Insight

A View from the Court Room: King v. Burwell

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If you decided to stay home earlier this week and not camp out on the steps of the Supreme Court to hear oral arguments in *King v. Burwell*, you might have missed a few things. *King v. Burwell* is a case of statutory interpretation where the Justices of the Supreme Court will have the opportunity to decide whether the IRS has the power to spend money from the treasury on tax subsidies for people purchasing insurance through an exchange established by the Department of Health and Human Services (HHS), when Congress has only given permission for the IRS to pay out money to people purchasing insurance through an exchange "established by the State." Here's a breakdown of what the Justices said during the hearing, and more importantly, what they might have been thinking.

Chief Justice Roberts: Roberts made only one comment during oral arguments and it was a life buoy offered to the plaintiffs' attorney Mike Carvin during a battery by Justice Kagan. Kagan was making much of what she portrayed as Carvin's contradictory position in *NFIB v Sebelius.* Roberts' singular comment served an important dual purpose: to rescue plaintiffs' attorney from the attack and perhaps signal some sympathy with his position, but also to remind everyone in the court that Roberts is not a sure vote for either side. Whether politically or philosophically guided, Roberts is a swing vote.

Justice Scalia: It is rarely difficult to divine what Scalia is thinking. Today he made it abundantly clear that he is ready and willing to rely heavily on the literal text of the law. Though conceding the Affordable Care Act (ACA) is "not the most elegantly drafted" law, Scalia suggested there is really no other reasonable interpretation but the plain text meaning offered by the plaintiffs. Everything else is "gobbledygook".

Justice Kennedy: True to form, Kennedy is a bit of a wild card. In the first hour of arguments he repeatedly suggested that the plaintiffs' proffered interpretation of the law, as applied, may be unduly coercive for states to establish exchanges, violating federalism principles.

This is an interesting question, but not a particularly problematic one for the case at hand. First, unlike in other cases of possible federal-state coercion, the absence of subsidies will not materially affect states' budgets. Second, the ACA's tax subsidies have previously been used by the Court as an example of the type of non-coercive incentive the federal government may offer.

Later, as usual, Kennedy gracefully transferred his attentions to the plaintiffs' opponent. Rapid questioning led the government's attorney down a rabbit hole where he claimed that by cross-referencing §1311 in 36B, Congress changed the meaning of "established by a state under §1311" to established by the state or Secretary of HHS under §1321."

Justice Thomas. As usual, Justice Thomas did not speak during oral arguments, but most Court observers are confident he will side with the plaintiffs and apply strict textualism to his interpretation of the statute.

Justice Ginsberg: Ginsberg spent an astonishing amount of time debating whether the plaintiffs in the case have proper standing. They do. The time spent on an already settled procedural issue distracted from the merits of the case, and Solicitor General Donald Verrilli himself conceded the plaintiffs' standing.

Justice Breyer: Breyer seemed to cling tightly to a circular definition of a state-established exchange. In §1311, the definition of exchange is an agency established by a state. Breyer's logic seems to be that any exchange established under § 1311 or which satisfies §1311's requirements is a *de facto* "exchange established by a state." While this logic may hold for some uses of the word "exchange," it should probably not apply to the relevant provisions in 36B. That language specifies that tax subsidies may only be paid through "an exchange established by the state under §1311." If we assume Breyer's reading is correct, the phrase "under §1311" would be enough to show that the exchange is "Established by the state." This would make the "Established by the state" language in 36B redundant. It is a basic canon of statutory interpretation that no language should be read as superfluous, and therefore it is necessary to understand that Congress intended to communicate something through the words "Established by the state," i.e.—that only a state-established exchange would satisfy 36B.

Justice Alito. Alito asked the question Breyer's logic begs: If Congress did not want "Exchange established by the state" to mean only exchanges established by the states, why did Congress say "by the state" at all? Why not "for a state" or "within a state?" These questions illustrate the confusion caused by attributing to the statute any interpretation besides its plain meaning.

Justice Sotomayor: The main point made by Sotomayor (not reiterated by others) was confusion as to why Congress "hid" this important provision about conditional premium subsidies. Carvin argued that the provision is where you would expect it—with tax subsidy payment information, and in fact it wouldn't logically belong in any other part of the statute. Another way to look at it though: how could Congress *not* appear to have hidden some things in a 900 page bill that no one read before passage?

Justice Kagan. A long and somewhat flawed hypothetical about Kagan's clerks drew some laughs from the crowd packed into the Supreme Court today, but it did little to clarify under what authority Kagan believes the IRS should amend any statute, let alone tax law, without congressional action. Her own hands-off, agnostic approach to how things are done in her chambers fell flat as an example of how American taxpayers might view legislative changes made by the administration.

Kagan also spent a good deal of time attempting to show discrepancies in the plaintiffs' lawyer's position in *NFIB v Sebelius*. This line of questioning came off as an attack on the attorney rather than his arguments, and was eventually interrupted by the comment by C.J. Roberts discussed above.