Written by **Jack Kenny** on July 2, 2012

Chief Justice Roberts and the House of Ill Dispute

The pace of modern education is frightful, so in case there are any pre-law students in nursery school, here is a summation of last Thursday's Supreme Court decision on the nation's health care law:

Johnny Roberts took a dive, e-i-e-i-o

ObamaCare is still alive, e-i-e-i-o

There is a lot of "buzz" on the Internet about yet another constitutional infirmity in the opinion of the Supreme Court, written by Chief Justice John Roberts, that held the individual mandate in the Affordable Care Act to be constitutionality permissible. The chief justice, recall, said that what the statute called a penalty is really a tax and therefore the legislation is valid under the taxing power of Congress. But the Constitution explicitly says, in Article I, Section 7, that all revenue bills must originate in the House of Representatives. The "ObamaCare" bill was hatched in the Senate. *Ooops!*

Oh, picky, picky! What difference does it make? The language of the statue itself said the charge to be levied against uninsured people for not purchasing health insurance would be a penalty, not a tax, despite the fact that the same legislation requires the fee to be collected by the Internal Revenue Service. President Obama publicly argued it was not a tax, as did members of Congress. So we all know this tax bill originated in the Supreme Court of the United States and if you don't like that you can, as Archie Bunker used to say, "Write a letter to Dear Abie." (sic)

Some of the commentary about the Roberts ruling that has been published over the last few days is really laughable. One argument is that Roberts, knowing full well of the firestorm that would follow if the Court struck down a national health care program that promises so much to so many for so little, wanted to preserve the legacy, the reputation and the integrity of the Supreme Court. Well, the Court has a legacy and a reputation, God knows, so I guess two out of three's not bad.

But where in heaven's name is the integrity? I suppose one can still find it in the civics textbooks used in high schools, but let us hope we have all learned a lot about the "real world" and the difference between theory and practice since we left high school. There is also the theory, popular among conservative pundits, that the Roberts fold was a strategic retreat as he holds his conservative fire for next year, when the Court will have the chance to hammer away at the dubious constitutionality of government affirmative action programs and perhaps even defend the federal Defense of Marriage Act against the challenge from those claiming a more "inclusive" definition of marriage — one that would include "gay marriage" — is constitutionally required. Though the Constitution says nothing at all about either homosexuality or marriage, there is a good chance that at least four votes on the nation's highest court

might be found for the proposition that the "living document" requires "gay marriage."

Well, maybe that's the chief justice's strategy. Or maybe he has been neutered and "Souterized." There is something to be said, after all, for choosing one's battles and husbanding one's ammunition. There is also something to be said for the eternal truth that both yesterday's and tomorrow's battles always appear easier than today's. "I'll be strong tomorrow" is the familiar cry of the weak.

There is something almost pathetic about the efforts of some conservatives to find a "silver lining" in the dark cloud over the Court by noting that the Roberts ruling threw out the bathwater of limitless authority for the Congress under either the Commerce Clause or the "necessary and proper clause," even as it saved the "baby" called ObamaCare. But the Court had already turned back the imperial reach of the Commerce Clause in 1995 with its ruling in *U.S. v. Lopez* that the claim by Congress that the Commerce Clause gave the federal lawmakers authority to establish gun-free zones around schools was bogus. The Court reasoned, correctly, that schools are not principally engaged in interstate commerce and an armed citizen passing by a school is not thereby engaged in commerce with foreign nations or among the States or with Indian tribes. By the same reasoning, the Court held the federal Violence Against Women Act unconstitutional, though Congress had gone to great lengths to demonstrate the harmful effect that battering and abusing women has on interstate commerce. It is worth noting that the Commerce Clause, as distinct from court decisions flowing from it, delegates to Congress the authority to regulate commerce and not the far broader authority to regulate anything that "affects" interstate commerce, which could be virtually anything imaginable.

Then in 2005, the Court resurrected the doctrine established in the 1942 case, *Wickard v. Filburn*, in which the "Supremes" upheld the penalty assessed against a farmer for violating the Agriculture Adjustment Act by growing more than the allotted amount of wheat, despite the fact that the excess wheat was consumed on his own farm by his own livestock. Congress claimed both the quota and the penalty were pursuant to its powers under the Commerce Clause and the Court agreed, ruling that if Filburn had not grown that wheat he would have had to buy it in an interstate market. His offense therefore lay in undermining the congressional effort to control prices by controlling the supply and demand. Justice Antonin Scalia, of all people, cited that precedent in writing the opinion whereby the Court upheld the conviction of a California man for growing marijuana at his residence for consumption in his own home for medicinal purposes. The action was legal under state law, since California had legalized marijuana for medical use. But the federal ban was still on the books and the Court found it constitutionally valid by invoking the Commerce Clause. Scalia produced his own tortured reasoning for departing from the *Lopez* precedent, but it may be that the real reason is more simple and direct: Scalia likes guns and has been a hunting companion of former Vice President "Deadeye" Dick Cheney. And he probably doesn't like marijuana, preferring, perhaps, Marlboros instead. Whatever the real reason, the stated reason drew well-deserved ridicule from dissenting Justice Clarence Thomas, usually a silent partner in Scalia's jurisprudence.

It has even been argued that by upholding rather than striking down the statute, Roberts and his liberal colleagues were actually exercising judicial restraint, humbly deferring to the political branches. And to those who have long argued against "judicial activism," it might seem more fitting that the health care debate be resolved in Congress rather than by the Court. But the federal judiciary is roughly one-third of the government of the United States, which is supposed to operate through a system of checks and balances. What checks? Where's the balance? Congress says, in effect, we have the power to rule everything in heaven and on earth by the Commerce Clause. And the Supreme Court checks that by

saying, “Oh, no, you don’t, it’s in your taxing power.” By God, that’ll restrain the overreaching Congress!

Alas, for the integrity of the Court. My favorite lawyer joke used to be this one:

Question: What do you call a lawyer with a low IQ?

Answer: “Your honor.”

But it’s not that judges are dumb. Most are rather intelligent. Nor are they ignorant, except when they wish to be. But too many are willful, arrogant, and downright dishonest. By dishonest, I don’t mean they are collecting money under the table. I mean they rub shoulders with the power elite. (I’ve already mentioned Scalia and Cheney, but there are other examples.) And they like being part of that elite. And they are, apparently, not too ashamed to prostitute themselves to maintain that status. I saw a somewhat reasonable facsimile of the “integrity of the court” long ago when, as a 20-year-old Marine, I sat at a table in a dive in Tijuana. A female employee of said dive sat down next to me and said “Hi.” Her very next words were “Let’s got the room.” Believe it or not, I was dumb enough to ask, “What room?”

“The *room!*” she said with added emphasis. Oh, yeah. The room.

Maybe I should have called her, “Your honor.”