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Onslaught of Litigation to Come from Obamacare

Recent circuit court split foreshadows protracted court battles over the Affordable Care Act.

By Ilya Shapiro
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When Chief Justice John Roberts upheld the Affordable Care Act's individual mandate under the taxing power, and thereby salvaged most of the law, his stated goal was to remove the U.S. Supreme Court from the political arena. But, as with all pieces of major social-welfare legislation, "Obamacare" is destined to keep plenty of lawyers occupied as it comes before the court again and again.

Forget *Hobby Lobby* and other challenges to the contraceptive mandate. Those cases are important for religious liberty but don't threaten Obamacare's operation. Instead, what the Supreme Court now faces is a steady stream of lawsuits against the complex web of subsidies and penalties at the heart of the health care scheme.

You may recall that last month, two federal appeals courts issued offsetting rulings regarding the IRS' implementation of the Affordable Care Act. First, the U.S. Court of Appeals for the D.C. Circuit held in *Halbig v. Burwell* that the agency broke the law in issuing tax credits — better known as subsidies — for people to buy policies from federal exchanges, because the Affordable Care Act provides for subsidies only to those who enroll in exchanges established "by the state." A couple of hours later, the U.S. Court of Appeals for the Fourth Circuit, in *King v. Burwell*, ruled in favor of the government's ability to provide these credits.

These subsidies are even more important to Obamacare than the individual mandate. Without them, consumers would face the full cost of health care and so enrollment would plummet. They also trigger the taxes on individuals and businesses that don't buy the requisite level of care. So, the issue is whether the executive branch spent billions of taxpayer dollars and subjected millions of people to taxes without any authority to do so. To paraphrase Joe Biden, that's a big deal.

TIME IS OF THE ESSENCE

The lead counsel for plaintiffs in both cases, Michael Carvin — who represented the National Federation of Independent Business in the original Obamacare challenge, *NFIB v. Sebelius* — quickly petitioned the Supreme Court to review *King v. Burwell*. He followed that with a letter asking the full court, not just the court's clerk, to consider any requests for extension in the government's time for a response (due on Sept. 3, but, at

press time, the government indeed had asked for a 30-day extension, which Carvin has opposed). Such requests are typically granted by the clerk as a matter of right, but Carvin wanted to make clear that time was of the essence, given that the fate of national legislation was stake.

The solicitor general, meanwhile, asked the D.C. Circuit to rehear *Halbig* en banc — that is, for all 11 active judges to reverse the three-judge panel's decision. Having filled the court with his own nominees after the Senate ended filibusters of judicial nominees — there are now seven judges appointed by Democrats — President Barack Obama thinks he has a good shot at erasing the circuit split and thus making *King* less attractive to the Supreme Court. Carvin's typically pugnacious response came on Aug. 18, arguing that *Halbig* is a poor vehicle for en banc review.

Indeed, having a majority of a circuit court think that a panel was wrong normally isn't enough to grant full rehearing. Federal appellate rules say that such review "is not favored." The D.C. Circuit has a particularly high bar, on average taking only one case per year en banc. Judge Harry Edwards, who dissented in *Halbig*, has taken great pains to reduce the number of en banc hearings (which distract the entire court and moot the efforts of the panel, not to mention counsel), in part to restore collegiality on a court that was hopelessly embattled in the 1980s. Even before he served as the D.C. Circuit's chief judge, Edwards wrote in *Bartlett v. Bowen* (1987) that "the institutional cost of rehearing cases en banc is extraordinary" and that it "substantially delays the case being reheard, often with no clear principle emanating from the en banc court."

Moreover, even if the D.C. Circuit were to change its practice, rehear *Halbig*, and reverse the panel, the shadow over the IRS subsidies would not go away. At least two other lawsuits elsewhere in the country raise the same question. One, brought by three dozen school districts in Indiana last month, survived a motion to dismiss. The other, filed by the Oklahoma attorney general, is on a similar track. Whoever wins those cases in district court will appeal to appeals courts — the U.S. Courts of Appeals for the Seventh Circuit and the Tenth Circuit, respectively — that are less friendly to the government than the courts that have already ruled.

Make no mistake: Regardless of what happens in *Halbig*, there will almost certainly be a circuit split for the Supreme Court to contend with. The only question is whether the D.C. Circuit will enable its superior to avoid that day of reckoning for another year or two, allowing the justices to kick the Obamacare can down the road.

Of course, all this is the direct consequence of three developments that we've seen too often in recent years: first, an overly complicated law rammed through Congress without serious consideration and against the will of the people; second, a politicized IRS that implements administration policy over the recommendations of career civil servants; and third, a White House that believes it gets more power when "Congress won't act," never mind that Congress is fully ready to reopen the health care legislation.

It's too late in the day for the D.C. Circuit to fix this mess. The ball is again in the Supreme Court.

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