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Decision To En Banc Halbig v. Burwell Is Unwise, Unfortunate, And Appears Political

By Michael F. Cannon
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Today's decision by the D.C. Circuit to grant *en banc* review of *Halbig v. Burwell* is unwise and unfortunate. It has the appearance of a political decision, and will likely only delay Supreme Court review. It does not necessarily presage the outcome of these cases, and I predict that even if the administration wins, it will lose ground before the full D.C. Circuit. But a ruling overturning the *Halbig* decision will be perceived as political, and understandably so.

The *Halbig* ruling does not require review. A three-judge panel of the D.C. Circuit correctly applied the law when it held that Congress authorized health-insurance subsidies, as the Patient Protection and Affordable Care Act says, only "through an Exchange established by the State." The health-insurance Exchanges the federal government established in 36 states were *not* "established by [a] State," and there is nothing in the PPACA to suggest Congress understood those words to mean anything other than their plain meaning. The *Halbig* ruling was authored by Thomas Griffith, a judge supported by President Obama when he was a senator and praised by prominent Democrats for his fair-mindedness.

To see why the decision to grant *en banc* review of the *Halbig* ruling, consider the dynamics surrounding the decision: (1) Senate Democrats eliminated the filibuster on most judicial nominations primarily so they could seat President Obama's nominees to the D.C. Circuit; (2) President Obama and Senate Democrats then "packed" the D.C. Circuit with their judicial nominees; (3) the *Halbig* ruling was written by a judge supported by President Obama when he was a senator and praised by Democrats for his fair-mindedness; (4) President Obama nevertheless appealed the *Halbig* ruling to a panel where, thanks to the elimination of the filibuster on most judicial nominees, Democratic appointees now outnumber Republican appointees by 8-5; (5) D.C. Circuit court Judge Harry 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; (6) Senate Majority Leader Harry Reid said the *Halbig* ruling vindicates the decision to pack the D.C. Circuit; (7) the president's supporters urged him to appeal the *Halbig* ruling to the full D.C. Circuit, (8) this move is consistent with the Obama administration's strategy of

delaying this litigation as long as possible, which would tend to prejudice the courts because delay further entrenches the subsidies that the *Halbig* ruling declared illegal, and increases the disruption that will be caused by eliminating those subsidies; and (9) granting *en banc* review is a highly unusual move for the D.C. Circuit, in large part due to the influence of Edwards, who has argued at length against *en banc* rehearings because they consume considerable resources and threaten comity among the judges on the circuit.

Obviously, we don't know how many judges voted to grant *en banc* review, or what they were thinking. But the grant of *en banc* review certainly has the appearance of a political decision. If *Halbig* is important enough for the D.C. Circuit to review, then it is also important enough for the Supremes to review. If inserting the additional step of *en banc* review does little more than further entrench those subsidies and give the other judges on the D.C. Circuit a chance to influence the ultimate outcome of the case, then it's hard to explain this decision anything other than political.

It is more likely that *en banc* review of *Halbig* will delay Supreme Court review of this issue than obviate it. The same factor that made *Halbig* a candidate for *en banc* rehearing – its "exceptional importance" – makes it an equally likely candidate for Supreme Court review. Thus the Supreme Court could grant *cert* in *Halbig* even if the D.C. Circuit overturns it. Or the Supreme Court could grant *cert* in *King v. Burwell* notwithstanding the D.C. Circuit's *en banc* review of *Halbig*. Or, two similar cases making their way through the U.S. Courts of Appeals for the Seventh and Tenth Circuits — *Pruitt v. Burwell* and *Indiana v. IRS* – could contribute to a circuit split and trigger Supreme Court review. There could also be other cases filed in additional circuits.

Finally, though it may be the case that the eight Democratic appointees on *Halbig*'s *en banc* panel tend to take a more "purposivist" approach to statutory interpretation, while the five Republican appointees tend to take a more "textualist" approach, I do not see the outcome of *en banc* review as a foregone conclusion. Consider: even though the Obama administration's record in these cases is 3-1, the government has lost ground as *Halbig* and *King* have moved through the federal courts. At the district-court level, the government won twice, once at *Chevron* Step One (*Halbig*) and once at *Chevron* Step Two (*King*). At the appellate-court level, only one out of six judges found for the government at *Chevron* Step One. Four Democratic appointees lent some weight to the plaintiffs' argument that the Obama administration is violating the clear language of the PPACA. As the plaintiffs and their *amici* highlight the serious, serious flaws in Edwards' *Halbig* dissent and the Fourth Circuit's *King* ruling, the D.C. Circuit's Democratic appointees could lend even more credence to the plaintiffs' position. That alone would be a victory — and not the last word.

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