

# NATIONAL REVIEW

## **Congress Should Fund Obamacare Subsidies — or Trump Must Stop Them**

Josh Blackman

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The headlines were predictable: If President Trump halts Obamacare subsidies for insurance companies, the Congressional Budget Office predicts, premiums for “Silver” plans will skyrocket by 20 percent next year. Buried halfway through the CBO’s report, however, was an important qualification: The executive branch could stop the payments “of its own volition or in response to a court order.”

You see, terminating the “BAILOUTS for insurance companies,” as President Trump has threatened to do, would not be an act of sabotage but rather a welcome step toward promoting the rule of law. Congress has never appropriated the funding for the subsidies, and every penny paid to the insurers is unlawful. For two years congressional Republicans argued the payments were illegal, and they even sued the Obama administration to halt them. Last year, a federal judge agreed, ruling that the payments were unconstitutional.

Yet, remarkably, for the first seven months of the Trump administration, the payments have continued without disruption. Even more remarkably, Speaker Paul Ryan — who commenced the initial investigation into the payments — is content to allow the administration to keep breaking the law.

Congress’s only true option is to follow the Constitution and appropriate the funds. Otherwise, members can only look the other way while the separation of powers is being violated.

The Affordable Care Act employed two strategies to make health insurance more affordable. Section 1401 of the law provides for the payment of subsidies to consumers to reduce premiums. Section 1402 provides payments to insurers to offset cost-sharing reductions (CSRs) for lower-income enrollees, such as reduced deductibles and co-pays. But while the ACA funds the subsidies under Section 1401 with a permanent appropriation, to date, Congress has not provided an annual appropriation for the cost-sharing subsidies under Section 1402.

Last year, a federal court ruled that Congress did not “squeeze the elephant of Section 1402 reimbursements into the mousehole of Section 1401.” Mr. Obama’s policy “violates the Constitution,” the court concluded. “Congress is the only source for such an appropriation, and

no public money can be spent without one.” And Congress is the only branch with the power to authorize these expenditures.

After the election, I expected the Trump administration would halt the payments. I was wrong. There has been no change in course. In April, the Department of Health and Human Services admitted that “there has been no policy change in the current administration.” Within the administration there seems to be some dispute, as President Trump has flirted with the idea of stopping the illegal subsidies yet has never pulled the trigger.

Even more surprising has been the reversal by House Speaker Paul Ryan. In February 2015, as chair of the Ways and Means Committee, Ryan launched the investigation into the legality of the CSR payments. In a letter to the Obama administration, Ryan demanded that the Obama administration explain the legal justification for making the payments. (See page 90.) “The Treasury Department has made and continues to make these payments,” Ryan charged, “even though no funds are lawfully available to do so.” After a thorough oversight investigation, the House concluded that the “Administration has spent an estimated \$13 billion on CSR payments without a lawful congressional appropriation.” Throughout the entire process, Ryan backed the investigation and the litigation. Yet, after the election, he began to sing a different tune.

In April, the speaker confirmed that he would not include funding for the CSR payments in the budget. “Obviously, we’re not doing that,” he said. “That’s not in an appropriation bill. That’s something separate that the administration does.” In other words, Ryan was content to let the Trump administration continue making the same payments that he’d previously sued Obama for making. Talk about chutzpah.

Fortunately, many other Republicans are standing on principle. Representative Kevin Brady of Texas, who now chairs the House Ways and Means Committee, explains that Congress should act within its “constitutional authority now to temporarily and legally fund cost-sharing reduction payments as we move away from Obamacare.” Doing so, Brady explained, would “help stabilize the insurance market and help lower premiums for Americans trapped in Obamacare.”

Likewise, Representative Greg Walden of Oregon, who chairs the Energy and Commerce Committee, insisted that Congress should fund the subsidies. “I will do everything I can to make sure that the cost-sharing reduction payments get made,” he said. Making those payments, Walden added, is “an obligation we have not only to the insurers” but also to consumers, and “we cannot leave them high and dry.”

Brady and Walden are exactly right. Their proposals are both constitutionally necessary and economically proper. Creating an appropriation for these payments will strengthen the separation of powers and fortify the insurance marketplaces. It will promote the rule of law and reduce premiums. It is a win-win situation all around.

Congress has only one choice: appropriate the funds. If the House and Senate do not act, President Trump has no option but to halt the payments.

*Josh Blackman is a constitutional-law professor at the South Texas College of Law in Houston, an adjunct scholar at the Cato Institute, and the author of Unraveled:*

