

THE MORAL LIBERAL

King vs. Burwell Update

In 2013, Nelson Admitted He Didn't Know if the ACA Offered Subsidies in Federal Exchanges

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The plaintiffs in *King v. Burwell* claim the Patient Protection and Affordable Care Act only offers premium subsidies, as the statute says, “through an Exchange established by the State.” Members of Congress who voted for the PPACA – most recently Sen. Bob Casey (D-PA) and former Sen. Ben Nelson (D-NE) – now swear it was never their intent to condition Exchange subsidies on state cooperation.

Ironically, Casey's and Nelson's decision to wade into the *King* debate demonstrates why, when a statute is clear, courts traditionally assign no weight to what members of Congress claim they intended a law to say – especially if, as here, those claims come after a clear provision has proven problematic. While he claims he never intended to condition subsidies on states establishing Exchanges, Casey repeatedly voted to condition Exchange subsidies on state cooperation, has misrepresented what Congress intended the PPACA to do, and continues to misrepresent the PPACA on his Senate web site. Nelson's claims about what Congress intended should likewise be taken with a grain of salt. In an unguarded moment in 2013, Nelson admitted that in 2009 he paid no attention to “details” such as whether the PPACA authorized subsidies in federal Exchanges.

All Sides Agree: Casey Supported Conditional Exchange Subsidies

Casey and Nelson exchanged correspondence exactly one day before *amicus* briefs supporting the government were due to be filed with the Supreme Court. Casey [asked](#) for Nelson's recollection of whether, in 2009, Nelson or anyone else suggested the PPACA's subsidies would only be available in states that established Exchanges. Perhaps more than anyone, Nelson was a pivotal figure in the debate over the PPACA. Not only did he insist on state-based Exchanges rather than a national Exchange run by the federal government, his was the deciding vote that enabled the bill to pass the Senate and become law – and he withheld his vote until his demands were met.

In his letter to Nelson, Casey discussed conditioning Exchange subsidies on state cooperation as if it were a foreign concept:

The plaintiffs in *King* argue that the law was intentionally designed to deny tax credits to people in states with federally facilitated exchanges in order to “induce” states into operating their own Exchanges...

[A]ccording to the *King* plaintiffs...residents of a state which did not operate its own Exchange would lose access to premium tax credits intended to ensure that those residents could afford health insurance.

I do not recall you – or any other member of the House or Senate – insisting upon such a structure. I would appreciate any clarification you can offer regarding your role in shaping this important law, as I believe it will be beneficial to the American public and the justices themselves.

Yet conditioning Exchange subsidies on state cooperation is hardly a foreign concept to Casey. In 2009, he supported and [voted](#) for another health care bill that even [the Obama administration](#) and [congressional Democrats](#) acknowledge conditioned Exchange subsidies on state cooperation. That bill was [S. 1697](#), reported by the Senate’s Health, Education, Labor, and Pensions Committee:

As Jonathan Adler and I explained in a [brief](#) we filed before the district court in *King*, every Democrat on the Senate’s HELP Committee voted in favor of S. 1697, and therefore in favor of conditioning Exchange subsidies on state cooperation:

1. Sen. Jeff Bingaman (D-NM)
2. Sen. Sherrod Brown (D-OH)
3. Sen. Bob Casey (D-PA)
4. Sen. Chris Dodd (D-CT)
5. Sen. Kay Hagan (D-NC)
6. Sen. Tom Harkin (D-IA)
7. Sen. Jeff Merkley (D-OR)
8. Sen. Barbara Mikulski (D-MD)
9. Sen. Patty Murray (D-WA)
10. Sen. Jack Reed (D-RI)
11. Sen. Bernie Sanders (I-VT)
12. Sen. Sheldon Whitehouse (D-RI).

In Casey’s words, then, he himself voted for a bill that “included the threat” that residents of uncooperative states “would lose access to premium...credits intended to ensure that those residents could afford health insurance.”

If you were a judge, what would you consider a better indicator of what Casey actually intended: what he repeatedly voted to enact, or what now he says to influence the courts after the clear language he voted to enact has proved problematic?

Casey Continues To Claim “If You Like The Coverage You Have, You Can Keep It”

Before you answer, keep in mind that Casey, like dozens of other Democratic [senators](#) and [representatives](#), claimed the PPACA lets everybody keep the health plans they had before the bill became law:

To this day, Casey still claims on his official Senate web site, “[If you like the coverage you have, you can keep it; the government will not force you to change it.](#)” This tells us either (A) Casey does not understand the legislation he voted to enact into law, or (B) he is willing to dissemble to advance his policy preferences. Personally, I think it’s (A).

Either way, if you were a judge, which would you think more accurately represents what Casey intended: what he repeatedly voted to enact, or what he now says to influence the courts after what he voted to enact has proved problematic?

Nelson’s Letter: The Irrelevant “Bombshell”

Nelson’s [response](#) to Casey received most of the attention, however. Here’s the key excerpt:

In either scenario—a state or federal exchange—our purpose was clear: to provide states the tools necessary to deliver affordable healthcare to their citizens, and clearly the subsidies are a critical component of that effort regardless of which exchange type a state chooses. I *always* believed that tax credits should be available in all 50 states regardless of who built the exchange. The final law also reflects that belief as well.

Doug Kendall, who filed the *amicus* [brief](#) with members of Congress who enacted the PPACA in which the Casey-Nelson letters first appeared, calls Nelson’s comments “[a bit of a bombshell.](#)” Not so much. Kendall and others don’t seem to understand, and therefore misrepresent, the plaintiffs’ argument about how Nelson fits into the story.

