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The Final, Last-Ditch Anti-Obamacare Challenge: A Courtroom Dispatch

By: Alec MacGillis – December 3, 2013

We had Tea Party talk of "death panels." We had John Boehner shouting "Hell no, you can't!" on the floor of the House as the votes came in to pass the legislation. We had a challenge on the constitutionality of the individual mandate that went to the Supreme Court. We had a government shutdown geared to forcing repeal. We had an outbreak of schadenfreude over a Web site misengineered within an inch of its life.

And now the undying effort to derail the Affordable Care Act has come down to this: in a windowless federal courtroom in Washington on Tuesday afternoon, with only a smattering of observers, a mind-bending back and forth among two lawyers and a judge peppered with eloquent turns of phrase like "36-B sub-G" and "Chevron authority" and "pre-enforcing APA action." The natural inclination would be to tune it all out and focus on, say, a college basketball team bumping regular passengers from a Delta flight. But given how unpredictable things have been so far for Obamacare, anyone who cares about the law's fate, pro or con, ought to pay attention to this last-ditch effort at killing it.

The skinny: several plaintiffs around the country are challenging the law in various federal district courts on the grounds laid out in 2011 by Case Western University law professor Jonathan Adler and Cato Institute health policy analyst Michael Cannon, an avowed Obamacare foe who came to the court hearing after testifying against the law on Capitol Hill, where committee Chairman Darrell Issa declared envy over the fact that this magazine had named Cannon, not Issa, "Obamacare's single most relentless antagonist." Adler and Cannon argue that the law is being carried out at odds with its text: the section decreeing that people will get federal subsidies to help them pay for individual insurance plans says that the subsidies are available for those buying plans on new exchanges established by the states – and makes no explicit provision for subsidies for those buying plans in states where the state governments left the creation of the exchange up to the federal government. The government and other defenders of the law counter that any confusion in the wording was inadvertent and that the rest of the law makes abundantly plain that the subsidies were intended to go to people buying plans in the exchanges regardless of whether they were established by the states or Washington.

On this the two sides agree: for a court to strike down the subsidies in the federally-run exchanges as out of keeping with the text would utterly devastate the Affordable Care Act. Expanding coverage only works if many people are buying coverage in the new exchanges, the only way large numbers will do so is if the plans are relatively affordable to them, and the way the law makes coverage affordable is by providing income-based subsidies, in the form of tax credits, to the vast majority of people buying plans on the exchanges. Since no fewer than 36 states have opted to let the federal government run the

exchange for their residents, ending the subsidies for people in those exchanges would blow up the law in whole swaths of the country, if not all of it.

So, to Courtroom 29 at the U.S. District Court just off the Washington Mall, with Judge Paul Friedman presiding. Things got interesting quickly, dense legalistic jargon aside. The plaintiff's attorney, Michael Carvin, pivoted quite quickly from making a simple argument that the text clearly limits the subsidies to the state-run exchanges – the argument Cannon and Adler laid out in the first place – to making the more expansive claim that this was no mere glitch, but rather an intentional policy choice by the senators who crafted the bill. They wanted the states to run the exchanges, and the best way to do this, Carvin surmised, was to offer them the inducement that their citizens would only be able to get the tax credits was if the states set up their own exchange.

Friedman seemed skeptical. "What's the evidence?" he asked.

Good luck finding any. As someone who closely covered the law's crafting, I can recall zero discussion of denying subsidies on a federally-run exchange as a way to lure states into setting up their own exchanges. In fact, the senators who were pushing for the exchanges to be run by the states, such as Nebraska Democrat Ben Nelson, were doing so precisely because they thought many state regulators and legislators would *want* to have a hand in the exchanges, rather than letting Washington call all the shots. Liberal Democrats leading the way in the House, on the other hand, thought it better if the exchanges were overseen by the federal government (with the potential for states to apply to take control of their own) and wrote their bill that way. When it came time to meld the two bills in conference committee, all signs suggested that the House would prevail on this point. But then Scott Brown won the election to replace Ted Kennedy, leaving as the only way to pass a final bill the budget reconciliation process, which forced Democrats to adopt the Senate bill's language in most areas, including the creation of exchanges.

What's notable about Carvin taking the tack he did, though, was that he even felt it necessary – he seemed to realize it was not enough to argue on the basis of the language about subsidies in that one line of the law, that he needed to venture onto the shakier ground of musing about congressional intent – "psychoanalyzing Congress," as he put it. It was supposed to be the government's lawyers who were stuck in this position of having to tell the judge what Congress of course intended with the law. And they did do that, noting that the whole point of the law was to provide affordable health coverage to most Americans, and the only way to do that on the exchanges was with subsidies. They also noted court testimony by Congressional Budget Office director Doug Elmendorf that there was no contemplation in his agency's estimates of the law's costs of the fact that the subsidies would only be paid out fully if all states created their own exchanges.

But the government's lawyers, led by Joel McElvain, also had hard text in the law to cite beyond the one carelessly worded line that launched this whole line of lawsuits. They were able to point to another clause in the law regarding eligibility for subsidies in the exchanges and to note that, if the plaintiffs' logic was followed through, the result would be an "absurdity" – no one would be eligible to enroll in a federally-run exchange, much less get a subsidy in one. More crucially, they pointed to language in the

law instructing the Health and Human Services secretary to report to the Internal Revenue Service the nature and cost of the plans taxpayers were purchasing on the federal exchanges – what purpose would there be for this requirement but to help the IRS in calculating tax credits for enrollees on the federal exchanges? Carvin countered that it was perhaps necessary in order to enforce the law's individual insurance mandate, but McElvain noted that the IRS was getting the basic fact of people's coverage from the insurers; why would they need the full financial details on their plans but do help in awarding the tax credits?

After two-plus hours, Friedman called it a day. "I will give you a decision as soon as I can," he said. Another judge, in Virginia, is expected to issue a ruling on a similar challenge in the coming weeks, while yet two more percolate in Oklahoma and Indiana. Regardless of the outcome at the trial court level, we can be pretty sure this one's headed to the appeals courts, including, perhaps, the one in Washington that's been at the center of a spot of recent controversy. It's quite remarkable – a slew of legal challenges, at great cost of time, money and paper, over a couple lines of text that almost surely would not have made it into the final law had Ted Kennedy held on a year or two longer or had Martha Coakley been a slightly less dreadful candidate.

But them's the breaks. The ghost of Scott Brown lives on in these unceasing challenges of this duly-passed law, and Obamacare won't be fully in the clear until it's shaken them.