Upholding the Rule of Law

Analysis: Halbig v. Burwell is a blow to Obamacare, but issue is far from settled

By Andrew Evans
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Tuesday's ruling against Obamacare in *Halbig v. Burwell* is a major blow to the reputation of Obamacare as "the law"—at least as the president has implemented it—and its long term implications could cripple the law's practical viability.

The ruling, if upheld, also deals a major blow to progressive attempts to strengthen the powers of the presidency beyond its constitutional limits, making it a major victory for constitutional government.

The D.C. Circuit Court of Appeals' decision focused on the technical rules governing the exchange subsidies. Obamacare sets up health insurance "exchanges" or "marketplaces" in each state where people can go to buy insurance. Additionally, the law extends subsidies to people who make below 400 percent of the poverty level to help them buy the insurance on the exchanges.

The law gives states the option of whether to set up their own exchange or allow the federal government to set one up for them. The Obama administration interpreted the law to allow the federal government to extend subsidies to people on both state-run and federally run exchanges.

A health care expert at the Cato Institute, a Washington based think tank, took issue with this interpretation. Michael Cannon argued that the law only allows subsidies for exchanges run by the states, not those run by the federal government. His reasoning was that the subsidies acted as a sort of carrot to the states meant to encourage them to set up their own exchanges. Several different groups, including the state of Oklahoma, have taken up this argument in suits against the administration.

The D.C. Circuit Court agreed with Cannon's argument on Tuesday, releasing a 2-1 decision that ruled that the Obama administration had overstepped the law by supplying subsidies for insurance on federally run exchanges.

Because of the structure of the law, the implications of this ruling cascade out.

The first and most obvious result is that those who received subsidies through federally run exchanges are at risk of having their subsidies cut off. Obamacare's structure drives up the price of insurance through a web of regulations and requirements, and many people can only afford the insurance because of the subsidies. Only 16 states and the District of Columbia decided to set up their own exchanges, leaving 34 states—and millions of people—where the subsidies are now imperiled by this decision.

However, the biggest impact of this ruling might not actually be on the subsidies. The law was structured such that both the individual and employer mandates—requiring individuals to buy insurance and employers to provide it—were tied to the existence of the subsidies.

The individual mandate affects only those who cannot afford insurance (based on a predetermined formula). The subsidies made insurance technically affordable for many people, and since many of these people legally cannot receive subsidies (according to today's ruling), the individual mandate will apply to far fewer people.

If this decision holds, the federally run exchanges will likely crumble. The high cost of insurance on the exchanges without the subsidy will drive away healthy people, leaving only those with pre-existing conditions, who cannot be turned away, to buy insurance on the exchanges. Insurance premiums will have to rise to cover the shrinking and more expensive pool of people, driving even more people away and likely leading to a so-called insurance "death spiral."

The employer mandate is also at risk. The employer mandate only kicks in if employees have access to the subsidies—which means that if the subsidies are illegal in most states, then there is no employer mandate in those states, either.

The employer mandate required not only that employers provide health insurance, but also required that the insurance fit certain parameters—such as covering 20 different kinds of birth control. This ruling frees employers to provide the kind of insurance that they think is best, free from government interference. Around 80 percent of health insurance plans come through employers, which makes this ruling especially important for the vast majority of people with insurance.

It would be wrong to assume that this decision is final. Indeed, just hours after the *Halbig* ruling came down another circuit court rejected the arguments the D.C. Circuit Court accepted. And the odds are that the lower court, to which the D.C. Circuit Court returned this case with instructions, will put a hold on any decision, preventing it from having any practical effect for now and meaning that the subsidies will continue to flow.

But the decision nevertheless is an important victory for the rule of law and constitutional government.

The two-judge majority wrote that it reached "this conclusion, frankly, with reluctance," as it would have "have significant consequences." Nevertheless, the justices wrote:

within constitutional limits, Congress is supreme in matters of policy, and the consequence of that supremacy is that our duty when interpreting a statute is to ascertain the meaning of the words of the statute duly enacted through the formal legislative process. This limited role serves democratic interests by ensuring that policy is made by elected, politically accountable representatives, not by appointed, life-tenured judges.

President Obama has been bending the law over the last couple years, delaying and deferring numerous parts of the statute, and this ruling seeks to stop a more egregious example of presidential overreach.

This ruling upholds the law, but the law as it actually is—not as the president wants it to be.