

THE NEW REPUBLIC

What Happens if the Obamacare Lawsuits Prevail? Near death experiences are nothing new for Obamacare

By Jonathan Cohn
July 23, 2014

The legislation barely made it out of Congress. On no less than three separate occasions, most famously after Democrats lost their filibuster-proof majority in the Senate, key sponsors were ready to abandon the effort because they thought it was hopeless. Then came the challenge to the individual mandate, which made it all the way to the Supreme Court. It would have succeeded if not for a last-second change of heart by Chief Justice John Roberts, whose switch gave the Court's four liberals a majority. And while President Obama eventually won reelection handily, there were moments during the campaign, particularly after the first debate, when it seemed that Mitt Romney might win. If he had, Congress might well have voted to repeal the law—or at least eviscerate it.

Tuesday's news was a ruling by a three-judge panel of the D.C. Circuit Court of Appeals, in favor of lawsuit challenging Obamacare's structure for providing insurance subsidies. It's a bona fide big deal—those subsidies are worth thousands of dollars a year to some people, making them arguably more essential than the individual mandate. But this ruling is not the existential threat that those previous episodes were.

For one thing, the ruling applies only to states that have asked the Department of Health and Human Services (HHS) to operate the new insurance marketplaces. California, Connecticut, Kentucky, and about a dozen other states plus the District of Columbia are running their own marketplaces. No matter what happens with these cases, the federal assistance for buying health insurance in those states will continue to flow.

And it's not like the D.C. Circuit has the last word on the matter. The Administration is filing an "en banc" appeal, seeking a ruling from all of the Circuit's judges, a majority of whom are Democrats. Experts seem pretty convinced they will reverse, perhaps lifting directly from the opinion written by Harry Edwards, the dissenter in the case. Meanwhile, just hours after the D.C. Circuit issued its decision, a three-judge panel from the Fourth Circuit announced that it was ruling the other way—to uphold the lawsuit—in a parallel lawsuit that had fallen into its jurisdiction.

The Supreme Court may end up deciding this case. You could make a strong case that the Roberts Court, obviously hostile to the law and the Obama Administration, would relish a chance to deal such a major blow to the Affordable Care Act. (Kevin Drum quotes a legal expert

making just that argument.) You could also make a strong case that the justices would be reluctant to take such a dramatic step, since the law would be so entrenched and they'd already passed up the opportunity once before, in the mandate cases. (Ezra Klein takes that position.) I think the latter argument is more persuasive, in part because I continue to find the merits of the lawsuit laughably weak. Its basis is an audacious, if undeniably clever, attempt to rewrite history. But predicting how judges will rule is not my specialty.

If the unthinkable happens—if the Court rules as the D.C. Circuit just did—then what happens? It's impossible to know, obviously. My best guess is that officials would scramble to make new arrangements. Officials in a bunch of states would find some way to take formal, nominal ownership of the marketplaces, and then outsource most of the actual work to HHS. (Some states do that already.) Think of places like Michigan and Ohio and Arizona, where Republicans may be in charge but the public is less conservative and very much values the financial assistance they're getting.

Still, there would probably be holdouts, particularly in the Deep South. The map of states with working marketplaces would look just like the map of states that have expanded Medicaid. In effect, you'd have two health care regimes—one where most people could get decent, affordable health insurance, regardless of income or health risk, and one where coverage depended heavily on your ability to pay for it and your pre-existing medical conditions. Of course, the places without universal health care would be the places with many more poor and uninsured people. America's red-blue divide would get even deeper, as the people living in the most conservative states would be left in even worse shape than they are now.

ADVERTISEMENT

Republicans on Tuesday didn't talk about these things. As Dave Weigel notes, they tried to frame the ruling as proof that the law is fundamentally "unworkable" (even though millions are now getting insurance through it) or that Obama has stretched the limits of executive authority (which is arguable in some cases, but not this one) or that the law's architects didn't know what they were doing (which is based heavily on a deliberately misleading interpretation of something Nancy Pelosi once said). But the motives of Republican leaders, like the motives of the individuals who thought up these lawsuits, are no mystery. As I noted yesterday, they simply don't believe in universal health care. They don't believe it's the job of government to make sure every person can pay for medical care without going bankrupt. That's one reason the Obamacare wars still haven't stopped.

It wasn't always this way. As recently as the 1990s, prominent conservatives and Republicans at least paid lip service to the idea that Americans should enjoy the same basic security and access to health care that citizens in every other developed country enjoy—the only question was how, exactly, to make it happen. Maybe those conservatives didn't mean what they were saying back then. Or maybe they did, and their successors today just have more extreme, libertarian views. I have no idea. But it's a remarkable, disheartening statement about how the terms of the political debate have changed.

—Jonathan Cohn

More on the Obamacare rulings, from the New Republic

Brian Beutler thinks the politics of these lawsuits could boomerang on Republicans.

Danny Vinik says Harry Reid may have saved Obamacare, by invoking the nuclear option and creating a Democratic majority on the D.C. Circuit.

And from the wayback machine, it's worth re-reading Alec MacGillis' article on the libertarian mastermind behind these lawsuits: Michael Cannon of the Cato Institute.

More on the Obamacare rulings, from the rest of the web

Julie Rovner has a typically accurate, fair, and pithy summary of what the courts ruled on Tuesday. (Kaiser Health News)

Cannon and Jonathan Adler, the Case Western Law Professor and the lawsuits' other architect, take a victory lap. They've earned it, as crazy (and dangerous) as their arguments may be. (*Wall Street Journal*)

Timothy Jost, of Washington and Lee Law School, knows as much about Obamacare as anybody. His synopsis and critique of Tuesday's rulings is the most thorough we've seen. (*Health Affairs*)

Invoking Dickens, Michael Tomasky reminds everybody that conservatives are trying to take insurance away from millions—and may yet succeed. (Daily Beast)

Ian Millhiser and Scott Lemieux rip the D.C. Circuit ruling, piece by piece. (ThinkProgress, *The Guardian*)

Via Greg Sargent, University of Michigan Law Professor Nicholas Bagley continues to think these lawsuits won't succeed. (The Plum Line)

Things to know

MORE OBAMACARE: The two lawsuits weren't the only reason Obamacare's subsidies made news Tuesday. A GAO investigation found that it was easy to apply for Obamacare, either over the phone or online, with false information and receive subsidies to purchase health insurance. Expect to hear a lot about this today. (Maggie Fox and Joel Seidman, NBC News)

IMMIGRATION: Senate Democrats are pushing a bill with around \$2.5-2.7 billion in emergency funds for the border crisis, \$1 billion less than Obama requested. But it won't contain changes to a 2008 anti-trafficking law that Republicans are seeking. (Seung Min Kim, *Politico*)

Things to read

Corporate Personhood: Binyamin Appelbaum explains how America could change as corporations gain more rights, as embodied in the recent *Hobby Lobby* ruling. (*New York Times Magazine*)

Where is he now?: Simon Maloy lays out Marco Rubio's ever-increasing number of positions on immigration. Rubio was for a comprehensive immigration bill before he was against it. Now he is criticizing the border security provisions he once cheered. (Salon)

Things to watch

GAO officials will testify before a House subcommittee at 10:30 on the "integrity" of Obamacare's subsidies.

Things at QED

Danny Vinik notes an interaction between Fed Chair Janet Yellen and a Republican congressman during her testimony before the House Financial Services Committee. It showed just how uninformed and dangerous GOP monetary policy could be.