TIME

# 4 Really Weird Things About the Latest Obamacare Ruling

*An appeals court says Congress must have meant to make the health care law even more complicated than we thought.*

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July 23, 2014

Today two separate appeals courts handed down decisions on challenges to the Affordable Care Act, known popularly as Obamacare. One of those courts, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit, ruled that the federal government can't provide insurance premium subsidies to people in states that haven't set up their own insurance exchanges. The other court rejected that argument.

The D.C. circuit's opinion, which would invalidate the subsidies paid to about 5 million people, will be a huge, huge deal if it holds up. Much of the early debate and legal wrangling over the ACA focused on the "individual mandate," the part of law that fines you if you don't have health coverage. But the subsidies are even more important because they make the required coverage affordable for moderate- to middle-income families. (The subsidies are available to a family of four earning up to $95,400.) The law says you don't have to pay the fine if insurance isn't affordable, so without the subsidies the mandate doesn't apply to so many people.

The ruling could very well be overturned on appeal, and in the meantime the subsidies remain in place. (You can read more on what happens next in this report by *Time's* Kate Pickert.) But as a reporter who has covered health care reform closely since the George W. Bush administration, I have to say this ruling just doesn't make much sense to me. In particular, four very odd things stand out.

**1. The court's interpretation seems implausible.**

Quick background: Obamacare subsidies are issued when you buy insurance on an online marketplace called an exchange. Some states set up their own exchanges, but 36 states didn't, leaving the federal government to do the job instead. The D.C. Circuit ruled that the law authorizes the subsidies to be paid only through state-run exchanges.

This ruling hinges on a close reading of the law, a purported effort to figure out what Congress truly intended. The government, defending Obamacare, argued that because the law *can't* work without the premium subsidies, Congress must have meant them to apply regardless of who ran the exchange.

But the court offered another theory: Maybe Congress meant the subsidies to be an *incentive* for states to set up their own exchanges.

That sounds like a implausibly flexible approach to what was meant to be a sweeping national health care law. After all, it essentially gives any state whose governor or legislature opposes the ACA a chance to opt out of some its biggest provisions—not just the subsidies, but the individual mandate, too.

Cast your mind back to the debate in 2009 and 2010. What I remember was conservatives denying the ACA a single Republican vote and arguing that Democrats would brook no compromise. Democrats, meanwhile, were pointing out that Obamacare looked a lot like the Massachusetts law signed by Republican governor Mitt Romney.

It seems to me that in a long argument over whether Obama and Nancy Pelosi and Max Baucus were tyrants, or just sweetly reasonable splitters-of-the-difference, someone might have said: "Hey, if Republican-led states don't like the individual mandate, they can always opt out of the exchanges."

That did not happen.

**2. If the ruling stands, this messes up the insurance markets in 36 states.**

If there are no subsidies, that doesn't only mean that many people won't get help from the government to buy coverage. Even those who didn't get the subsidies in the first place could face higher prices.

That's because the law requires the exchanges to sell insurance to everyone who applies, charge them the same rates (based on age) regardless of health, and offer a minimum package of benefits. The problem is that if you don't *have* to buy insurance, many people will do so only when they know they need coverage—i.e., when they are sick. And if too few healthy people and too many sick people sign up, insurers have to raise prices to cover the costs. That then means you have to *really* sick to want to sign up, and that jacks up rates more, and so on. This is known in insurance as adverse selection, or a "death spiral."

So the federal exchanges could stop working pretty quickly if this ruling stands. In fact, according to the briefs filed by the insurance industry and a group of economists who support the ACA, the adverse selection problem in the exchanges could spill over into the market for private individual plans outside the exchange too, since the law links the two markets in various way. How this would actually play out is unclear, but suffice it say, it's a major rug-pulling.

Setting up federal exchanges that can't work seems pretty dumb. Now, as Michael Cannon of the libertarian Cato Institute says, it's not like lawmakers never make bad laws. States have tried to regulate insurance coverage the way the ACA does, without subsidies, and they've run into all these adverse selection problems. The thing is, people in Washington knew this when the ACA was being debated and written. It's why the subsidies and the individual mandate—a wildly

controversial, politically costly provision that many members of Congress wished would go away—were in the law in the first place.

### 3. This somehow involves the Northern Mariana Islands.

The D.C. Circuit panel notes that the ACA in fact did trigger the "death spiral" problem in this U.S. overseas territory in the Pacific. That's because the Northern Mariana Islands were subject to the new rules about health coverage but left out of the subsidies. That, says the court, means that maybe Congress really could have meant to regulate the insurance market without subsidizing it too.

I can think of some other reasons why Congress might have klutzed up the part the law that applies to U.S. territories. Like the fact that people in those places have no voting representation in Congress.

### 4. Congress really isn't very good at crafting laws

I don't mean it's not good at *making* laws (views may vary on that). I'm talking about the actual writing-it-down part. The court's lead opinion is devastating in showing how badly written parts of the law are. If these were comments from the professor in a course titled "Lawmaking 101: Making a Bill a Law," you'd expect to see a big fat red "D" at the bottom of Congress' term paper. The bill was pushed through hastily after Republican Scott Brown unexpectedly won the late Ted Kennedy's seat in the Senate, depriving the Democrats of a filibuster-proof majority. The craziness of the legislative process shows in the text.

But its not just a craft problem. The legal vulnerability of the ACA goes hand-in-hand with how politically vulnerable it is. The law makes sense in a basic way and seems to be helping more people get coverage. And polls say people like many of the provisions of the law. But it is also complicated, and hinges on many different players (states, employers, private insurers, Medicare, Medicaid, you and me…) interacting in predictable and not-so-predictable ways. From the beginning, many people have really struggled to *get* how the law fits together. Turns out that may have included some people in Congress.