ''Only Congress may determine a lower federal court's subject-matter jurisdiction,''[18] the Court said, and nothing in the relevant statutory provision suggested a time limit prescribed by the rules would be jurisdictional.[19] The Court went on to criticize the tendency of courts to be imprecise and careless in the use of the term ''jurisdictional'':

> *Courts, including this Court, it is true, have been less than meticulous in this regard*; they have more than occasionally used the term ''jurisdictional'' to describe emphatic time prescriptions in rules of court. ''Jurisdiction,'' the Court has aptly observed, ''is a word of many, too many, meanings.'' . . . Clarity would be facilitated if courts and litigants used the label ''jurisdictional'' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.[20]

The Court then identified one of the main reasons why the distinction between genuinely jurisdictional requirements and other types of requirements, such as claim processing rules, matters:

> Characteristically, a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point.[21]

Non-jurisdictional requirements can be forfeited or waived; jurisdictional requirements cannot. Because of that important distinction, if the AIA is not jurisdictional, the government is free to waive it. Because the government has made clear it is not relying on the AIA in connection with the challenges to the PPACA, characterizing the AIA as non-jurisdictional would allow the challenges to proceed to a decision on the merits.

Eberhart v. United States,[22] following *Kontrick*, held that a time limit in the federal rules of criminal procedure was non-jurisdictional, once again referring to the carelessness and lack of precision on the issue in prior cases: ''We break no new ground in firmly classifying Rules 33 and 45 as claim-processing rules, despite the confusion generated by the 'less than meticulous' uses of the term 'jurisdictional' in our earlier cases.''[23]

Arbaugh v. Y&H Corp.[24] represented a significant development in this history. *Arbaugh* held that a particular statutory provision was an element of the cause of action rather than a jurisdictional prerequisite. More significantly, *Arbaugh* set out a bright-line test for distinguishing between genuinely jurisdictional requirements and other, non-jurisdictional requirements. The Court began by describing once again the tendency of courts to be imprecise by confusing elements of a cause of action with jurisdictional requirements:

> ''Jurisdiction,'' this Court has observed, ''is a word of many, too many, meanings.'' *This Court, no less than other courts, has sometimes been profligate in its use of the term*.
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> . . .
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> *On the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous*. ''Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound

[16] *Id.* at 91 (emphasis added).
[17] 540 U.S. 443 (2004).
[18] *Id.* at 452.
[19] *Id.* at 453.
[20] *Id.* at 454-455 (emphasis added).
[21] *Id.* at 456.
[22] 546 U.S. 12 (2005).
[23] *Id.* at 16.
[24] 546 U.S. 500 (2006).

> by the federal law asserted as the predicate for relief — a merits-related determination.'' Judicial opinions, the Second Circuit incisively observed, ''often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim.'' We have described such unrefined dispositions as ''drive-by jurisdictional rulings'' that should be accorded ''no precedential effect'' on the question whether the federal court had authority to adjudicate the claim in suit.[25]

The Court then identified some of the consequences of the distinction between genuinely jurisdictional requirements and non-jurisdictional requirements:

> First, ''subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.'' Moreover, courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.[26]

Finally, the Court announced a ''readily administrable bright line'' for distinguishing jurisdictional from non-jurisdictional requirements:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.[27]

In *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen*,[28] the Court held that an agency had improperly limited its jurisdiction by erroneously interpreting as jurisdictional a statutory requirement relating to procedures to be followed by disputing parties in attempting to reach a settlement before asking the agency to adjudicate the dispute and once again emphasized the need for greater precision in distinguishing between jurisdictional and non-jurisdictional requirements than in the past:

> In this case . . . our grant of certiorari enables us to address a matter of some importance: We can reduce confusion, clouding court as well as Board decisions, over matters properly typed ''jurisdictional.''
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> . . .
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> Recognizing that the word ''jurisdiction'' has been used by courts, including this Court, to convey ''many, too many, meanings,'' *we have cautioned, in recent decisions, against profligate use of the term. Not all mandatory ''prescriptions, however emphatic, are . . . properly typed jurisdictional*.'' . . . Subject-matter jurisdiction properly comprehended, we emphasized, refers to a tribunal's ''power to hear a case,'' a matter that ''can never be forfeited or waived.'' In contrast, a ''claim-processing rule . . . even if unalterable on a party's application,'' does not reduce the adjudicatory domain of a tribunal and is ordinarily ''forfeited if the party asserting the rule waits too long to raise the point.''[29]

