Did 'America's Sexiest Man' Almost Doom The ACA?

Law360, New York (July 1, 2015, 11:47 AM ET) -- He wasn't one of the litigants. He wasn't one of their attorneys. He wasn't one of the judges or justices deciding the case at any level. But "America's Sexiest Man" in 1982, at least according to Cosmopolitan magazine, played a significant role in the U.S. Supreme Court's ruling in King v. Burwell.

To understand his role, we must understand more about the legislative process than is typically taught by schools or Schoolhouse Rock.

Let's Start With the Basics

A bill becomes law through a process whereby both houses of Congress consider and vote on it. In many cases, the Senate and House of Representatives disagree on its terms and end up passing two different versions. A conference committee made up of members of both houses then reviews the bills and produces a single, revised bill to be voted on by both houses.

In some cases, however, one house will choose to pass the other house's bill as is. No conference committee is needed, and the bill is sent to the president for signature.

The Affordable Care Act Was Not Typical

In no small part, because of "America's Sexiest Man," the House of Representatives in 2010 adopted the Senate's health care reform bill and sent the ACA to President Obama for signature. Neither the House of Representatives nor a conference committee suggested changes to the language of the Senate bill, which was, as Chief Justice John Roberts noted in King v. Burwell, inartfully drafted.

Had the House of Representatives chosen not to approve the Senate bill, a conference committee would have created a consolidated revised bill for full congressional consideration. Although a conference committee would have given Congress an opportunity to discover and address some of the Senate's inartful drafting, it also would have required the Senate to vote on the revised bill. As a result, senators would have had the opportunity to debate and offer amendments to it.

Senate Complexities

Senators generally can offer any number of amendments to a bill. In addition, a senator who has the floor during a debate may continue to speak for as long as he or she wishes. Senators sometimes take advantage of these rules (i.e., filibustering) to keep a bill from coming to a vote. The Senate can end a filibuster by invoking cloture, which essentially limits the amendments and debate, and guarantees the bill will come to a vote at a particular time.

Once a bill comes to a vote, it takes only a simple majority of senators to approve it. However, a cloture motion requires the votes of at least three-fifths, typically 60, of the senators.

A Change in the Tide

In August 2009, the Senate consisted of 60 Democrats and 40 Republicans. And with 60 senators, the Democrats had a filibuster-proof majority — enough votes to invoke cloture, essentially guaranteeing that any bill with the support of all the Democratic senators would come to a vote and be passed by the Senate.

However, when the late Sen. Ted Kennedy, D-Mass., passed away on Aug. 25, 2009, Massachusetts held a special election to fill that seat in January 2010, and Scott Brown was elected.

Sen. Scott Brown, R-Mass., is significant here not because of his service in the National Guard, his service in the Massachusetts Legislature or his distinction as Cosmopolitan magazine's "America's Sexiest Man" for 1982. He is significant in this story only because is a Republican. With the election of that single Republican, the Senate lost its filibuster-proof majority.

Creative Collaboration

It would be an understatement to say that health care reform was (and remains) politically divisive. Without a filibuster-proof majority in the Senate, it would have been extremely difficult for a health care reform bill to pass. To address this issue, former Senate Majority Leader Harry Reid, D-Nev., and former House Speaker Nancy Pelosi, D-Calif., agreed that the House of Representatives would pass the Senate's health care reform bill, and then both chambers would each pass a reconciliation bill to make certain changes desired by the House of Representatives.

A reconciliation bill is a special kind under which amendments and debates are limited. Senators cannot filibuster a reconciliation bill, meaning Senate Democrats could pass a reconciliation bill despite the presence of Sen. Brown. Reconciliation bills, however, are generally limited to budget-related issues, such as taxing and spending. Under these circumstances, Congress could not have fixed all of the Senate's inartful drafting with a reconciliation bill.

With this procedural history in mind, it is not surprising that there was a drafting error in the ACA. In fact, as Chief Justice Roberts points out in the majority opinion, it contains several.

Now Comes King v. Burwell

King v. Burwell arose after the IRS promulgated regulations interpreting language in the ACA that provides tax credits to eligible taxpayers to help pay for coverage obtained through a state exchange. However, the new Internal Revenue Code Section 36B created in the ACA provides that the amount of the credit is determined in part based on the number of months in which a taxpayer is enrolled in coverage obtained through "an exchange established by the state under Section 1311 of the Affordable Care Act." If a taxpayer is not enrolled in coverage obtained through "an exchange established by the state under Section 1311," the taxpayer's credit amount would be zero.

Section 1311 of the ACA provides that each state shall establish an exchange, but because federalism prevents Congress from requiring states to take action, Section 1321 of the ACA provides that the federal government will establish “such” exchange for a state that does not establish one.

Questions Unanswered

By referring specifically to ACA Section 1311 in Internal Revenue Code Section 36B, did ACA drafters intend to extend tax credits only to those taxpayers who live in states that established their own exchanges? Did the senators who passed the bill understand that tax credits would not be available in states where the federal government established the state’s exchange? Did members of the House of Representatives who passed the Senate bill read, understand and agree to such a limitation?

Or was there a drafting error that could have been fixed through the conference committee process?

Thanks to "America’s Sexiest Man," we will never know.

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