



Father of Obamacare makes a 'speak-O'

By Larry Elder

July 30, 2014

Last week, by 2-1 vote, a Washington, D.C., appellate panel ruled that the Obama administration unlawfully changed Obamacare. Meanwhile, on the same day, on the same question, a panel from the Fourth Circuit Court of Appeals ruled the other way. This issue is headed for the Supreme Court.

Michael Cannon, director of health policy studies at the Cato Institute, is -- according to CNBC -- the "intellectual godfather" of what is perhaps Obamacare's most serious court challenge. Cannon says when Congress drafted Obamacare, they made it clear: Tax credits, grants and other subsidies would be available only to those enrollees who sign up via state-funded exchanges.

Right after the appellate court decision, Cannon told me; "The way the [ACA] law works ... and it's all there in black and white, the statute gives states the ability to veto certain parts of the law's regulatory scheme, including the subsidies that shift from enrollees in the health insurance exchanges the cost of their very expensive insurance ... to the taxpayers. That's what those subsidies are there for, to shift those costs from the enrollee to the taxpayer. States have the power to veto those subsidies, and all they have to do is not cooperate -- not implement the law by creating a health insurance exchange or doing other things."

But only 14 states agreed to set up their own exchanges. So Obama simply picked up his pen and rewrote the law to give the tax credits to the federal exchange as well.

Cannon says: "So what these lawsuits are about is the people who are being injured by that decision by the administration -- the people who are being subject to those taxes, those penalties, even though they are by law exempt, saying, no, wait a second, what you are doing here is illegal. The law is clear; you don't have the authority to implement those provisions where states have vetoed them. Congress gave states that power. If you want to call this a glitch, you can call it a glitch, but it's a glitch that has to be fixed by Congress, because that's who writes the laws in this country -- not the IRS, not the executive. If you want to fix the law, go back to Congress."

Defenders of the administration's decision claim that Congress actually just made a boo-boo, a drafting error, an unintentional mistake by not giving the fed exchange the same benefits. And therefore Obama's interpretation is simply following the intention of Congress.

But Jonathan Gruber, the architect of both Romneycare and Obamacare, admitted in early 2012 that Congress wanted credits to go *only* to state exchanges, and the feds used this as an

inducement to "squeeze" the states into setting up their own state-run exchanges: "The federal government has been sort of slow in putting out its [health insurance exchange] backstop, I think, partly because they want to sort of squeeze the states to do it. I think what's important to remember politically about this is if you're a state and you don't set up an exchange, that means your citizens don't get their tax credits. But your citizens still pay the taxes that support this bill. So you're essentially saying to your citizens you're going to pay all the taxes to help all the other states in the country."

A week earlier, Gruber said: "By not setting up an exchange, the politicians of a state are costing state residents hundreds and millions and billions of dollars. ... That is really the ultimate threat, is, will people understand that, gee, if your governor doesn't set up an exchange, you're losing hundreds of millions of dollars of tax credits to be delivered to your citizens."

Flash forward, and once the appellate panel decisions came in, Gruber changed his tune: "We can go to the people who wrote it and say did you ever intend this as a poison pill or is it a typo every single one says it's a typo? And every single one of them will say this is just a typo. So there is no mystery here."

And three days later, Gruber was confronted with his 2012 statements that subsidies are tied to state exchanges. His explanation? Gruber said: "I was speaking off the cuff. It was just a mistake. My subsequent statement was just a speak-o -- you know, like a typo."

Expect SCOTUS again to come down 5-4. But this time Justice Roberts will get it right. As Cannon put it: "This is not a constitutional challenge to the law. It's not asking any court to strike down the law. It's actually asking them to uphold the law."

Respected leftwing law professor Laurence Tribe, who once taught Obama, supports Obama's action. But he concedes that the administration faces an uphill battle. "I don't have a crystal ball," said Tribe. "But I wouldn't bet the family farm on this coming out in a way that preserves Obamacare."