After noting that ''Congress gave the Board no authority to adopt rules of jurisdictional dimension,''[30] the Court concluded ''neither the RLA nor Circular One could plausibly be read to require, as a prerequisite to the NRAB's exercise of jurisdiction, submission of proof of conferencing.''[31]

Reed Elsevier Inc. v. Muchnick[32] held that a statutory requirement that copyright holders register their works before suing for copyright infringement[33] did not represent a jurisdictional requirement. The Court once again emphasized the need for greater clarity in identifying genuinely jurisdictional requirements:

> ''Jurisdiction'' refers to ''a court's adjudicatory authority.'' Accordingly, the term ''jurisdictional'' properly applies only to ''prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)'' implicating that authority.
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> While perhaps clear in theory, the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice. *Courts — including this Court — have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis*.

[25] *Id.* at 510, 511 (emphasis added; citations omitted).
[26] *Id.* at 514 (citations omitted).
[27] *Id.* at 515-516 (footnotes and citations omitted).
[28] 130 S. Ct. 584 (2009).
[29] *Id.* at 596 (emphasis added; citations omitted; alterations in original).
[30] *Id.* at 597.
[31] *Id.* at 599.
[32] 130 S. Ct. 1237 (2010).
[33] *Id.* at 1241.

> In light of the important distinctions between jurisdictional prescriptions and claim-processing rules, we have encouraged federal courts and litigants to ''facilitat[e]'' clarity by using the term ''jurisdictional'' only when it is apposite.[34]

After quoting the test adopted in *Arbaugh*, and describing the analysis used in that case, the Court applied the same approach to the copyright registration requirement. The detailed analysis applied in *Reed Elsevier* will be discussed below in connection with the AIA.

Henderson v. Shinseki[35] held that the statutory time limit for filing an appeal from the Board of Veterans' Appeals to the Court of Appeals for Veterans Claims is not jurisdictional. *Henderson* also presented an extensive discussion of the reasons supporting the Court's recent focus on requiring more precision in the consideration of which requirements relating to litigation are genuinely jurisdictional, including the potential for waste of resources of both the courts and litigants that may result from classifying a particular requirement as jurisdictional:

> In this case, as in others that have come before us in recent years, we must decide whether a procedural rule is ''jurisdictional.'' This question is not merely semantic but one of considerable practical importance for judges and litigants. *Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system.* Under that system, courts are generally limited to addressing the claims and arguments advanced by the parties. Courts do not usually raise claims or arguments on their own. But federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press.
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> *Jurisdictional rules may also result in the waste of judicial resources and may unfairly prejudice litigants.* For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times. Objections to subject-matter jurisdiction, however, may be raised at any time. Thus, a party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction. Indeed, a party may raise such an objection even if the party had previously acknowledged the trial court's jurisdiction. And if the trial court lacked jurisdiction, many months of work on the part of the attorneys and the court may be wasted.
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> *Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term.* We have urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction. Other rules, even if important and mandatory, we have said, should not be given the jurisdictional brand.[36]

Most recently, in *Stern v. Marshall*,[37] the Court held a statutory requirement non-jurisdictional, applying the rationale from *Henderson*:

> Because ''branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system,'' we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such.[38]

The message of this line of cases[39] is clear and strong: Statutory requirements are not to be interpreted as jurisdictional requirements unless it is clear Congress intended that treatment. Prior cases characterizing particular statutory requirements as jurisdictional without engaging in the type of careful analysis required by this recent line of cases are not controlling, especially when the jurisdictional characterization did not affect the outcome in the case.

Is *Williams Packing* a Drive-By Ruling?

The statement in *Williams Packing* that ''the object of section 7421(a) is to withdraw jurisdiction'' was not supported either by analysis or by any citation to prior case authority. Moreover, *Williams Packing*'s characterization of the AIA as withdrawing jurisdiction had no effect on the outcome in the case. The government had relied on the AIA both in the district court[40] and in the court of appeals,[41] so there was no possible issue whether the government's ability to rely on the AIA might have been forfeited or waived. Thus, the statement in *Williams Packing*

[34]*Id.* at 1243-1244 (emphasis added; citations omitted).
[35]131 S. Ct. 1197 (2011).
[36]*Id.* at 1202-1203 (emphasis added; citations omitted).
[37]131 S. Ct. 2594 (2011).
[38]*Id.* at 2606-2607 (citations omitted).
[39]Other cases in the series are *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010); *United Student Aid Funds Inc. v. Espinosa*, 130 S. Ct. 1367 (2010); *Dolan v. United States*, 130 S. Ct. 2533 (2010); and *Scarborough v. Principi*, 541 U.S. 401 (2004).
[40]176 F. Supp. 168 (D. Miss. 1959).
[41]291 F.2d 402 (5th Cir. 1961).

was clearly in the category of drive-by jurisdictional rulings that the Supreme Court in the above cases repeatedly insisted ''have no precedential effect.''

