



Statement On D.C. Circuit's Ruling In *Halbig v. Burwell*

By Michael Cannon
July 22, 2014

In August 2011, the Internal Revenue Service proposed offering subsidies through health insurance Exchanges established by the federal government, even though the Patient Protection and Affordable Care Act clearly and repeatedly provides those subsidies are available only “through an Exchange established by the State.” Due to the PPACA’s interrelated provisions, the decision to offer unauthorized subsidies in federal Exchanges also triggers unauthorized taxes against millions of individuals and employers in the 36 states that ultimately opted not to establish Exchanges. When the IRS finalized this proposal in May 2012, it cited no authority for its decision to depart from the clear language of federal law.

Jonathan Adler and I were the first to criticize this decision in August 2011, and have continued to show how it is contrary to federal law and the PPACA’s legislative history.

Today, a panel of the U.S. Court of Appeals for the D.C. Circuit – known as the second-highest court in the land – ruled in *Halbig v. Burwell* that the Obama administration is indeed imposing taxes and spending funds through those 36 federal Exchanges without statutory authority, and indeed contrary to the plain language of the PPACA.

Simply put, the president is violating the law.

Unlike other courts who have examined *Halbig* and related cases, the D.C. Circuit looked at the totality of the evidence, reached the only conclusion the law and the evidence permit, and struck down the IRS rule.

The court rejected the seemingly endless string of legal arguments the administration offered in defense of its actions. Despite those arguments, the court held, “the government offers no textual basis...for concluding that a federally-established Exchange is, in fact or legal fiction, established by a state.” As a result, the PPACA “does not authorize the IRS to provide tax credits for insurance purchased on federal Exchanges” and the Obama administration’s decision to offer them anyway is not only unauthorized but “gives the individual and employer mandates...broader effect than they would have” if the IRS followed the law.

While the dissent was political, focusing on the plaintiff's motives, the opinion of the court was authored by Judge Thomas B. Griffith, whom the *Washington Post* has described as "widely respected by people in both parties, and those who have worked with him elsewhere regard him as a sober lawyer with an open mind. There is considerable reason to think he would make a fine judge." His nomination to the D.C. Circuit drew praise from prominent Democrats including Seth Waxman and David Kendall. Indeed, then-senator Barack Obama himself supported Griffith's nomination. Griffith noted that while the court's ruling could have a significant impact on the PPACA, "high as those stakes are, the principle of legislative supremacy that guides us is higher still."

The D.C. Circuit applied the law that Congress enacted. Any downstream effects of *Halbig* are the result of the PPACA itself, not today's ruling. If those effects are intolerable, then it is up to Congress to change the law, not the IRS. If *Halbig* results in people losing health-insurance subsidies, the blame lies with a president who recklessly offered millions of Americans tens of billions of dollars in subsidies he had no authority to offer, that could vanish with a single court ruling.

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