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Written by **Jack Kenny** on June 30, 2012

ObamaCare Decision: C.J. Roberts Took a Dive

Splish! Splash! John was taking a bath!

There are a lot of metaphors from the sports world to describe Chief Justice John Roberts's defection to the liberal bloc in Thursday's Supreme Court ruling holding the Patient Protection and Affordable Care Act ("ObamaCare") and its individual mandate constitutional. You could say the good judge is ambidextrous, appearing on the lineup card as a right-handed hitter, but one who throws left once the ball is in play. You could call him a broken-field runner, who feigns a run in one direction, then abruptly turns and runs in another. But it may be best to think of it in terms of a fighter taking a dive. "Sorry, kids," Big John might have said to those expecting a "strict construction" of the powers of Congress under the Constitution, "but it's not your turn."

For the opponents of the ever expansive and imaginative "living document" concept of the Constitution are always the "kids" who must wait our turn. And we must never be allowed to face, much less accept, the reality that it never is and never will be our "turn." We are like Charlie Brown, running up to kick that football each autumn, believing that this time Lucy will be true to her oath and will not snatch the ball away at the last second, leaving us making a mighty kick at the air and landing flat on our backs. For whenever we think we have five votes for the Constitution on anything, at least one of the "conservative" justices may be counted on to go into the tank. Did we really think it would be different with Georgiebird's (Bush the Lesser's) first pick for the high court sitting as chief justice?

So this time it wasn't Justice Kennedy. And both "Diva" David Souter and Slippery Sandra (and rarely Cassandra) Day O'Connor are gone. So Roberts did the ignoble deed. So this time it wasn't the marvelously versatile Commerce Clause, or the extremely convenient "necessary and proper" clause, or even the incredibly elastic and all encompassing "general welfare" clause that was used as the battering ram that knocks down any closed doors or other barriers to the increasingly unlimited police power of the federal government. No, this time it is power of Congress to lay and collect taxes that justifies what the statute itself says is not a tax but a penalty for not buying something Congress has deemed it necessary for us to buy. "Close the door, they're coming in through the windows!" It matters not where the secret tunnel is found or called, nor what the rationale for its construction might be. The important thing is that there be a passage to unlimited federal power and that there be at least five justices willing to defend it. Because as another "surprise" liberal on the high court, the late Justice William Brennan, said, "With five votes you can do anything around here."

Remember David Souter? Oh, how the liberals fought tooth and nail against his confirmation, so sure

were they that he would be the fifth vote to overturn the *Roe v. Wade,* Supreme Court decision striking down state anti-abortion laws on the basis of "emanations" found in the "penumbras" of constitutional rights. Souter not only joined the Court's liberal bloc, he became its intellectual leader. In many ways, it became the "Souter Court." It upheld *Roe v. Wade* in its first test with Souter on board, the 1992 *Planned Parenthood v. Casey* decision. Worse, it upheld it as a precedent that could not be overturned simply because it was a precedent that had been considered the "law of the land" for nearly 20 years by then. Souter was part of that majority and even joined with Justices Sandra Day O'Connor and Anthony Kennedy in a trio that wrote a separate opinion that upheld the abortion ruling, based in part on Kennedy's rhapsodic hymn to the individual's right to decide for herself or himself the "meaning of the universe" and the "mystery of life." Such is the kind of high school sophomore liberalism that passes for constitutional law in this post-Sixties era of social do-good jurisprudence: If it feels good, rule it!

Yet Souter was supposed to be a "home run for conservatives" according to the political flak catchers for the administration of President George H. W. Bush. But sphinx-like Souter was hardly the first surprise on the high court, where Franklin Roosevelt's court-packing plan produced the "switch in time that saved nine," as a court that had been consistently finding executive overreach in the New Deal unconstitutional suddenly began to "see the light" as they "felt the heat" and discovered constitutional virtue in New Deal's revolution in American life and law. When President Dwight D. Eisenhower nominated former California Governor Earl Warren to the Supreme Court, no one thought Warren, the "baron of barbed wire" when the opportunity came to put Japanese-Americans in internment camps and take their land and homes during World War II, would find in the 14th Amendment and in the Bill of Rights imperatives that the authors and ratifiers of the Constitution and its amendments had never known or likely imagined. Eisenhower's next appointment, William Brennan became, arguably, the all-time leader of judicial activism.

Nixon gave us Warren Burger, Harry Blackman, and Lewis Powell, all of whom joined with the liberal justices in striking down the state abortion laws. Nixon, to his limited credit, also gave us William Rehnquist, who, along with Kennedy appointee Byron White, found the abortion rulings a breathtakingpower grab by their fellow justices. Gerald Ford appointed John Paul Stevens, another lion of the liberal bloc.

The ObamaCare ruling has all the consistency of watered down tapioca. The Court rightly discerned that not buying something is not commerce, so it could not reasonably uphold the claim that by penalizing individuals for their non-purchases, Congress would be regulating interstate commerce. And it ruled, again rightly, that the "necessary and proper" clause, to mean anything at all, must mean that Congress has power to pass laws "necessary and proper" to exercising the powers delegated to it by the Constitution. Otherwise there would be no point in delegating powers. The Constitution might simply read, "Congress shall have power to do whatever Congress deems 'necessary and proper.'"

But a moment's reflection, assuming that is not asking too much of the esteemed jurists, would suffice to bring home the realization that the same thing applies to the power of taxation. The power to legislate and collect taxes makes sense only in the context of what is necessary for the carrying out of those responsibilities and powers delegated to the Congress by the Constitution. And nowhere in the Constitution do we find delegated to Congress a power to establish a health care or health care insurance program.

But I'm sure Johnny "B. Goode" Roberts is enjoying the praise he has been receiving from the arbiters of socially acceptable opinions. The court's decision would have been historic no matter which way it

went, but it was more dramatic with Roberts changing sides. He has matured, has "grown in office." He is eligible for the mythical Souter Award, a bright red jacket bearing a British coat of arms.

You can bet that at least some members of Congress, themselves doubtful of the law's constitutionality, voted for the Affordable Care Act anyway, leaving it up to the justices to sort it all out. Don't expect them, for heaven's sake, to actually honor the ritualistic oath of fidelity to the Constitution of the United States that they take each year. Stranger and stranger it seems as time goes on that a Pulitzer Prize-winning book called *Profiles in Courage* was written about members of the U.S. Senate. Is it any wonder it is a slender volume?

Congress has, of course, the power to limit the Court's jurisdiction, but we can hardly expect Congress to rein in the Court over ObamaCare, when the Court did its damnedest — and I choose that word deliberately — to find a way to uphold as constitutional a patentlyunconstitutional Act of Congress.Ironic, too, that at a time when public respect for Congress is at its lowest level, the House of Representatives, on another matter, justifiably found U.S. Attorney General Eric Holder in "contempt of Congress." Aren't we all? Shouldn't the perjury crime of lying to Congress, a charge on which baseball great Roger Clemens was recently acquitted, be renamed "Usurping the Powers of the President and the Supreme Court"?

Congress has the power to repeal the law, which seems unlikely even in the equally unlikely event that the Republicans hold on to control of the House, recapture control of the Senate and take the White House as well. Obama, after all, is the savior of the auto industry and the high court has saved ObamaCare. But there is nothing to prevent Congress from enacting a change of venue for the Court, moving it out of the decadent intellectual milieu of Washington, D.C. that encourages apostasy on the part of conservative jurists. It could legislate that, beginning the following fall, the Court would convene and continue to meet, hold hearings and deliberate in Ogden, Utah. I don't know if the citizens of Ogden deserve such a fate. But I believe the justices of the Supreme Court do.