In another passage, *Williams Packing* stated:

> The manifest purpose of section 7421 (a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue.[42]

When, as is the case in the litigation concerning the PPACA, the government does not invoke the protection of the AIA, it is hard to see that the manifest purpose of protecting the government against unwanted judicial intervention in the collection of taxes is thwarted. When the government seeks prompt judicial review no less than the challengers, it would be extremely anomalous for the AIA to be applied to prevent that.

As the Court said in *Union Pacific*, ''not all mandatory 'prescriptions, however emphatic, are . . . properly typed jurisdictional.'''[43] The conclusion that the AIA is not jurisdictional, despite the unsupported dictum in *Williams Packing*, achieves the goal of permitting the government to forgo reliance on the AIA, because one of the defining characteristics of non-jurisdictional requirements is that those requirements can be waived.

While it is clear that the statement in *Williams Packing* that the AIA withdraws jurisdiction is a drive-by jurisdictional decision because it is unsupported by analysis or authority and because the jurisdictional status of the AIA made no difference to the outcome in the case, that conclusion is not enough to resolve whether the AIA is in fact genuinely jurisdictional. As the recent line of cases requiring a more precise analysis of which requirements for litigation are genuinely jurisdictional makes clear, whether a particular statutory requirement is jurisdictional is a matter of statutory interpretation to be performed by the courts, based on the evidence of congressional intent reflected in the statute, employing normal tools of statutory construction.

For purposes of performing that inquiry, *Arbaugh* announced a bright-line test based on whether ''the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional,''[44] or whether, instead, ''Congress does not rank a statutory limitation on coverage as jurisdictional.''[45] However, *Reed Elsevier* recognized that in applying that test, ''while perhaps clear in theory, the distinction between jurisdictional conditions and [non-jurisdictional requirements] can be confusing in practice.''[46]

Applying the *Reed Elsevier* Analysis

Reed Elsevier engaged in a detailed analysis on the issue that is helpful as a guide in other cases. The Court summarized its three reasons for concluding the provision at issue was not jurisdictional:

> Section 411(a) imposes a precondition to filing a claim that [1] is not clearly labeled jurisdictional, [2] is not located in a jurisdiction-granting provision, and [3] admits of congressionally authorized exceptions.[47]

Regarding the first reason, the Court noted that under the *Arbaugh* test, it ''must consider whether section 411(a) 'clearly states' that its registration requirement is 'jurisdictional.' It does not.''[48] Similarly, the AIA does not use the term ''jurisdiction.'' The principal operative language of the provision at issue in *Reed Elsevier* was as follows: ''No civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.''[49] The operative language of the AIA is as follows: ''No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.'' The central language in the AIA that no suit shall be maintained is quite similar to the central language in *Reed Elsevier* that no civil action shall be instituted. In neither case does the operative language say anything about jurisdiction or the court's power.

Regarding the second reason, the Court said: ''Section 411(a)'s registration requirement . . . is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over those . . . claims.''[50] Section 411(a) is located in title 17 of the United States Code, whereas the provisions granting federal district courts subject matter jurisdiction over copyright suits are located in title 28. Similarly, in *Liberty University*, the plaintiffs relied on provisions in title 28 for the jurisdiction of the district court, and the government agreed with

[42] 370 U.S. at 7.
[43] 130 S. Ct. at 596 (alterations in original).
[44] 546 U.S. at 515.
[45] *Id.* at 516.
[46] 130 S. Ct. at 1243.
[47] *Id.* at 1247 (alterations added).
[48] *Id.* at 1245 (citations omitted).
[49] *Id.*
[50] *Id.* at 1245-1246.

the applicability of those provisions.[51] As was the case with the provision at issue in *Reed Elsevier*, the AIA is not located in title 28; it is located in title 26.

The third reason supporting non-jurisdictional status for the provision in *Reed Elsevier* was the existence of ''congressionally authorized exceptions'' to the requirement: ''Most significantly, section 411(a) expressly *allows* courts to adjudicate infringement claims involving unregistered works in three circumstances.''[52] Similarly, the AIA contains far more than the three exceptions present in the provision in *Reed Elsevier*:

> *Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436*, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.[53]

Thus, the AIA lists *12 different sections* of the Internal Revenue Code as providing exceptions to the general rule.

