THE WALL STREET JOURNAL

Reining in ObamaCare—and the President

Halbig v. Burwell is about determining whether the president, like an autocrat, can levy taxes on his own.

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July 22, 2014

A three-judge panel of the U.S. Court of Appeals for the D.C. Circuit—a tribunal second only to the Supreme Court—ruled on Tuesday that the Obama administration broke the law. The panel found that President Obama spent billions of taxpayer dollars he had no authority to spend, and subjected millions of employers and individuals to taxes he had no authority to impose.

The ruling came in *Halbig v. Burwell* , one of four lawsuits aimed at stopping those unlawful taxes and expenditures. It is a decision likely to have far-reaching repercussions for the health-care law.

Because the ruling forces the Obama administration to implement the Affordable Care Act as written, consumers in 36 states would face the full cost of its overpriced health insurance. According to one brief filed in the case, overall premiums in those states would be double what they are under the administration's rewrite, and typical enrollees would see their out-of-pocket payments jump sevenfold. The resulting backlash against how ObamaCare *actually* works could finally convince even Democrats to reopen the statute.

At its heart, though, *Halbig* is not just about ObamaCare. It is about determining whether the president, like an autocrat, can levy taxes on his own authority.

The president's defenders often concede that he is doing the opposite of what federal law says. Yet he claims that he is merely implementing the law as Congress intended.

Such claims should be met with more than the usual skepticism when made by a president who openly advocates unilateral action—"I've got a pen, and I've got a phone"—when the legislative process doesn't produce the result he wants, and when they are made by a president whose expansive view of his powers the Supreme Court has unanimously rejected 13 times. Unfortunately, the abuse of power exposed in *Halbig* may trump them all.

Here's where the president broke bad. The Patient Protection and Affordable Care Act directs states to establish "exchanges" to regulate the sale of health insurance. If a state declines to do so, as 36 states have, the health-care law directs the federal government to "establish and operate such Exchange within the State." But here's the rub: Certain taxpayers can receive subsidized coverage, the law says, if they enroll "through an Exchange established by the State." The law nowhere authorizes subsidies through exchanges established by the federal government.

This is common practice. The Medicaid program has operated on the same principle for nearly 50 years. Only residents of cooperating states get assistance. When Congress debated health reform in 2009, both Republicans and Democrats introduced legislation conditioning health-insurance subsidies on states establishing exchanges. Senate Democrats advanced two leading health-care bills. Both allowed federal exchanges to operate without subsidies. One of them became law.

The only thing that is uncommon about the Affordable Care Act is that two-thirds of the states refused to comply. Yet federal law is clear, consistent and unambiguous: The Obama administration has no authority to issue subsidies outside "an Exchange established by the State." According to congressional investigators, Treasury Department and Internal Revenue Service personnel even admitted they knew the statute did not authorize them to dispense subsidies in states with exchanges established by the federal government. Yet the IRS still promulgated a rule authorizing subsidies in states with federal exchanges.

We were the first to draw attention to the president's actions, on these pages in November 2011. In January 2014, despite years of criticism from members of Congress and others, the Obama administration began spending taxpayer dollars to buy coverage for an estimated five million people who enrolled through federal exchanges. If eight million people enrolled in federal-exchange coverage, as we are told they have, it is because the president was unlawfully subsidizing more than half of them.

Subsidies for policies purchased on an exchange automatically trigger taxes against both employers and individuals who do not purchase the mandated level of coverage. So when the president issued those subsidies in states where he had no authority to do so, he also imposed, on millions of employers and individuals, taxes that no Congress ever authorized. Two states, dozens of public-school districts, and several private-sector employers and individual taxpayers filed *Halbig* and three other lawsuits to block that unlawful spending and the illegal taxes it triggers.

The president's supporters claim that *Halbig* is meritless because Congress clearly intended to authorize subsidies through federal exchanges. If that were Congress's intent, certainly one should be able to find some statutory language to that effect. Or contemporaneous quotes from the law's authors explaining that they intended the Affordable Care Act to authorize subsidies in federal exchanges. The president's supporters have had three years to find such evidence supporting their theory of congressional intent. They have come up empty.

The administration's legal strategy is therefore, of necessity, bizarre. The president's representatives argue in court that Congress intended to use the words limiting subsidies to exchanges "established by the State," and intended to authorize subsidies through exchanges established by the federal government, without ever explicitly reconciling the contradiction. Also on Tuesday, the Fourth Circuit Court of Appeals upheld the Internal Revenue Service rule as a permissible interpretation of an ambiguous statute, as if there were anything ambiguous about the difference between a state and the federal government.

The D.C. Circuit saw through this nonsense. One by one, it rejected the government's many arguments. The court held the Affordable Care Act "does not authorize the IRS to provide tax credits for insurance purchased on federal Exchanges" and "the government offers no textual basis . . . for concluding that a federally-established Exchange is, in fact or legal fiction, established by a state." The administration's decision to issue those subsidies anyway is thus

contrary to the statute and "gives the individual and employer mandates . . . broader effect than they would have" if the government followed the law.

While the dissent in *Halbig* highlighted the plaintiff's motives, the majority opinion came from Judge Thomas B. Griffith, whose nomination in 2005 was supported by prominent Democrats including Seth Waxman, David Kendall, and even then-Sen. Barack Obama. Judge Griffith noted that while the court's ruling could have a significant impact on the Affordable Care Act, "high as those stakes are, the principle of legislative supremacy that guides us is higher still."

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