



## The Meaning of the Federal Health Care Cases

By Dick Clark

There is much discussion of political polarization in the United States. Hardly any piece of federal legislation is more polarizing than the federal health care law passed in March 2010. Central to Barack Obama's 2008 presidential campaign was the promise of a major health care shake-up that would achieve universal health care coverage in the United States.<sup>1</sup> The major initiative advanced by the Obama administration and his allies in Congress took form as The Patient Protection and Affordable Care Act of 2010 ("PPACA" or "ACA"). The controversial law is unpopular with the American public. Disapproval of the proposal was at 59 percent shortly before the legislation advanced through Congress, and a recent poll found that 59 percent of the public still oppose it now that it is federal law.<sup>2</sup> A poll of Nebraskans showed the healthcare package was even less popular in Nebraska than the rest of the country, with 64 percent of Nebraskans opposing it.<sup>3</sup>

In bill form, the legislation comprised over 900 pages of text, so to describe the law as "complex" is an understatement. However, the law can be distilled down to three principal components: market reforms, the individual mandate, and subsidies. The law's directives to the insurance market expand eligibility for new policies to include applicants with known pre-existing medical conditions. Allowing people who are already sick to get "insurance" against such illness posed a significant problem for insurers, since it creates the incentive to purchase insurance only after illness sets in. To address this, federal legislators also included a provision mandating that individual taxpayers secure health coverage or face a tax penalty. Finally, financial subsidies for lower-income taxpayers broaden the individual mandate by paying for a portion of premiums—sometimes a very significant portion.

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<sup>1</sup> Brown, Carried Budoff and Glenn Thrush. "President Obama's health care conversion." Politico. September 22, 2013. [URL: <http://www.politico.com/story/2013/09/obama-health-care-conversion-obamacare-97185.html>]

<sup>2</sup> CNN/ORC Poll. CNN/ORC International. July 23, 2014. [URL: <http://i2.cdn.turner.com/cnn/2014/images/07/22/rel7c.pdf>]

<sup>3</sup> "Election 2012: Nebraska Senate." Rasmussen Reports. May 17, 2012. [URL: [http://www.rasmussenreports.com/public\\_content/politics/elections/election\\_2012/election\\_2012\\_senate\\_elections/nebraska/election\\_2012\\_nebraska\\_senate](http://www.rasmussenreports.com/public_content/politics/elections/election_2012/election_2012_senate_elections/nebraska/election_2012_nebraska_senate)]

Given the law's unpopularity and broad ramifications for taxpayers, it is no surprise that opponents have been persistent in working to roll it back through a series of legal challenges. In June 2012, the Supreme Court of the United States upheld the individual mandate as a constitutional application of Congress's power to tax in *National Federation of Independent Business v. Sebelius*.<sup>4</sup> Two U.S. Circuit Court decisions announced last week, though, signal that the high court will almost certainly be asked to answer more questions relating to the ACA, this time about how the federal government has interpreted the scope of the law.

The pair of cases—*Halbig v. Burwell* in the DC Circuit and *King v. Burwell* in the 4th Circuit—were brought by taxpayers in several states seeking to challenge an IRS regulation that sets out the rules for tax credit subsidies for health insurance purchases. At issue in both cases is whether or not these subsidies under the ACA are available in all states or only in those states that have elected to create their own state-based health insurance exchanges.

The law states that individuals are eligible for tax credits to subsidize their insurance premiums if their income places them between 100 percent and 400 percent of the Federal Poverty Level and if they are purchasing insurance on an “exchange established by the state,” but IRS regulations allow for tax credit subsidies in all states. This is of key importance because the penalties backing up the individual mandate to secure “minimum essential coverage” hinge upon the cost of insurance. If the subsidies are not available in states with federally run exchanges, fewer individuals in those states would potentially be subject to the penalties for not buying coverage. Similarly, tax penalties for employers not complying with mandates to purchase insurance are only enforceable in states where the tax credits are available.

In a 2–1 decision, the DC Circuit Court found that the IRS regulations conflict with the unambiguous language of the statute and vacated the rule. In his concurring opinion, Judge Raymond Randolph stated that “to hold otherwise would be to engage in distortion, not interpretation. Only further legislation could accomplish the expansion the government seeks.”<sup>5</sup> One commentator describes the majority decision as “a fairly straightforward exercise in statutory interpretation.”<sup>6</sup>

A three-judge panel in the Fourth Circuit arrived at a contrary conclusion. While agreeing “a literal reading of the statute undoubtedly accords more closely with [the plaintiffs'] position,”<sup>7</sup> the court ultimately concluded that the IRS rule was permissible, because the overall statutory scheme set up by the law would not function without the subsidies. In its decision, the Court concluded that “denying tax credits to individuals shopping on federal Exchanges would throw a

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<sup>4</sup> *National Federation of Independent Business v. Sebelius*, 132 S.Ct 2566 (2012)

<sup>5</sup> *Halbig v. Burwell*, No. 14-5018, GS 808363970123236732 (D.C. Cir. July 22, 2014) (Randolph, concurring) [URL: [http://scholar.google.com/scholar\\_case?case=808363970123236732](http://scholar.google.com/scholar_case?case=808363970123236732)]

<sup>6</sup> Adler, Jonathan H. “Interpreting the ACA in *Halbig v. Burwell*.” *The Volokh Conspiracy*. *Washington Post*. 2014. [URL: <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/22/interpreting-the-aca-in-halbig-v-burwell/>]

<sup>7</sup> *King v. Burwell*, No. 14-1158, GS 15095772979412361067 (4th Cir. July 22, 2014)

debilitating wrench into the Act's internal economic machinery.... It is therefore clear that widely available tax credits are essential to fulfilling the Act's primary goals and that Congress was aware of their importance when drafting the bill. The IRS Rule advances this understanding by ensuring that this essential component exists on a sufficiently large scale.”<sup>8</sup>

Further review at the circuit court level is likely before the issue will be presented to the Supreme Court. This conflict between the circuits on this narrow issue makes it ripe for a final decision by the high court, perhaps as early as 2015. One thing that the parties all agree on is that the entire ACA regulatory scheme is dependent on the outcome.

Here in Nebraska, state officials declined to create a state insurance exchange, leaving exchange development and administration to the federal government. The significant costs avoided in Nebraska by not choosing to create a state exchange have become increasingly apparent as other states have struggled to roll out their own exchanges while facing massive cost overruns.<sup>9</sup> It now appears that the reluctance of Nebraska and many other states to fully participate in implementation of the federal law will also play a role in the question of whether or not the ACA survives at all. Individual taxpayers and employers who may or may not be subject to the law's mandates and penalties have a lot riding on the answer.<sup>10</sup>

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<sup>8</sup> *Ibid.*

<sup>9</sup> Clark, Dick. “Nebraska’s Caution Wise on Implementing Federal Health Law.” Platte Institute for Economic Research. May 14, 2014. [URL: <http://www.platteinstitute.org/research/detail/nebraskas-caution-wise-on-implementing-federal-health-law>]

<sup>10</sup> Cannon, Michael. “Halbig v. Burwell Would Free More Than 57 Million Americans From The ACA's Individual & Employer Mandates.” *Forbes*. July 21, 2014. [URL: <http://www.forbes.com/sites/michaelcannon/2014/07/21/halbig-v-burwell-would-free-more-than-57-million-americans-from-the-acas-individual-employer-mandates/>]