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D.C. Circuit to IRS: Only Congress Can Change the Law

By Ilya Shapiro

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The U.S. Court of Appeals for the D.C. Circuit ruled this morning in *Halbig v. Burwell* that the government isn't Humpty Dumpty and so statutory text doesn't mean whatever the government says it means. The Affordable Care Act provision at issue, which grants tax credits for people to buy health insurance, only applies to people buying policies through "exchanges established by the State" — which in any sane world can't apply to exchanges established by the federal government. The fact that the vast majority of states (36) have declined the federal government's invitation to establish exchanges — the list grows weekly as initially supportive states' exchanges fail — and that the resulting system thus doesn't function as some hoped is of no moment.

Here's the background, in case you haven't been following this particular Obamacare challenge. To encourage the purchase of health insurance, the Affordable Care Act added a number of deductions, exemptions, and penalties to the federal tax code. As might be expected from a 2,700-page law, these new tax provisions can interact in counterintuitive ways. As first discovered by Michael Cannon and Jonathan Adler, one of the new tax law sections, when combined with state decisionmaking and Interal Revenue Service rulemaking, has given Obamacare yet another legal problem.

The legislation's §1311 provides a subsidy for anyone who buys insurance from an insurance exchange "established by the State." The provision was supposed to be an incentive for states to create their own exchanges, but in most states, the federal government ended up establishing its own exchange, as another section of the ACA specifies. But where §1311 only explicitly authorized a tax credit for people who buy insurance from a *state* exchange, the IRS issued a rule interpreting §1311 as also applying to purchases from federal exchanges.

This creative interpretation most obviously hurts employers, who are fined for every employee who receives such a tax credit/subsidy to buy an exchange plan when their employer fails to comply with the mandate to provide health insurance. But it also hurts some individuals, such as David Klemencic, a lead plaintiff in *Halbig*. Klemencic lives in a state, West Virginia, that never established an exchange, and for various reasons he doesn't want any of the insurance options available to him. Because buying insurance would cost him more than 8% of his income, he

should be immune from Obamacare's ~~individual mandate~~ tax on the decision not to buy insurance. After the IRS expanded §1311 to subsidize people in states with federal exchanges, however, Klemencic could've bought health insurance for an amount low enough to again subject him to the Roberts tax.

Klemencic and plaintiffs in multiple lawsuits around the country argue that they face these costs only because the IRS exceeded the scope of its powers by extending a tax credit not authorized by Congress. The district court in *Halbig* rejected that argument, ruling that, under the highly deferential test courts apply to actions by administrative agencies, the IRS only had to show that its interpretation of §1311 was reasonable — which the court was satisfied it had.

And indeed so did the Fourth Circuit later today, in the case of *King v. Burwell* out of Virginia. There the panel found "that the applicable statutory language is ambiguous and subject to multiple interpretations." When a court finds statutory ambiguity — judges are good at manufacturing it when they don't want to enforce the law as written — it defers to the agency action that purports to interpret that statute.

Here that's judicial mischief bordering on tomfoolery. Indeed, the Fourth Circuit even likely timed the release of *King* in a way to blunt the political/media impact of the *Halbig*. To have them both come down on the same day is coincidence enough, but the *King* opinion apparently "leaked" before counsel on the case were advised via the electronic distribution system and before the ruling was put on the court's own website, as is standard practice.

While it's manifestly the province of the judiciary to say "what the law is," where the law's text leaves no question as to its meaning — as is the case here with the phrase "established by the State" — it's neither right nor proper for a court to replace the laws passed by Congress with those of its own invention or the invention of civil servants. If Congress wants to extend the tax credit beyond the terms of the Affordable Care Act, it can do so by passing new legislation. The only reason for executive-branch officials not to go back to Congress for clarification, and instead legislate by fiat, is to bypass the democratic process, thereby undermining constitutional separation of powers.

These IRS-tax-credit cases ultimately aren't about money, the wisdom of individual health care decisionmaking, or even political opposition to Obamacare. They're about who gets to create the laws we live by: the democratically elected members of Congress or the bureaucrats charged with no more than executing the laws that Congress passes and the president signs.

The government would have the IRS and courts rewrite the law to fix its massive structural weaknesses. But neither executive-agency bureaucrats nor judges can change Obamacare's text, after-the-fact legal rationalizing notwithstanding. Today's conflicting rulings show that Obamacare, a cynical political bargain that lacked popular support from day one, simply doesn't work as conceived. It's time to repeal this Frankenstein's monster and instead pass market-based health care reform that lowers costs, expands choice, and increases quality-all while respecting the rule of law.

For more, read my briefs in *Halbig* and *King* and follow my colleague Michael Cannon's own Forbes site.

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