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Harry Reid's Court-Packing Scheme Pays Off In Halbig Case

By Ross Kaminsky
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One of the main reasons that Senate Majority Leader Harry Reid blew up the traditional applicability of the filibuster in the United States Senate was so that President Obama could pack the DC Circuit Court of Appeals with liberal judges, anticipating the need for bias, or at least partisanship, on the bench in order to defend Obamacare from legal challenge.

This particular appeals court, officially called the United States Court of Appeals for the District of Columbia Circuit, is often considered the second-most important court in the country since it handles so many cases related to the regulatory power of the federal government.

Prior to the confirmations of Judges Patricia Millett and Nina Pillard in December 2013 and Robert Wilkins in January 2014, the court had an even balance of Democratic and Republican appointees (four of each) and had such a light caseload that the existing judges were substantially underworked. Judge Millet ended up getting two Republican votes for her confirmation, while Judge Pillard was opposed by all Republicans *and three Democrats*. Judge Wilkins was confirmed on a 55-43 party-line vote.

A decade earlier, when President George W. Bush proposed nominating judges to this same court, Democrats argued strenuously that the court's caseload did not justify adding more judges. In fact, after current Chief Justice John Roberts was elevated to the Supreme Court from the DC Circuit Court of Appeals, the Democrats blocked the nomination of the man President Bush had chosen to replace him.

But because the current administration recognized this court as critical in future legal challenges to Obamacare, they wanted to – and hypocritically did – shift the balance of the court in a decidedly Progressive way – which is to say in a way which recognizes almost no limits on government power nor on the appropriate behavior of judges in expanding that power.

On Thursday, those malign efforts paid off for Obama and Reid as the DC Circuit agreed to an *en banc* review (all of the judges rehearing the case after it is initially decided by a

three-judge panel) of the July 22nd ruling in *Halbig v Burwell* that the IRS may not issue subsidies to those who purchase health insurance plans through the federal insurance exchange known as Healthcare.gov – because the plain text of the law specifies that subsidies are available on exchanges "established by the State." In fact, this language is in the law *twice*.

Furthermore, the law includes specific mention of a federal exchange so it is not credible to suggest that the drafters didn't consider the possibility of a federal exchange existing alongside state exchanges (though the federal exchange is not available to those living in states which have set up their own exchanges.)

Currently fourteen states have state-run exchanges, with two more planning on having theirs operational next year. (Oregon's state exchange's technology failed so they moved to the federal exchange earlier this year.) Seven states have "partnership marketplaces" which, for legal purposes, qualify as part of the federal exchange. In short, citizens of at least 34 states would be ineligible for subsidies (36 for this year) if the Affordable Care Act were enforced as it is written.

Since the *Halbig* ruling, two recordings (one video, one audio) have been unearthed showing an architect of Obamacare, MIT professor Jonathan Gruber, stating explicitly that "if you're a state and you don't set up an exchange, that means your citizens don't get their tax credits." Gruber now says that all such statements were "mistakes," but that's clearly untrue, as is the liberal talking point that the problem is due to a "drafting error."

No, the intent of the language was to force states to set up exchanges because the lobbyists and ideologues who drafted the law assumed that no governor would turn down "free money" even it came at the expense of common sense, limited government, affordable and good-quality health care, the doctor-patient relationship and the sustainability of future state budgets. The law's explicit statement that subsidies are only available through state-based exchanges was obviously intentional.

In the 2-1 decision of the original panel (written by Judge Thomas Griffith who received a "Yes" vote from one Senator Barack Obama during Griffith's 2005 confirmation vote) the majority castigates the dissent's nonsensical argument that "because federal Exchanges are established under section 1311, they too, by definition, are established by a state." Apparently, dissenting Judge Harry Edwards went to the Bill Clinton School of Definitions.

En banc reviews are particularly rare in the Court of Appeals for the DC Circuit – roughly one a year despite hearing nearly 500 cases annually – and one cannot help but marvel at the willingness of the court's newest appointees to blow up comity and tradition in order to impose their leftist political vision on an unwilling nation. But then three of them are only in their jobs because of a Senate majority leader and a president who take exactly that approach to governing.

The judges should consider the ramifications of what they do next. An overturning of the original panel's ruling will properly be considered a purely political move leading to a further erosion of the public's trust in our highest courts. Indeed, it is widely believed that avoiding such perceived politicization of the courts influenced John Roberts to change his vote in the case of *NFIB v Sebelius* which, if it had been constitutionally decided, would have ended the travesty that is Obamacare.

As the Cato Institute's Michael Cannon points out, Judge Edwards "made political arguments both during oral arguments over *Halbig*, when he shouted at plaintiffs' counsel that they were trying to 'gut the statute,' and in his dissent, where he questioned the plaintiffs' motives."

In a fit of remarkable haughtiness, Edwards ended his dissent by describing the majority opinion as a "proposed judgment," all but demanding an *en banc* overturning. Yet (speaking of hypocrisy) Edwards himself has strongly argued against such hearings in almost all situations, writing in the case of *Bartlett v Bowen* that "The decision to grant *en banc* consideration is unquestionably among the most serious non-merits determinations an appellate court can make, because it may have the effect of vacating a panel opinion that is the product of a substantial expenditure of time and effort by three judges and numerous counsel. Such a determination should be made only in the most compelling circumstances."

Again, hypocrisy has never stopped a liberal as their ends-justifies-the-means mentality routinely trumps what should be shame and embarrassment at pouring acid on the foundations of our civil society (such as separation of powers) and supporting behavior which they would, and do, call "imperial" when embarked on even to a much lesser degree by a Republican.

This shame and embarrassment should be particularly strong in a judge. As James Madison noted in Federalist 47, quoting Montesquieu's "Spirit of the Laws," "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*." (emphasis in original) Montesquieu himself prefaced that observation with "Again, there is no liberty, if the judiciary power be not separated from the legislative and executive."

While one might be tempted – as long as liberal judges are willing to behave as legislators – to call for an *en banc* hearing in the 4th Circuit, based in Richmond, VA, in which a three-judge panel upheld the Obamacare subsidies (on the same day that the DC Circuit overturned them), that court has a large majority of Democratic nominees (nine, versus five Republican nominees).

The real lesson, then, which people typically think of regarding the composition of the Supreme Court although this administration realized that lower courts can be just as important, is that elections have consequences.

In the meantime, much as Madison cautions us, someone might remind the DC Circuit judges who supported an *en banc* review in *Halbig* that they are judges, not members of Congress, and that their job is not to rewrite laws or redefine words in order to "fix" the plain language of legislation.

The DC Circuit Court of Appeals is currently the only court to have ruled against the legality of the Obamacare subsidies on federal exchanges. If the *en banc* review overturns the original opinion, the chances of the Supreme Court taking up the case would diminish, though there may still be four justices willing to grant *cert* even without disagreement among the circuits. Perhaps even Chief Justice Roberts would join in, regretting (as I hope he does) the damage he did to the nation in *NFIB* and looking for a way to redeem both his conscience and his legacy.