Thus, the three reasons relied on in *Reed Elsevier* for the conclusion that the provision at issue there was not jurisdictional likewise lead to the same conclusion for the AIA. Although *Reed Elsevier* did not discuss this factor in its analysis, in the section of the opinion stating the general principles applicable in determining which statutory provisions are jurisdictional, it quoted the following language from an earlier opinion: ''Jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'''[54]

The AIA, like the provision at issue in *Reed Elsevier*, does not refer to the power or authority of the courts to hear or decide a case, but rather to the right of a party to maintain an action: ''No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.'' In contrast, a provision that is often discussed in connection with the AIA, the so-called Tax Injunction Act (title 28, section 1341), very clearly speaks to the power of the courts: ''*The district courts shall not* enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.''[55] The contrast in wording between those two provisions is striking, and that contrast — together with the fact that section 1341 is in title 28, whereas the AIA is in title 26 — supports the conclusion that the AIA is not jurisdictional.

Bowles v. Russell

During the period that the Supreme Court has been engaged in its campaign for more precision in the determination of which litigation-related requirements should properly be classified as jurisdictional, the Court has also, in a few cases, held that particular requirements were genuinely jurisdictional. The most notable of those is *Bowles v. Russell*,[56] which held that a statutory time limit for filing an appeal from a district court judgment was jurisdictional: ''This Court has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'''[57]

In support of that proposition, the Court cited six of its prior decisions, including decisions from 1848 and 1873. The Court also said regarding the statutory time limit for filing petitions for certiorari in civil cases: ''We have repeatedly held that this statute-based filing period for civil cases is jurisdictional. . . . It is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century.''[58] While the Court did not specifically emphasize it, the time limit at issue was in a provision located in title 28.[59]

In *Reed Elsevier*, the Court distinguished *Bowles*:

> *Bowles* did not hold that any statutory condition devoid of an express jurisdictional label should be treated as jurisdictional simply because courts have long treated it as such. Nor did it hold that all statutory conditions imposing a time limit should be considered jurisdictional. Rather, *Bowles* stands for the proposition that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional. . . .
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> After analyzing section 2107's specific language and this Court's historical treatment of the type of limitation section 2107 imposes (i.e., statutory deadlines for filing appeals), we concluded that Congress had ranked the statutory condition as jurisdictional. Our focus in *Bowles* on the historical treatment of statutory

[51]The plaintiffs relied on 28 U.S.C. sections 1331 (federal question) and 1343 (civil rights) as the basis for jurisdiction; the government cited 28 U.S.C. sections 1331 and 1346 (United States as defendant) as the basis for jurisdiction. *See* Opening Brief of Appellants Liberty University, Michele G. Waddell, and Joanne V. Merrill at 1, *Liberty University*, No. 10-2347; Brief for Appellees at 1, *Liberty University*, No. 10-2347.

[52]130 S. Ct. at 1246 (emphasis in original).

[53]Section 7421(a) (emphasis added).

[54]130 S. Ct. at 1243 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994)).

[55]Emphasis added.

[56]551 U.S. 205 (2007).

[57]*Id.* at 209.

[58]*Id.* at 209 n.2, 212.

[59]*Id.* at 213.

> conditions for taking an appeal is thus consistent with the *Arbaugh* framework. Indeed, *Bowles* emphasized that this Court had long treated such conditions as jurisdictional, including in statutes other than section 2107, and specifically in statutes that predated the creation of the courts of appeals.
>
> *Bowles* therefore demonstrates that the relevant question here is not . . . whether section 411(a) itself has long been labeled jurisdictional, but whether the type of limitation that section 411(a) imposes is one that is properly ranked as jurisdictional absent an express designation. The statutory limitation in *Bowles* was of a type that we had long held *did* ''speak in jurisdictional terms'' even absent a ''jurisdictional'' label, and nothing about section 2107's text or context, or the historical treatment of that type of limitation, justified a departure from this view.[60]

Based on that analysis, the Court in *Reed Elsevier* concluded *Bowles* was not inconsistent with the conclusion that the provision at issue was not jurisdictional. In contrast to the provision at issue in *Bowles*, the AIA is not a statutory time limit on filing an appeal, nor is it a type of limitation that has long been treated as jurisdictional. Thus, under the same type of analysis that was used in *Reed Elsevier*, the jurisdictional conclusion in *Bowles* should be inapplicable to the AIA just as it was inapplicable in *Reed Elsevier*.

AIA Cases After *Williams Packing*

The specific limitation in the AIA does not have the same long history of consistent treatment by the Supreme Court as jurisdictional that was the case for the provision at issue in *Bowles*. As noted above, dictum in *Williams Packing* stating that the AIA withdraws jurisdiction was not supported by any citation of prior cases.

