Bloomberg

The Flaws That Will Bring Down Obama's Health-Care Plan

By Ramesh Ponnuru
Ramesh Ponnuru is a senior editor for National Review, where he has covered national politics for 15 years.

October 1, 2012

The debate over President Barack Obama's health-care law has taken another twist. Now conservatives and libertarians are defending it, while the administration tries to toss part of the legislation out.

The reason for this role reversal is that the drafters of the law outsmarted themselves and handed their opponents a weapon. Now they would like to pretend the law doesn't say what it does.

Obama's plan makes tax credits available to people who get health insurance from exchanges set up by state governments. If states don't establish those exchanges, the federal government will do so for them. The federal exchanges, however, don't come with tax credits: The law authorizes credits only for people who get insurance from state-established exchanges. And that creates some problems the administration didn't foresee, and now hopes to wish away.

Legislative debate over the law didn't go into great detail about these provisions. We can surmise what happened, though. Supporters of the legislation wanted to encourage states to set up the exchanges. So they offered the states a deal: If they did so, they would get to write their own rules, and their citizens would be able to get the tax credit. The states would also gain extra flexibility on Medicaid spending. The law's supporters also expected the health-care law to become more popular over time.

Taxes and Penalties

That hasn't happened. Many states are determined in their opposition, and few of them have set up exchanges. If they don't do so, the tax credits don't go into effect and the federally established exchanges won't work: People won't be able to afford the insurance available on them without the subsidy.

States have another incentive to refrain from setting up exchanges under the health-care law: It protects companies and individuals in the state from tax increases. The law introduces penalties of as much as $3,000 per employee for firms that don't provide insurance -- but only if an employee is getting coverage with the help of a tax credit. No state exchanges means no tax credits and thus no employer penalties. The law also notoriously penalizes many people for not buying insurance. In some cases, being eligible for a tax credit and still not buying insurance subjects you to the penalty. So, again, no state exchange means no tax credit and thus fewer people hit by the penalty.

The administration's response to the impending failure of its signature legislation -- a failure resulting entirely from its flawed design -- has been to ignore the inconvenient portion of the law. In May, the Internal Revenue Service decided it would issue tax credits to people who get insurance from exchanges established by the federal government. It has thus exposed firms and individuals to taxes and penalties without any legal authorization. Obviously, that situation sets the stage for lawsuits.

The plaintiffs will have a strong case. Jonathan Adler and Michael Cannon -- two libertarians, the first a law professor at Case Western Reserve University and the second a health-care analyst at the Cato Institute -- have done more than anyone to bring attention to this issue. They point out that every health bill advanced by Senate Democrats clearly made tax credits conditional on states' establishment of exchanges. They have also uncovered that during the debate over the bill, Senator Max Baucus, a Democrat from Montana, explicitly said the same thing.

Court Battles

Supporters of the health-care law may be tempted to dismiss the challenge to the IRS. That would be to repeat a mistake. They were contemptuous of the constitutional case against the law, too. Timothy Jost, a Washington and Lee University law professor, even wrote that the attorneys who brought the suits should face professional sanctions for filing frivolous cases. In the end, the Supreme Court sided with the plaintiffs on their constitutional claims, in one case by a 7-2 margin, upholding the law only by removing parts of it.

There will be many more court battles over the health- care law, because it involves so many legally dubious expansions of bureaucratic power. In addition to the IRS move, there are lawsuits against the administration's ruling that almost all employers must provide coverage for contraception and sterilization, a decision that conflicts with the Religious Freedom Restoration Act. The law also creates a board of experts to control health-care costs, a move that is sure to bring legal action on separation-of- powers grounds.

Supporters of the law see such legal attacks as proof of the fanaticism of the opposition. Jost is now the leading defender of the IRS's action. "What is it about extending the benefits of our health-care system to millions of uninsured Americans that so troubles opponents?" he asks.

One answer: It is troubling that this expansion of benefits is being accomplished in such a lawless way.

The health-care plan the Obama administration got enacted isn't going to work. That doesn't mean they get to rewrite the law unilaterally as they go. It means they should have passed a different law.

(Ramesh Ponnuru is a Bloomberg View columnist and a senior editor at National Review. The opinions expressed are his own.)