Halbig Court Opinion: A Victory For The Rule Of Law, But Merely A Speed Bump For Obamacare

By Avik Roy
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If you visited certain corners of the media yesterday—left and right—you may have read that in a case called *Halbig v. Burwell*, a federal court in D.C. dealt a "lethal blow" to Obamacare, by limiting the flow of the health law's insurance subsidies. The D.C. court made the right call, based on a strict reading of the law. But the probability that this ruling leads to the collapse of Obamacare is somewhere between zero and zero. That is to say, zero.

The IRS attempted to rewrite the legal text of Obamacare

The dispute at issue was whether or not the Affordable Care Act, a.k.a. Obamacare, authorizes the federal government to disburse insurance subsidies directly, absent the existence of state-based insurance exchanges.

The Affordable Care Act makes numerous references—most critically, in Section 1401 of the law—to "premium assistance" subsidies being available only to taxpayers "which were enrolled in through an Exchange established by the State under [Section] 1311 of the Patient Protection and Affordable Care Act." There is literally not one mention in the Act of subsidies being available through any other mechanism other than through "an exchange established by [a] State."

This wasn't a big deal when Obamacare was being drafted. Unlike the Medicaid program, Obamacare's insurance subsidies are entirely funded by the federal government. So states had every incentive to set up their own exchanges and draw down the "free" federal cash.

But then, in August 2011, the Internal Revenue Service unilaterally decided to overrule Congress—not normally one of its duties—and assert that Congress *really meant* to also allow insurance subsidies to flow through an exchange set up by the federal government. "A taxpayer is eligible for the credit [subsidy]," IRS wrote, "if the taxpayer…is enrolled in one or more qualified health plans through an Exchange established under [either]

section 1311 or 1321 of the Affordable Care Act." (Section 1321 is the section describing a federal exchange, though it does not authorize the flow of subsidies through a federal exchange.)

As long-time *Apothecary* readers will know, we have been covering this issue for three years. James Blumstein, a professor at Vanderbilt Law School, had identified in 2010 a "technical problem in the law" regarding the way in which the ACA specified that insurance subsidies would work.

Blumstein's concerns caught the attention of David Hogberg of *Investors' Business Daily*, who was the first journalist to write about the problem. Jonathan Adler and my *Forbes* colleague Michael Cannon then organized a legal challenge of the IRS regulation, the background of which Michael has ably and tirelessly covered at his blog.

The Forbes eBook On Obamacare

Inside Obamacare: The Fix For America's Ailing Health Care System explores the ways the Affordable Care Act will affect your health care and is available for download now.

Yesterday's two court rulings

Then yesterday, two federal appeals courts weighed in on the dispute. First, in the case of *Halbig v. Burwell*, the U.S. Court of Appeals for the District of Columbia, in a 2-1 decision, ruled in favor of the challengers. Judge Thomas Griffith, writing for the majority, concluded "that the ACA unambiguously restricts the section [1401] subsidy to insurance purchased on Exchanges 'established by the State,'" and thereby overturned the IRS rule.

A few hours later, the U.S. Court of Appeals for the Fourth Circuit, in the nearly identical case of *King v. Burwell*, ruled 3-0 in favor of the IRS. Judge Roger Gregory wrote the opinion, concluding that "the applicable statutory language is ambiguous and subject to multiple interpretations," leading him to defer to the IRS.

All told, the opinions split on partisan lines. The two judges who ruled against the IRS were appointed by Republicans: Griffith (George W. Bush) and Raymond Randolph (George H. W. Bush). The four who supported the IRS were appointed by Democrats: Gregory (Clinton), Stephanie Thacker and Andre Davis (Obama), and Harry Edwards (Carter).

The Democratic appointees made some fair points. The ACA was indeed drafted in a messy and incoherent way. The law's goal—to subsidize insurance coverage for the uninsured—could be seen as a reason to offer subsidies through a federal exchange. But the Democratic judges' core argument—the one upon which their pro-IRS case rests—is astonishingly weak.

Obamacare isn't on the verge of collapse

The case goes like this. Unless the Obama administration has the latitude to deliver taxpayer subsidies through a federal exchange, Obamacare will collapse. Judge Edwards, in his rabid D.C. Circuit dissent, fulminated that a strict interpretation of Section 1301 "would 'crumble' the Act's structure," by "[condemning] insurance markets in States with federally-created Exchanges to an adverse selection death spiral."