Supreme Court cases dealing with the AIA after *Williams Packing* have not established the type of consistent treatment that existed in *Bowles*. *Bob Jones University v. Simon*,[61] while discussing *Williams Packing*,[62] does not refer to the statement in *Williams Packing* that the AIA withdraws jurisdiction. However, the case does state its conclusion in terms of jurisdiction.[63] Nevertheless, the outcome in the case clearly did not depend on whether the AIA was considered jurisdictional.

In *Alexander v. ''Americans United'' Inc.*,[64] a companion case to *Bob Jones*, the majority opinion included no reference to that aspect of *Williams Packing*. A dissenting opinion by Justice Harry Blackmun quoted the statement from *Williams Packing*, but the issue of whether the AIA is jurisdictional played no part in his analysis or conclusion. *United States v. American Friends Service Committee*[65] included no reference to the statement in *Williams Packing* that the AIA withdraws jurisdiction.

In *Laing v. United States*,[66] the majority's discussion of the AIA included no reference to whether it is jurisdictional.[67] A dissenting opinion by Justice Blackmun, which two other justices joined, contained a two-page discussion of the AIA, including a brief discussion of *Williams Packing*, but there was no reference to whether the AIA is jurisdictional.[68]

In *Commissioner v. Shapiro*,[69] the Court included language in several places to the effect that the applicability of the AIA results in a lack of jurisdiction, for the most part in describing the contentions of the government in the lower courts and the holdings by those courts,[70] but the question whether the AIA is jurisdictional had no effect on the outcome in the case.

In *South Carolina v. Regan*,[71] the majority did not refer to that aspect of *Williams Packing*. However, a concurring opinion by Justice Sandra Day O'Connor, which two other justices joined, assumed without discussion that the AIA deprives ''courts of jurisdiction to resolve abstract tax controversies.''[72] Based on that assumption, Justice O'Connor expressed concern that applying the AIA to the Supreme Court's original jurisdiction ''raises a grave constitutional question: namely, whether Congress constitutionally can impose remedial limitations so jurisdictional in nature that they effectively withdraw the original jurisdiction of this Court.''[73]

> To be sure, the Tax Anti-Injunction Act does not expressly withdraw the original jurisdiction of the Court. Rather, it merely prohibits

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[60]130 S. Ct. at 1247-1248 (emphasis in original; footnotes and citations omitted).
[61]416 U.S. 725 (1974).
[62]*Id.* at 742-746, 748-749.
[63]*Id.* at 749 (''The Court of Appeals did not err in holding that section 7421(a) deprived the District Court of jurisdiction to issue the injunctive relief petitioner sought'').
[64]416 U.S. 752 (1974).
[65]419 U.S. 7 (1974).
[66]423 U.S. 161 (1976).
[67]*Id.* at 184 n.27.
[68]*Id.* at 194-197 (Blackmun, J., dissenting).
[69]424 U.S. 614 (1976).
[70]*Id.* at 620-623.
[71]465 U.S. 367 (1984).
[72]*Id.* at 386 (O'Connor, J., concurring in the judgment).
[73]*Id.* at 395.

> ''any court'' from maintaining a suit that has ''the purpose of restraining the assessment or collection'' of federal taxes. The effect of that prohibition, however, is to preclude the Court from ever assuming original jurisdiction to adjudicate a state-qua-state's 10th and 16th Amendment tax claims, in apparent derogation of the grant's constitutional purpose. While ''Congress has broad powers over the jurisdiction of the federal courts and over the sovereign immunity of the United States[,] it is extremely doubtful that they include the power to limit in this manner the original jurisdiction conferred upon this Court by the Constitution.''[74]

That passage mischaracterizes the text of the AIA in a way that is crucial for determining whether it is jurisdictional. It asserts that the AIA prohibits any court from maintaining a suit that has ''the purpose of restraining the assessment or collection'' of federal taxes. The opinion later repeated that characterization: ''The Act precludes 'any court' from maintaining a suit initiated for the purpose of restraining the assessment or collection of federal taxes.''[75]

To the contrary, the AIA provides that no suit shall be maintained in any court. It does not refer to a court maintaining an action but rather to a suit being maintained in a court. As discussed above, the AIA is not, by its terms, directed at the power of the courts, but rather at the rights of parties.

