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Will Wickard v. Filburn Save the Health Bills?

-by Neil E. Harl*

Only a small group of constitutional scholars would have anticipated that a key agricultural case, Wickard v. Filburn, would play an important role in the determination of the constitutionality of the Patient Protection and Affordable Care Act of 2010. With the United States Supreme Court announcement on November 14, 2011, granting certiorari in the case of State of Florida v. Health and Human Services, to hear the case in the 2011-2012 term, the decision will likely rank highly in importance for cases heard this century and will likely add luster to the oft-cited case of Wickard v. Filburn.

Regardless of the side one is on, it is fascinating that a battle waged more than 70 years ago by a small Ohio farmer could have provided some of the guidance for one of the more important judicial decisions of the Twenty-First Century.

The Patient Protection and Affordable Care Act of 2010

As is widely known, the legislation that has provoked widespread public comment and almost unprecedented appellate-level litigation was enacted in 2010 in the form of complex provisions that were highly resisted in both Houses of Congress.

The legislation, in one of the more vigorously contested provisions, expanded health insurance coverage by requiring “minimal insurance coverage” for individuals and their dependents beginning by 2014, by obtaining coverage through their employers or by purchasing coverage through newly-created market places called “exchanges.” Because of the mandated nature of the provision, this aspect of the legislation has become the principal target for those arguing that the legislation was unconstitutional. The legislation provided qualifying taxpayers with household incomes of 400 percent of the federal poverty line a refundable health insurance premium assistance credit after 2013 on a sliding scale basis. Other objections, mentioned in the announcement of Supreme Court review, included the argument that the Anti-Injunction Act might be applicable to the legislation.

The District of Columbia Court of Appeals Decision

One of the more influential opinions from the appellate courts involved the case of Seven-Sky et al. v. Holder, Jr., et al., issued by a three judge panel in early November, 2011, headed by Judge Silberman, a highly respected (and conservative) jurist. The decision upheld the 2010 law as within the power of Congress to legislate under the commerce power.

As to precedential authority for the appellate court’s position, Judge Silberman’s opinion stated, “We think the closest Supreme Court precedent to our case is Wickard v. Filburn,”

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There, a farmer in Ohio in raising wheat sold some wheat and used the rest for livestock feed (and possibly some for family consumption). The production exceeded the quota allocated and so the U.S. Secretary of Agriculture, Wickard, assessed a penalty against Filburn. He refused to pay the assessed penalty and resisted in court all the way to the United States Supreme Court which upheld the penalty against Filburn in a unanimous decision. The authority for the United States Government to limit production of specified commodities and to assess penalties for non-compliance with the established quotas was the commerce clause of the United States Constitution.

The Congress had enacted legislation in 1938, the Agricultural Adjustment Act of 1938, which gave the Secretary of Agriculture authority to set quotas on the amount of wheat produced and to establish penalties for overproducing the quota allocated to a particular producer. The 1938 Act was passed after the Agricultural Adjustment Act of 1933 was held unconstitutional. The 1938 Act was the first legislation to make price support mandatory for corn, cotton and wheat, implemented with production quotas.

The case of Wickard v. Filburn upheld the authority of the Secretary of Agriculture and, in the process, significantly broadened the right of the Congress to regulate interstate commerce.

As the opinion in the 2011 case of Seven-Sky, et al. v. Holder, Jr., et al. stated, Wickard . . . comes very close to authorizing a mandate similar to ours, at least indirectly, and the farmer’s activity could be as incidental to the regulation as simply owning a farm.” Judge Silberman, in the opinion, concluded with the statement “we are obliged – and this might well be our most important consideration – to presume that acts of Congress are constitutional.”

Will Wickard v. Filburn determine the outcome?

So what are the chances that the current Supreme Court will follow the path taken by the District of Columbia Court of Appeals and uphold the health legislation? The Supreme Court, as recently as 2005, in the case of Gonzales v. Raich endorsed Wickard v. Filburn.

It would appear that the court has a choice – overturn Wickard v. Filburn or, at least distinguish it, which could be difficult to do, or uphold the 2010 health care legislation.

ENDNOTES

1 317 U.S. 111 (1942).
3 648 F.3d 1235 (2011).
4 See note 1 supra.
6 PPACA § 1501.
7 PPACA § 1401, adding I.R.C. § 36B.
8 I.R.C. § 7421(a).
9 2011-2 U.S. Tax Cas. (CCH) ¶ 50,713 (D.C. Cir. 2011), aff’g sub nom., 766 Supp. 2d 16 (Fed. Cir. 2011).
10 Id.
11 Art. I, § 8, Cl. 3.
13 Id.
14 Pub. L. No. 73-10, 48 Stat. 31 (1933).
15 United States v. Butler, 297 U.S. 1 (1936) (processing taxes under the 1933 legislation were unconstitutional; case did not turn on the commerce power).
17 2011-2 U.S. Tax Cas. (CCH) ¶ 50,713 (D.C. Cir. 2011).
18 Id.
20 545 U.S. 1 (2005).
22 317 U.S. 111 (1942).