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The U.S. Supreme Court decides the Constitutionality of the Affordable Health Care Act

-by Neil E. Harl*

In one of the most widely anticipated cases in judicial history, the United States Supreme Court on June 28, 2012 decided *National Federation of Independent Business et al. v. Sebelius*[1] which held the 2010 Act[2] mostly constitutional. One of the major surprises was that Chief Justice John Roberts, a staunch conservative, wrote the majority opinion and joined the four liberal members of the court in upholding all but one part of the 2010 law.

Constitutionality

The commerce clause. The architecture of the legislation at issue and the arguments before the United States Supreme Court all focused on the constitutionality under the Commerce Clause of the United States Constitution.[3] The commerce clause grants Congress the power – ". . .to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." That provision has been expanded over the past 75 years to give broad powers to the Congress, under well-established guidelines, if the economic or social activity to be regulated would substantially affect interstate commerce.[4] A 1942 U.S. Supreme Court case, *Wickard v. Filburn,*[5] involved an Ohio farmer who exceeded the quota for the production of wheat under limits set under the Agricultural Adjustment Act of 1938[6] and was assessed a penalty which the farmer refused to pay, arguing that none of the wheat entered interstate commerce. The Supreme Court held, in a unanimous decision, that the excess production nonetheless affected interstate commerce and so the Secretary of Agriculture was well within his authority to levy the penalty.[7]

One of the more influential opinions from the appellate courts in the litigation leading up to the Supreme Court opinion in question was the case of *Seven-Sky, et al. v. Holder, Jr., et al*.[8] issued by a three judge panel in early November, 2011, headed by Judge Silberman, a highly respected (and conservative) jurist. Judge Silberman's opinion stated, "we think the closest Supreme Court precedent to our case is *Wickard v. Filburn,* 317 U.S. 111 (1942)." Even the four dissenters (Justices Scalia, Kennedy, Thomas and Alito) conceded that *Wickard v. Filburn* ". . . .has been regarded as the most expansive assertion of the commerce power in our history."

The Chief Justice brushed aside the commerce power. So how did Chief Justice Roberts handle the constitutionality issue? The Chief Justice concluded that the individual mandate under the health bills was not a valid exercise of the Congressional power under the commerce clause and proceeded to fashion a new rule for the express purpose of influencing this case

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and future cases in stating that the power to regulate commerce presupposes the existence of commercial activity to be regulated and does not include situations where a law compels individuals to become active in commerce by purchasing a product on the grounds that failure to do so affects interstate commerce. This approach, of course, narrows the field of situations that would likely have been approved by the court (and were) prior to this decision. That facet of the decision is likely to receive intense scrutiny with the future of that position in some doubt.

Indeed, that scrutiny (and criticism) flow from Justice Ginsberg's lengthy dissent, as where Justice Ginsburg wrote "the Chief Justice's crabbed reading of the Commerce Clause harks back to the era in which the court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it."[9]

Reliance on the taxing power. However, the Chief Justice nonetheless rescued the health bills from unconstitutionality by reciting that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality"[10] and shifting the focus to the power to tax. The Chief Justice argued that the legislation was, indeed, constitutional under the power to tax[11] and proceeded to defend that move against the charge that relying on the power to tax would collide with the Anti-Injunction Act[12] which specifies that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." The Chief Justice provided a rationalization for why reliance on the power to tax, if relied upon for purposes of determining constitutionality of the health bills, would not invoke the Anti-Injunction Act. One objective of the Chief Justice may have been to narrow the broad reach of the commerce clause as it has been interpreted for three quarters of a century.

What the dissenters would have done. The last paragraph of the dissent by Justices Scalia, Kennedy, Thomas and Alito states that "for the reasons here stated, we would find the Act invalid in its entirety." That indicates just how close the health bills came to being held unconstitutional.

The Medicaid issue

Another significant provision of the legislation is the expansion of Medicaid coverage. Currently, the Medicaid Program provides federal funding for states to assist pregnant women, children, needy families, the elderly, the blind and the disabled in obtaining medical care.[13] The 2010 health bills expand the scope of coverage, including adults with incomes up to 133 percent of the federal poverty level with increased funding to cover the states' costs for the expanded coverage. However, if a state does not comply with the expanded coverage requirements, the state could lose all Medicaid funds.

The Chief Justice concluded that the provision is unconstitutional by threatening the states with loss of their existing Medicaid funding if the states decline to comply with the requirements of the expansion.

That outcome seems unlikely to occur inasmuch as states have a strong economic incentive to comply and avoid the loss of funding so the unconstitutionality of that provision appears not to pose serious problems in the administration of the health bills. This holding, on the Medicaid Program, could have far-reaching consequences for the funding of existing programs as well as future programs that are based on the Congressional spending power.

ENDNOTES

[1] Case No. 11-393, 12-2 U.S. Tax Cas. (CCH) ¶ 50,423 (S. Ct. 2012). See generally 4 Harl, *Agricultural Law* § 28.02[6][d] (2012); Harl, *Agricultural Law Manual* § 4.03[11] 2012); 1 Harl, *Farm Income Tax Manual* § 3.03[14], [15] (2012 ed.). See also Harl, "Health Insurance Bills Are Now Law," 21 *Agric. L. Dig.* 57 (2010); Harl, "Some Highlights From the Patient Protection and Affordable Care Act," 21 *Agric. L. Dig.* 51 (2010).

[2] The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 111th Cong., 2d Sess. 2010), signed into law as the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 111th Cong., 2d Sess. (2010).

[3] U.S. Const. Art. I, Sec 8, cl. 3.

[4] See, e.g. Gonzales v. Raich, 545 U.S. 1, 17 (2005). In that case, in a 6-3 decision, Justices Stevens, Kennedy, Souter, Ginsburg, Breyer and Scalia were in the majority. Two of those justices, Kennedy and Scalia, dissented in applying the commerce power to the health bill litigation.

[5] 317 U.S. 111, 122 (1942).

[6] Pub. L. No. 75-430, 52 Stat. 31 (1938).

[7] In the case of *Gonzales v. Raich*, 545 U.S. 1 (2005), the court made it clear that the case was similar to the facts in *Wickard v. Filburn,* 317 U.S. 111 (1942).

[8] 2011-2 U.S. Tax Cas. (CCH) ¶ 50,713 (D.C. Cir. 2011), *aff'g, sub nom*. 766 F. Supp. 2d 16 (Fed. Cir. 2011).

[9] Justice Ginsburg cites Railroad Retirement Bd. v. Alton R. Co., 295 U.S. 330, 362, 368 (1935) (invalidating compulsory retirement and pension plans for employees of carriers subject to the Interstate Commerce Act; court found law related essentially "to the social welfare of the worker, and therefore remote from any regulation of commerce as such").

[10] Hooper v. California, 155 U.S. 648, 657 (1895). If the Chief Justice truly believed those words, the logical step would have been to uphold the legislation under the commerce power which had been argued by those appearing before the Supreme Court and which had maintained a prominent position in the lower court deliberations.

[11] U.S. Const. Art. I, § 8, cl.1.

[12] 26 U.S.C. § 7421(a).

[13] 42 U.S.C. § 1396d(a).