To avoid the constitutional issue, Justice O'Connor's concurring opinion concluded the AIA reference to ''any court'' should be interpreted as not applying to the Supreme Court's original jurisdiction but as instead encompassing state courts, in addition to federal courts other than the Supreme Court.[76] That interpretation is consistent with the statement in *Williams Packing* that ''the object of section 7421 (a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes.''

However, the conclusion that the AIA applies to state courts as well as federal courts is difficult to reconcile with the position that the AIA *withdraws* jurisdiction, because the federal government does not *establish* the jurisdiction of state courts. It would not make sense to say that a federal statute withdraws jurisdiction that Congress has not established in the first place. In any event, the constitutional concern raised in Justice O'Connor's concurring opinion disappears if the AIA is not, in fact, jurisdictional.

Hibbs v. Winn[77] did not deal with the AIA, but rather with the Tax Injunction Act, section 1341 in title 28. However, in addressing section 1341, *Hibbs* discussed the AIA, noting that it was one of the models for section 1341. As noted earlier, the text of section 1341 differs in one key respect from the text of the AIA: It directly prohibits action by courts, whereas the AIA does not.

The majority's discussion did not refer to whether the AIA is jurisdictional. A dissenting opinion by Justice Anthony Kennedy, which three other justices joined, also discussed section 1341 by reference to the AIA, referring to section 1341 as a ''jurisdictional bar.''[78] However, both the majority and the dissent overlooked the crucial textual difference between section 1341 and the AIA.[79]

United States v. Clintwood Elkhorn Mining Co.[80] likewise did not deal with the AIA, but rather with the refund claim requirement in section 7422(a) for filing a refund suit. The decision did address the AIA in connection with the discussion of section 7422(a) but did not discuss whether the AIA is jurisdictional.

Thus, the Supreme Court's decisions after *Williams Packing* in which the AIA has been at issue have clearly not produced the sort of well-established principle regarding the possible jurisdictional status of the AIA that existed in *Bowles* regarding the jurisdictional status of time requirements for filing appeals. Consequently, the statutory construction analysis based on the approach used in *Reed Elsevier*, together with the fact that *Williams Packing* represented a drive-by jurisdictional decision on the jurisdictional status of the AIA, lead to the conclusion that the AIA is not, in fact, jurisdictional.

Moreover, as the government pointed out in its petition for certiorari in the Eleventh Circuit challenging the constitutionality of the PPACA,[81] one

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[74]*Id.* at 398 (alterations in original).

[75]*Id.* at 399.

[76]''I would conclude that the Act's reference to 'any court' means to assure that all state, as well as federal, courts are subject to the anti-injunction prohibition.'' *Id.* at 400.

[77]542 U.S. 88 (2004).

[78]*Id.* at 114 (Kennedy, J., dissenting).

[79]542 U.S. at 102 (the AIA ''bars 'any court' from entertaining a suit brought 'for the purpose of restraining the assessment or collection of any'' federal tax) (alteration in original); *id.* at 115 (the AIA specifies ''that federal courts may not restrain or enjoin an 'assessment or collection of any'' federal tax) (Kennedy, J., dissenting).

[80]553 U.S. 1 (2008).

[81]Petition for a Writ of Certiorari at 33, *HHS v. Florida*, No. 11-398 (Sept. 28, 2011).

important decision before *Williams Packing* permitted an express waiver of the AIA by the government.[82] As discussed above, that waiver is possible only if the AIA is not jurisdictional. Also, as pointed out in another petition for certiorari filed on the same day in the same case,[83] genuinely jurisdictional requirements do not permit judicially created exceptions,[84] whereas there are several judicially created exceptions to the AIA.[85] The existence of judicially created exceptions means the AIA cannot be genuinely jurisdictional.

Recent Developments

As noted above, two significant certiorari-stage filings were submitted to the Supreme Court after this report was completed. The first was the private parties' response to the government's petition for certiorari in the Eleventh Circuit case.[86]

Arguing that the AIA is not jurisdictional, the private respondents cited *Arbaugh*, *Henderson*, and *Helvering v. Davis*,[87] in which the government expressly waived the AIA and the Supreme Court accepted the waiver. They asserted that the government had similarly waived the AIA in the Eleventh Circuit case. The certiorari petition filed earlier by those private parties contained a much briefer discussion of the AIA, only raising the possibility that the AIA is non-jurisdictional, rather than making an affirmative argument to that effect.[88]

About two weeks later, the government filed its reply brief in connection with its certiorari petition in the Eleventh Circuit case.[89] That brief was largely devoted to defending the position that the AIA is jurisdictional, even though the government does not contend the AIA bars all the challenges to the PPACA.

