Drafting error jeopardizes Obamacare in DC federal court

By Adam Serwer
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The Affordable Care Act managed to have two bad days in court on the same day.

While a majority on the Supreme Court appeared sympathetic to a challenge to the Affordable Care Act's mandate that insurance companies provide birth control, blocks away, two out of three judges on the D.C. Circuit Court seemed willing to gut the rest of the law based on what supporters say is, at worst, a mere drafting error.

"If the legislation is just stupid, I don't think it's up to the court to save it," said Judge A. Raymond Randoph Tuesday. Randolph had other choice words for the law, calling the law "Janus-faced," "cobbled together" and "poorly written," later describing its launch as an "unmitigated disaster."

This particular challenge to the Affordable Care Act involves whether, when Congress drafted the law, they intended for only customers in state-run health insurance marketplaces known as "exchanges" to be eligible for federal subsidies to help them purchase health insurance. The plaintiffs are challenging a rule put forth by the Internal Revenue Services stating that state exchanges run by the federal government are also eligible. The subsidies, combined with the individual mandate, are an essential part of making the law work. Without them, working class Americans would have a harder time purchasing insurance. The challengers contend that the subsidies were meant as an incentive to states to set up their own exchanges — and that Congress intended to punish the very people the law was meant to provide with health insurance, should the state fail to do so.

That interpretation is convenient for conservatives opposed to the law, since it would mean Congress was handing Republicans an Obamacare self-destruct button. Mostly Republican-run state governments across the country have refused to set up exchanges. Only 16 states and Washington D.C. have set up their own exchanges, the other 36 states have refused. If

Americans in the federally-run exchanges are ineligible for the subsidies, it could seriously wound the law.

"In order to believe this argument," says Simon Lazarus of the liberal Constitution Accountability Center, you have to think that Democrats in Congress said to themselves, "we really need to make them set up these exchanges, and I know how we'll do it, we'll do it by saying if they don't, we'll give them the power to vaporize the act." Indeed, the Cato Institute's Michael Cannon, one of the intellectual architects of this latest challenge to the Affordable Care Act, wrote in 2012 that "refusing to create exchanges is the most powerful thing states can do to take Obamacare down."

At least two of the judges on the panel seemed inclined to buy the view put forth by the plaintiff's attorney Michael Carvin, that when Congress wrote that an "exchange established by the state" would be eligible for the subsidies, they meant to exclude the federally run ones. This is about "whether the plain language of the statute dictates the result," Carvin said. "You can't interpret state to mean federal, you can't interpret North to mean South."

The Reid Report, 3/25/14, 3:24 PM ET

The fact vs. fiction of Obamacare

Judge Harry Edwards, who was appointed by President Jimmy Carter, was as disdainful of Carvin's argument as Randolph was towards the Affordable Care Act.

"I've thought about this a lot, your argument makes no sense," Edwards said. "What you're asking for is to destroy the individual mandate and gut the statute … That's what this is about."

Edwards was outnumbered on the panel by Randolph, appointed by George H.W. Bush, and Judge Thomas B. Griffith, appointed by George W. Bush. Although less bombastic than Randolph, Griffith also appeared sympathetic to the argument that the law should be interpreted as barring subsidies for federal exchanges. "The key language is 'established by the state,'" Griffith told Assistant Attorney General Stuart Delery.

Two prior federal judges have ruled in favor of the government, concluding that viewed in context, Congress clearly intended for the subsidies to be available to all Americans. There's no evidence in the legislative record to the contrary, says Robert Weiner, an attorney at Arnold & Porter and the former Department of Justice official who oversaw the administration's defense against prior challenges to the Affordable Care Act.

"I have a hard time believing that anyone really thinks that's what Congress intended, it's completely contrary to the whole structure and purpose and functioning of the statue," said Weiner. "Could they have been clearer and neater about it? Yeah. But did they intend to make it so that the very people they were trying to help would suffer if their state governments didn't do what they were supposed to do? That's just far fetched."

Far fetched or not, Griffith, the closest thing to a swing vote on the panel, seemed to be taking the theory seriously. Hope is not lost for Obamacare supporters,however: If the government loses before the panel, it can ask for the D.C. Circuit to hear the case "en banc," before the judges on the D.C. Circuit.

After the Democrats nuked the filibuster, Obama was able to make four appointments to the court. Though judges' opinions don't always track with those of the party that appointed them, thanks the changes to the filibuster, more Democratic appointees than Republican appointees would rule on the matter.

So the subsidies, and the law itself might yet survive–at least until the Supreme Court gets its hands on it.