Never mind that the Congress is perfectly capable of condemning insurance markets to adverse selection death spirals. The CLASS Act, a government-sponsored insurance scheme for nursing-home care and related benefits, was included in the ACA, and set up from the start as an adverse selection death spiral. Kathleen Sebelius herself described it as "totally unsustainable." That didn't stop Congress from enacting it, and it certainly didn't give the courts the power to rewrite it.

Here's the main problem with the Democratic judges' pro-IRS argument. If the IRS had simply enforced Obamacare as written, Obamacare *wouldn't have collapsed*. Why? Because, over time, every state would have taken the "free" federal cash. And if they were reluctant, the powerful hospital and insurance lobbies would be there to make sure they did.

Think about it this way. The original Medicaid program, passed in 1965, was optional for the states. Most states signed up within a few years, but there were one or two holdouts. Arizona, the last holdout, set up its Medicaid program in 1982. The point is: every state now participates in Medicaid. And that's for a program for which states, on average, pay 40 percent of the costs.

A few years back, Texas looked into withdrawing from the Medicaid program altogether. They found it would be nearly impossible to do so, because they couldn't do without the federal government's support.

Unlike Medicaid, the Obamacare exchange subsidies are entirely funded by the federal government. But somehow we're to believe that state governments would willingly forego trillions of dollars in federal subsidies, in a program with minimal direct costs to the states? I could imagine a couple of states holding out temporarily, but not for long. Remember that a majority of states have agreed to expand Medicaid under Obamacare, including several Republican-controlled ones.

Supreme Court unlikely to disrupt Obamacare

Let's also remember that the *Halbig* and *King* cases are likely to be appealed to the Supreme Court. And there, if Chief Justice John Roberts' past behavior is any indication, the Obamacare challengers are in for an uphill battle.

In this context, Ezra Klein makes a relevant point. "By the time [the Supreme Court] even could rule on *Halbig* the law will have been in place for years. The Court simply isn't going to rip insurance from tens of millions of people due to an uncharitable interpretation of congressional grammar." Ezra unfairly derides the legal issues at play, and exaggerates the policy implications, but he asks the right political question.

Chief Justice Roberts, you may recall, was the justice who singlehandedly re-wrote Obamacare in order to justify the legality of the law's individual mandate. He did so, it appears, because he was more worried about left-wing criticism of the Court than he was about constitutional precision. It's hard to believe he wouldn't act the same way here.

States might have more leverage under a *Halbig* victory

At best, two good things could come out of a *Halbig* victory at the Supreme level. The first is that it would vindicate an important legal and social principle: that the law, *as written*, means something, and that judges don't have the latitude to rewrite laws they don't like.

The second is that if the Obama administration is forced to work with state governments to set up exchanges, conservative states may have more leverage to set up insurance exchanges that actually resemble voluntary markets. Utah, under Govs. Jon Huntsman and Gary Herbert, set up such an exchange, before Obamacare was enacted. It was submarined by the Obama administration. But in a post-*Halbig* world, the administration might have to allow exchanges like Utah's to go forward.

This would be a great thing—both for Obamacare, and for the country. It would allow states to come up with innovative ways to deliver health coverage to the uninsured, ways that are less intrusive and more cost-effective than Obamacare's current structure.

But the bottom line is that if taxpayer-funded subsidies can't flow through healthcare.gov—the federal exchange—nearly every state will set up its own exchange. And subsidies will flow through the federal exchange until John Roberts says they can't. No death spiral is imminent. No collapse is forthcoming. Obamacare is going nowhere.

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UPDATE: One important point to make is that there is a chance that Halbig doesn't make it to the Supreme Court. The case could be heard *en banc* by the entire panel of D.C. Appeals Court judges, in which Democratic appointees outnumber Republicans 7-4. If every appeals court rules in favor of the IRS, including the D.C. circuit *en banc*, the Supreme Court would not necessarily take up the case, because it wouldn't involve a contradiction among appellate rulings.

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INVESTORS' NOTE: The biggest publicly-traded players in Obamacare's health insurance exchanges are Aetna (NYSE:AET), Humana (NYSE:HUM), Cigna (NYSE:CI), Molina (NYSE:MOH), WellPoint (NYSE:WLP), and Centene (NYSE:CNC), in order of the number of uninsured exchange-eligible Americans for whom their plans are available.