The government had not previously expressed the position that the AIA is jurisdictional in any of the Supreme Court filings for the PPACA cases. However, despite contending the AIA is jurisdictional and that the private respondents are wrong to claim otherwise, the government in its reply brief did not discuss the most relevant authorities on the distinction between jurisdictional and nonjurisdictional requirements for being in court — namely, the *Arbaugh* line of cases — except to cite *Arbaugh* itself on an entirely tangential point.[90]

Instead, the government relied on the drive-by jurisdictional dictum in cases such as *Williams Packing* and *Bob Jones University*.[91] It also relied on authority holding that the Tax Injunction Act is jurisdictional.[92] The government contended the jurisdictional character of the Tax Injunction Act means the AIA is also jurisdictional, based on the contention the Tax Injunction Act is "cognate" to the AIA and is "similarly worded."[93] However, as discussed above, the Tax Injunction Act clearly is not similarly worded, because it directly addresses the power of the courts to take specified actions, whereas the AIA does not.

Also, the government engaged in what might be characterized as wordplay by claiming that when the Supreme Court has recognized there are "exceptions"[94] to the AIA, such as when there is certainty of success by the plaintiff on the merits, the Court "is best understood to have merely interpreted the language of the Act as inapplicable in a certain, very limited category of cases." It is difficult to see how holdings that the AIA *does not apply* in circumstances in which *by its terms it does apply* are not accurately characterized as "exceptions." The government's wordplay may take as its starting point the notion, from a 1932 decision, that a "tax" the government has no chance of successfully defending on the merits is therefore not really a "tax."[95] However, the Court in *Bob Jones University* clearly repudiated "the evisceration of the Act inherent in" that 1932 decision.[96]

Moreover, in discussing the significance of judicially recognized exceptions to the AIA, the government did not even attempt to address *South Carolina*,[97] in which the Court held the AIA inapplicable "to actions brought by aggrieved parties for whom [Congress] has not provided an alternate remedy."[98] The government discussed the case elsewhere in its brief, but only for the point that the

[82]*Helvering v. Davis*, 301 U.S. 619 (1937).

[83]Petition for a Writ of Certiorari at 16, *Nat'l Federation of Independent Business v. Sebelius*, No. 11-393 (Sept. 28, 2011). This report was nearly complete at the time the two petitions for certiorari were filed.

[84]*Bowles*, 551 U.S. at 214 ("This Court has no authority to create equitable exceptions to jurisdictional requirements").

[85]*See Williams Packing*, 370 U.S. at 7.

[86]Brief in Response for Private Respondents, *HHS v. Florida*, No. 11-398 (Oct. 14, 2011).

[87]301 U.S. 619 (1937).

[88]Petition for a Writ of Certiorari at 16, *Nat'l Federation of Independent Business*.

[89]Reply Brief for Petitioners, *HHS v. Florida*, No. 11-398 (Oct. 26, 2011).

[90]*Id.* at 5.

[91]*Id.* at 3.

[92]*Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821, 824, 825-826 (1997).

[93]Reply Brief for Petitioners at 3, *HHS v. Florida*.

[94]*Id.* at 4.

[95]*Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932) (referring to "an exaction in the guise of a tax").

[96]416 U.S. at 746.

[97]465 U.S. 367.

[98]*Id.* at 378.

exception to the AIA recognized there does not, according to the government, apply here.

The government also attempted to distinguish *Davis*, in which the Court clearly allowed the government to waive the AIA. In *Davis*, the government stressed, there was "an express and extensively explained waiver of the predecessor to the Anti-Injunction Act by the Solicitor General in his merits brief in this Court,"[99] and the Court's conclusion was explained "with minimal elaboration."[100] It is not apparent how the fact that the Supreme Court has permitted the government to waive the AIA does not conclusively establish that the AIA is subject to waiver and is therefore not jurisdictional. The government's argument in the present cases that it has not waived the AIA the way it did in *Davis* is irrelevant to the significance that *Davis* clearly allowed a government waiver of the AIA.

In another paper-thin argument, the government contended:

> The Court in *Davis* could have acted on [an] understanding that the Anti-Injunction Act, while jurisdictional, allows the federal government itself to expressly waive the jurisdictional bar on those rare occasions when the government formally represents that substantial countervailing interests outweigh the interest in avoiding pre-enforcement tax challenges.[101]

The government here relied on a comparison with the Court's decision in *Arkansas v. Farm Credit Services of Central Arkansas*,[102] which involved a previously established exception to the Tax Injunction Act for suits by the United States against a state to challenge the state's taxation. Apart from the fact that *Arkansas* predated the Court's reexamination of the distinction between jurisdictional and nonjurisdictional requirements, there is a clear distinction between the Tax Injunction Act, under which the United States is only one among many potential challengers to state taxes, and the AIA, under which the United States is always the defendant in a challenge to a federal tax. Thus, even though the Tax Injunction Act has been interpreted as having an exception for suits by the United States without impairing the act's jurisdictional status, that fails to support the conclusion that the government's ability to waive the AIA has no effect on the act's jurisdictional status.

