
I. Background – Quick (2 minute summary of why NFIB got involved in the Healthcare case)

II. Discussion of Congress’ Power Under Commerce and Necessary and Proper Clause
   a. Commerce Clause power prior to NFIB v. Sebelius.
      i. Two lines of cases: Wickard/Raisch; Lopez/Morrison
      ii. Good language in NFIB v. Sebelius regarding our federalist structure and reaffirmance that 10th amendment designed to protect individuals, not just states.
      iii. Still have work to do regarding the scope of Congress’ power over intrastate commerce
   b. Novel issue regarding compelled activity – NFIB v. Sebelius halted Congress from taking us off the “constitutional cliff”.
      i. Now have at least one clear line that Congress can’t force you into a market; cannot compel activity under this power
      ii. Significance of clear line

III. Discussion of Congress’ Power to Tax – How NFIB v. Sebelius transformed this power
   a. Congress has tremendous power to tax under NFIB v. Sebelius
      i. Only limit appears to be whether taxing burden on the citizenry is so great as to take away any meaningful choice when it comes to compelled government activity
         a. Congress has tremendous power to tax under NFIB v. Sebelius
            a. Can compel activity by taxing failure to do what the government wants you
to do.

b. Unclear whether any tax would be considered a direct tax after *NFIB v. Sebelius*

c. Brief discussion as to why Plaintiffs didn’t spend more time on the tax argument

IV. Roberts’ Misapplication of the Constitutional Avoidance Doctrine

V. Conclusion

Karen R. Harned, Esq.
Executive Director
National Federation of Independent Business
   Small Business Legal Center
1201 F Street, N.W.
Suite 200
Washington, D.C. 20004
(202) 314-2061 (Office)
(202) 554-5572 (Fax)
(202) 631-4610 (Cell)
Karen.harned@nfib.org