Why Should Tax Lawyers Care About *King v. Burwell*?

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In June 2015 the United States Supreme Court will decide *King v. Burwell*, and that decision could have significant implications for the long term viability of the federally mandated health insurance system established by the Affordable Care Act. If, as the petitioners argue, Treasury Regulation § 1.36B-2 is invalid to the extent that it extends the premium tax credit to individuals who purchase health insurance through an exchange established by the federal government, as opposed to an exchange established by a State, there is a significant risk that millions of taxpayers who have purchased health insurance through the federal exchange program will withdraw from that program. While that might be catastrophic to President Obama’s signature health care program, regardless of one’s views on that question, there are several other important reasons why tax lawyers should care about the Supreme Court says in *King v. Burwell*.

That statute at issue in *King v. Burwell* states that a taxpayer will be allowed a tax credit determined by premiums paid by the taxpayers for coverage in qualified health plans “which were enrolled in through an Exchange established by a State under 1311 of the Patient Protection and Affordable Care Act. . .” The Supreme Court will have to decide whether this language means that the tax credit is available only to taxpayers who obtained coverage in exchanges established by a State, or whether it also is available to taxpayers who obtained coverage in exchanges established by the federal government for those living in the more than thirty States that did not establish their own exchanges. If the Court concludes that the statute is not ambiguous, the decision likely will rest on how the Justices parse the words quoted above.

In their respective merits briefs before the Supreme Court, the parties debate whether it is plausible that Congress intended to condition the availability of the premium tax credit on the establishment of exchanges by States. One problem with this line of inquiry is that it presumes that the Supreme Court can divine the “intent” of the 535 individuals who served in Congress in 2010 – or at least the small majority of those individuals who voted in favor of the Affordable Care Act. Unlike legislation that was drafted decades ago through “regular order,” the Affordable Care Act, like many other statutes enacted in recent years, was developed largely behind closed doors, making it harder for citizens (and courts) to truly understand what might have been intended. Committee reports are not much help, as they too are drafted behind closed doors, and because the reports often do not provide sufficient detail to inform readers of all of the nuance that may lie in the legislation. For these and other reasons, some members of the Supreme Court tend to view legislative history with disdain, and focus their analysis squarely on the words of the statute.

Other members of the Supreme Court, perhaps influenced by prior experience in the legislative branch, embrace legislative history as a useful tool for judges to better understand

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2 While a plain reading of the statute might seem to favor the petitioners’ argument, given that States establish exchanges under section 1311 of the Affordable Care Act, but the federal government establishes exchanges under section 1321 of that act, it can be difficult to predict how the Supreme Court will read a statute. For example, in Yates v. United States, No. 13-7451, 2015 WL 773330, at *5 (U.S. Feb. 25, 2015) the Court recently concluded that the phrase “any record, document or tangible object” does not encompass all tangible things, but rather that it means only those “objects one can use to record or preserve information.” While welcome news to Mr. Yates, the fisherman who faced a potential 20 year sentence for destruction of fish, the Court’s plain reading of the underlying statute appears to have added words to the statute that Congress did not actually include.
3 See, e.g., Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) in which Justice Scalia, in a concurring opinion, stated: “We are governed by laws, not by the intentions of legislatures.”
statutes. While it is difficult to predict how the Supreme Court will come out on the underlying issue in *King v. Burwell*, it is probably safe to predict that the opinions will continue the debate on whether courts should refer to legislative history in their analysis, and how much weight legislative history should be given.

Because the merits of *King v. Burwell* turn on the validity of a Treasury regulation, the case presents yet another opportunity for the Supreme Court to address the scope of the Treasury’s authority to interpret the Internal Revenue Code. The petitioners argue that because the statute is not ambiguous, Congress did not leave a gap for the Treasury to fill. They further argue that it is not plausible that Congress would give the executive branch the discretion to fill a gap that could lead to billions of dollars of annual federal expenditures, and that if there is any ambiguity in the statute, the ambiguity is in the provisions of the Affordable Care Act codified in Title 42, and as such the Treasury does not have authority to interpret those provisions.

On the other side, the government argues that the petitioners’ reading of the statute is not the only plausible reading, and that the Treasury regulation’s contrary reading “is at least a reasonable one warranting deference under *Chevron*.” From my vantage point, it is not clear that the Supreme Court needs to address these questions if it concludes that the statute is unambiguous. But if the Court provides a roadmap for how to determine when a statute is or is not ambiguous, that might help tax lawyers when analyzing the scope of the Treasury’s authority in other contexts.

So, why should tax lawyers care about *King v. Burwell*? Regardless of one’s views on the Affordable Care Act, the Supreme Court has an opportunity to inform the larger debate on how statutes are to be interpreted and how far the executive branch can expand on Congress’s words through regulations. Beyond that, there are two broader, systemic issues presented in this case that all of us should care about. First, complex legislation should be drafted and debated in a transparent manner, with opportunity for discussion and input from the public at large, and from all members of Congress. And legislation should be accompanied by reports that address, in detail, the competing views espoused during the discussion and debate, the positions adopted in the ultimate legislation, and the reasons why those positions prevailed. Second, the continued expansion of the scope of programs administered by the Internal Revenue Service, which call upon the agency to delve far beyond questions concerning the computation of income and collection of taxes imposed thereon, creates undue burdens on the core function of the tax collector. The requirement that the Internal Revenue Service devote its scarce resources to administer the Affordable Care Act has hampered its ability to issue timely guidance in other areas, and has added fuel to the fire for those who seek out opportunities to demonize the agency. If the government prevails in *King v. Burwell*, the agency will continue to be demonized, and its priorities will continue to be questioned; if the government loses, the agency will then face the dilemma of whether to use its collection apparatus to recoup the premium tax credits paid to millions of taxpayers who enrolled in the federally-sponsored exchange, or to instead exercise its authority under I.R.C. § 7805 to limit the retroactive effect of judicial decisions and permit those

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5 There is also the question of what constitutes “legislative history”. For example, Justice Breyer has described committee hearing testimony from individuals (not members of Congress) and floor statements by members of Congress as within the rubric of legislative history. See, e.g. Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995). On the other hand, Justice Scalia appears to take a narrower view of what constitutes legislative history. See United States v. Woods, 134 S.Ct. 557, 568 (2013) (concluding that a “bluebook” prepared by the staff of the Joint Committee on Taxation was not a legitimate tool of statutory interpretation, but that, “like a law review article, may be relevant to the extent it is persuasive”).
6 Brief for Petitioner at 18, King v. Burwell, No. 14-114.
7 Id. at 51.
8 Id.
taxpayers to keep the subsidies they have already received. Regardless of the choice the agency makes, it is sure to face some criticism. One can only hope that other observers will recognize that the true fault lies with how we got to this point, and for that the agency should not bear the blame.