The government also argued that it has not waived the AIA in the present cases in the same way as in *Davis*, because it is contending that the AIA is inapplicable on grounds that the IRC provision at issue does not impose a tax for purposes of the act. That is a respectable argument, but it can be anticipated that the Supreme Court will ask the government to articulate what its position would be if the IRC provision were held to impose a tax for purposes of the AIA.

As noted above, the most significant shortcoming in the government's brief is its complete failure to address the principles established in the *Arbaugh* line of cases on when requirements for being in court are properly classified as jurisdictional. A close second in the list of shortcomings is the government's misplaced reliance on the clearly erroneous proposition that the AIA and the Tax Injunction Act are "similarly worded." However, all the arguments presented by the government for jurisdictional status for the AIA in the reply brief are weak. If the government seriously intends to defend the jurisdictional characterization of the AIA, as its brief indicates it does, it will need to do a much better job.

The third recent development was the issuance of the D.C. Circuit's opinion in *Seven-Sky*, with a dissenting opinion that addressed the issue of the AIA's jurisdictional status. This dissenting opinion concluded that the AIA is jurisdictional, but its analysis in support of that conclusion is no more persuasive than that of the government's reply brief in the Eleventh Circuit case.

The *Seven-Sky* dissent does not completely ignore the *Arbaugh* line of cases, but it comes very close by understating the significance of those cases, acknowledging them only in a brief footnote that mischaracterizes the decisions as relating only to "whether certain provisions governing a lawsuit's timing relate to claims processing rather than jurisdiction."[103] That characterization overlooks the importance of the many cases in this line of authority, which emphasize the need to engage in a more careful analysis of the jurisdictional classification issue than was performed in cases from earlier periods. It is only by ignoring that aspect of those cases that the *Seven-Sky* dissent can rely on decisions that characterize the AIA as jurisdictional — precisely the same type of drive-by jurisdictional rulings the Supreme Court in the *Arbaugh* line of cases repeatedly made clear are not binding precedent.

The *Seven-Sky* dissent also mistakenly characterizes the AIA as addressing the power of the courts[104] when, as discussed above, it clearly does

[99]Reply Brief for Petitioners at 5, *HHS v. Florida*.
[100]*Id.* at 6.
[101]*Id.* at 7.
[102]520 U.S. 821 (1997).
[103]*Seven-Sky*, dissenting opinion at 11, n.5.
[104]*Id.* at 11.

not. The dissent relies on *Bowles* and its holding, based in part on consistent prior characterizations, that the requirement at issue there was genuinely jurisdictional (but it relies on the holding in *Bowles* only as cited in *Henderson*,[105] which in turn cited a reference to *Bowles* in *Union Pacific* rather than citing *Bowles* directly). However, the dissent ignores the discussion in *Reed Elsevier* that clarifies and narrows the meaning of *Bowles*, as well as the discussion in *Henderson* of the important reasons for engaging in careful analysis before classifying requirements as jurisdictional. The dissent dismisses *Davis* as ''a suit by a shareholder against a private corporation, not against the Government,''[106] but that characterization ignores that the government intervened in the suit and that the IRS commissioner was one of the named parties in the case. To prevail, the argument for jurisdictional classification of the AIA will require something better than the incomplete analysis presented in the *Seven-Sky* dissent and in the government's reply brief in the Eleventh Circuit case.

Finally, on November 14, the Supreme Court granted certiorari in the Eleventh Circuit case on a total of four issues, one of which was the question whether the challenges are barred by the AIA. One hour of oral argument was allotted to that question.

Conclusion

There is a strong case to be made for the conclusion that the AIA is not genuinely jurisdictional, based on an application of the principles in the Supreme Court's recent line of cases emphasizing the need for clarity and precision in distinguishing between genuinely jurisdictional requirements and non-jurisdictional requirements. The statement to the contrary in *Williams Packing* is one of those drive-by jurisdictional rulings that the Court has said in those recent cases have no precedential effect. As a non-jurisdictional requirement, the AIA can be waived by the government, which it has done in the cases challenging the constitutionality of the PPACA.

[105] *Id.* at 11-12.
[106] *Id.* at 14.