



What did members of Congress know about those six little words in Obamacare?

'An exchange established by the state'

By Ellen Weiss

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“What did they know and when did they know it?”

It’s Washington’s favorite question for scandal, for mystery or subterfuge.

Senator Howard Baker coined “what did they know and when did they know it” back in the Watergate hearings. It’s what lawmakers are asking about politics within the IRS, what regulators asked bank executives about the financial crisis and, of course, what EVERYONE wants to know about Hillary Clinton’s emails.

But it also is the question at the heart of the current challenge to the Affordable Care Act, the ACA, also known as Obamacare. That’s the challenge the Supreme Court heard last week. Specifically, what did the people who wrote the law know about six words in the middle of a 906-page document. Those words stipulate that for people who cannot afford health care coverage, subsidies are available through “an exchange established by the state.”

A key reminder, an exchange is just another word for a marketplace where you can go and buy health insurance. If you know anything about the ACA, you know that the federal exchange, or at least its web site, healthcare.gov, was a disaster when it first launched. States have the option to set up their own exchanges and skip the federal marketplace altogether.

The government argued before the court that those words refer to any exchange, whether it was set up and run by the state or run for the state by the federal government. After all, it’s called the

Affordable Care Act because the whole goal was to make health insurance affordable to everyone.

The people challenging the law say the language is clear, it means exactly what it says. They argue that the Democrats who wrote those words actually wanted to withhold federal subsidies from states that didn't build exchanges. That was their intention – a sort of carrot and stick.

Michael Cannon, director of Health Policy Studies at the libertarian CATO Institute did research into those six words that formed the basis of the court challenge, and this is what he says:

“It's very clear right there in the statute. ... Congress really meant that -- they intended that,” he said. “We thought that we were going to find that that was just a drafting error, that those words were accidentally slipped into the law and that's not the case. All the evidence points to the conclusion that Congress meant to do this.”

John McDonough, who was a top aid to Sen. Ted Kennedy and deeply involved in writing the text of the ACA in 2009, says there's no mystery about what the lawmakers meant when they wrote those words:

“Absolutely every member who voted for the law and every staffer involved in crafting the law fully understood that the subsidies would flow and were intended to flow to all 50 states regardless of whether they had a state exchange or if they had a federal exchange.”

McDonough says the opponents to Obamacare are just cherry picking six words.

“The Supreme Court has talked repeatedly that you never interpret a law just looking at random words here and there. You interpret a law based upon the context and the whole meaning of the whole statute and when you do that, there is no argument left.”

Our podcast guest host, Todd Zwillich examines how those six words have become a federal case and why this law never got the copy-editing it deserved.