



Written by [Jack Kenny](#) on March 27, 2012

## Justices Question “Penalty Tax” in “ObamaCare”

The attorney general of South Carolina told reporters Monday that the Supreme Court debate over the Patent Protection and Affordable Care Act is a life and death struggle, not about health care but about the Constitution.

"This is not about hurting people. This is not about health care," said [Attorney General Alan Wilson](#). "As attorneys general our job is to live and die by the Constitution." Wilson is one of a group of Republican attorneys general who have challenged the constitutionality of a financial charge in the law, to be assessed against any uncovered person who does not purchase health care insurance. The controversy over the provision, usually referred to as the law's "individual mandate," has gone from a simmer to a rage since the legislation was debated in Congress and finally passed by both houses and signed into law by President Obama in March 2010. Opposition to "ObamaCare" largely fueled the Tea Party movement in 2010 and contributed the election of a Republican House of Representatives in that year's congressional elections.



In Monday's opening arguments, justices challenged the Obama administration's characterization of the fee imposed as a consequence of not purchasing health insurance. The administration claims that the authority is rooted in the taxing power of Congress, while the mechanism for enforcing the charge is not a revenue-raising measure, though it will be assessed under the tax code and collected by the Internal Revenue Service. Labeling the fee a tax could delay a decision on its constitutionality, since the 1867 Anti-Injunction Act forbids a judicial restraint on the assessment or collection of a tax before its effective date. Both the plaintiffs and the administration want a decision now, rather than in 2015, when the mandate would take effect. On the other hand, the power of Congress to tax is generally believed to be on a more sound constitutional footing than a presumed power to penalize people for not purchasing a product. The question in court Monday was over whether the payment in question would be a penalty, a tax, or, as Solicitor General Donald Verilli called it more than once in his oral argument, a "[penalty tax](#)."

"General Verrilli, today you are arguing that the penalty is not a tax. Tomorrow you are going to be back and you will be arguing that the penalty is a tax," said Justice Samuel Alito, drawing laughter from spectators in the court. Alito, a 2005 nominee of President George W. Bush, was not the only justice to



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challenge Verilli's fence straddling. Elena Kagan, nominated by President Obama in 2010, pursued the penalty aspect, asking if people who refuse to purchase insurance would be breaking the law. Verilli replied that if they "pay the tax, then they are in compliance with the law."

"Why do you keep saying tax?" asked Justice Stephen Bryer, a 1994 Clinton nominee, drawing more laughter.

A finding that the required payment is a penalty rather than a tax would increase the difficulty the administration faces in making a case for its constitutionality. While previous Supreme Court decisions have held that the growing of a crop strictly for consumption of one's own property may be subject to regulation under the Interstate Commerce Clause, (See [Wickard v. Filburn](#), 1942, and [Gonzales v. Raich](#), 2005) opponents of the insurance mandate argue its imposition would mark the first time the federal government penalized someone for *not* engaging in commerce by not purchasing a product.

Randy Barnett, described by the *New York Times* as "a passionate libertarian," and a professor of law at Georgetown University, has helped popularize the case against the individual mandate in his writings, speaking engagements and television appearances. While many of his colleagues have dismissed his arguments as ill founded, Barnett is not easily dissuaded. He was on the losing side in his only Supreme Court appearance, arguing in the *Raich* case that Congress's power to regulate interstate commerce does not apply to homegrown marijuana raised for personal medical use. But whatever the outcome of the current controversy, Barnett told the *Times*, the time and attention the high court has given the case are a testament to the argument against ceding unlimited regulatory power to the federal government.

"When the Supreme Court grants six hours of oral arguments over three days," he said, "I don't have to win that case to know that my challenge is serious."

*Illustration: This artist rendering shows Paul Clement speaking in front of the Supreme Court in Washington, March 27, 2012, as the court continued hearing arguments on the health care law signed by President Barack Obama: AP Images*



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