Kendall, the congressional *amici*, and the Huffington Post’s [Jonathan Cohn](#) accuse the petitioners of claiming that the language conditioning subsidies on state cooperation was inserted into the PPACA at Nelson’s request. That is simply not true. Neither the plaintiffs, nor Adler, nor I have ever claimed that Nelson even *suggested*, much less *insisted*, that the PPACA condition Exchange subsidies on state cooperation. (Nor did he need to: this feature appeared in the HELP bill, the Finance Committee’s bill, and the PPACA with or without his suggestion.)

What the plaintiffs, Adler, and I actually argue is that Nelson matters because, and *only* because, (1) he insisted on state-run Exchanges rather than a single, nationwide Exchange, and (2) his vote was crucial to get a bill through the Senate, and, since Congress cannot force states to implement federal programs, (3) the PPACA’s drafters therefore needed some way to states to establish Exchanges – a part of the Act that has turned out to be very costly, difficult, and fraught with political peril. So what the PPACA’s drafters do? They adopted a wacky, hair-brained, far-out idea that has been proposed only on numerous occasions by multiple Congresses as well as

Presidents [Johnson](#), [Nixon](#), [Clinton](#) (more than [twice](#)), and [Bush](#). They created an incentive for states to implement federal priorities by conditioning federal benefits on state cooperation.

Kendall, Cohn, and the congressional *amici* either (A) don't understand the plaintiffs' arguments, or (B) are deliberately misrepresenting them. Personally, I think it's (A). Kendall [writes](#), "The petitioners' assertion that Sen. Nelson insisted on conditional tax subsidies is itself pure speculation without a shred of support in the record." That assertion is moot, because Kendall's straw man is pure invention, without a shred of support in the briefs.

The real significance of Nelson's response to Casey is not how much Nelson says, but how little. He says he *wanted* subsidies in both state-established and federally established Exchanges. Okay, that's great. But it doesn't tell us what Nelson *intended*, because it offers no insight into what he voted to enact into law. In his last sentence, opines that the PPACA reflects his preference for subsidies in federal Exchanges. But that's the source of the dispute in *King*, and Nelson offers no evidence to help us resolve what the law says.

In 2013, Nelson Admitted He Didn't Know What The Bill Said

Nor does Nelson deserve to be considered an authority on what the PPACA says about subsidies in federal Exchanges, because in 2013 he admitted he didn't pay attention.

Thanks to a handful of [intrepidresearchers](#) and the North Dakota Department of Insurance, I happened to find audio of a press conference Nelson gave in January 2013, upon being appointed CEO of the insurance-regulators lobby in Washington, D.C.. As luck would have it, a reporter asked him about subsidies in federal Exchanges. Here's [part one](#) of the press conference, but the relevant part is [part two](#) (at 8:20). When discussing negotiations over the crafting of the PPACA, Nelson described federal Exchanges as an afterthought, and admits he voted for the bill without paying any attention to whether the bill actually authorized subsidies in federal Exchanges:

NELSON (8:20): This is Ben Nelson again. I might add that I don't know what everyone who voted for the health care act was thinking. But I can tell you that the discussions for having state-based Exchanges as an option for the states was to assure that the states would have that role. There was never really any intent for the federal government to assume any role, except by default or at the request of the states. So there was no way that the federal government was to have an initiative in this direction. It was more of a backup, fallback situation, should the states decide that they didn't want, or a state decided it didn't want for establish a state-based Exchange, but preferred to do it with a federal FFE, as it's called, or join together on a multi-state basis for an Exchange. As many options as possible, but the goal was to be as far away from any kind of federal preemption as possible.

REPORTER (9:32): Was there, was the discussion along the lines of, we don't want the subsidies to go through the federal Exchange? I'm sure you're aware of that issue. Was that part of the thinking? And why did they go the way, they write the law the way [inaudible].

NELSON (9:43): **I don't think it ever got quite that specific, at least not during any time that I was involved in discussions.** But when the discussion about an Exchange occurred, it was always, once [we] got over the hurdle of saying yes, states first, federal second, that it was clear that there was no real pre-emption, **we didn't get into, unfortunately, the details, because now they have to be fleshed out.** So there are some levels of uncertainty.

I know of no evidence that calls into question Nelson's claim that he always wanted subsidies in federal Exchanges. But these comments tell us (1) he never insisted on subsidies in federal Exchanges, (2) he never inquired about subsidies in federal Exchanges, (3) he never paid attention to whether the bill authorized subsidies in federal Exchanges, and (4) voted for the PPACA anyway. In an unguarded moment, Nelson admitted that whether the PPACA authorized subsidies in federal Exchanges just wasn't that important to him. He admitted the issue now "ha[s] to be fleshed out" because there is "uncertainty" about whether he had indeed voted to authorize subsidies in federal Exchanges. In other words, if we want to know what Nelson *actually* intended to become law, asking Ben Nelson is not an option. Our only option is to read the bill.

Again, if you were a judge, which would you think more accurately captures Nelson's intent: the clear language he voted to enact, or what now he says to influence the courts after the clear language he voted to enact – which he admitted was not a high priority for him – has proved problematic?

Conclusion

The King plaintiffs' case does not depend on Casey or Nelson or any PPACA supporters consciously knowing that they were voting to condition Exchange subsidies on state cooperation. The fact that PPACA supporters voted to enact clear statutory language conditioning subsidies on states establishing Exchanges is enough. It means that statutory language is both *the law* and Congress' intent – even if no members of Congress actually harbored such thoughts. The facts that some of them repeatedly voted to condition Exchange subsidies on state cooperation, and that others were indifferent, merely strengthens the plaintiffs' case.

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