Meet Michael Cannon, the man who could bring down Obamacare

By Sarah Kliff
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Michael Cannon is an ardent Obamacare opponent who runs the health policy program at the libertarian Cato Institute. The New Republic has described him as "Obamacare's most relentless antagonist." They're absolutely right; Cannon has spent the past three years testifying in countless statehouses, imploring legislators not to implement Obamacare. Now, he's gotten the Supreme Court listening.

In 2012 Cannon co-authored a paper with Jonathan Adler, a law professor at Case Western Reserve University. It argues that the health care law does not authorize subsidies through federally run insurance marketplaces. The plaintiffs in King v. Burwell, a recently accepted Supreme Court case, are relying on Cannon and Adler's argument in their claim against Obamacare.

The Affordable Care Act is, as Cannon and other health economists describe it, a "three-legged stool." It has three essential policies. If any of them disappear, the entire law crumbles. First, insurers cannot reject people for having pre-existing conditions, which opens the market to everybody. Then there's the individual mandate, the requirement to get healthy people (and not just the sick) to sign up for insurance. And last, there are the subsidies: financial help to make insurance affordable.

It's that last leg of the stool that Cannon thinks stands illegally — and wants to knock out. Cannon contends that Congress specifically meant to limit insurance subsidies to states that ran their own marketplaces. He notes that the part of the Affordable Care Act that authorizes the money says that the subsidies are available to people who enrolled "through an Exchange established by the State."

Because the law is written that way, Cannon (and the Supreme Court plaintiffs) hold that subsidies are available only on state-based exchanges, not on the Healthcare.gov exchanges used by the majority of states.

The lawsuit is a genuine existential threat to Obamacare. If the Supreme Court rules for the plaintiffs, the law's marketplaces would collapse in most states. I spoke with Cannon in mid-November about the case against Obamacare subsidies, how it began, and what it would mean for the Affordable Care Act if this lawsuit succeeded.

Sarah Kliff: Tell me how all of this got started. How did you, and Jonathan Adler at Case Western Reserve, and other people, start looking into the subsidies as an issue with the Affordable Care Act?

Michael Cannon: In December 2010, [former Department of Justice official] Tom Christina gave a presentation to the American Enterprise Institute, which I think is the first time we know of anyone noticing that the law says that exchange subsidies are available only "through an Exchange established by the State." There was that, and then Jonathan Adler presented on it at a forum at the University of Kansas in March 2011. He mentioned it to me in an email in August 2011.

What's interesting is there were some important muckety-mucks, some really well-known health policy scholars and constitutional law scholars, at the University of Kansas symposium. As Jonathan has told me, none of them batted an eye when he mentioned that feature of law. None of them thought it was absurd.

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Anyway, he mentioned it in an email to me and I, at the time, had been encouraging states not to establish exchanges for a number of reasons. I don't think Jonathan understood the significance of that feature when he told me, maybe because he wasn't health care wonk who talked about three-legged stools all the time.

What I recognized was that this allowed states to block one of the three legs of Obamacare's three-legged stool: the subsidies. And they could do so in a way that would increase pressure on Congress to re-open the law. So I started adding that into my list of reasons states shouldn't establish exchanges.

Sarah Kliff: You and Adler initially thought that this was a glitch or a typo, that it was a drafting error where legislators were sloppy and forgot a word. But you've since become convinced that it was the intention of Congress to withhold subsidies from states that don't build exchanges. How did your viewpoint change on that?

Michael Cannon: We first thought that it was a mistake, that it was a drafting error. And it is still a glitch in the sense that it's a snag or something that complicates implementation. The reason I didn't initially think they wrote it this way was it would give states a lot of power to block the law.

But we started doing a lot of research into this, the most research that I think anyone has done. And if you look at the tax-credit eligibility rules, they are very tightly worded. It's not in one place, but in two places, it says that the credits are only available "through an Exchange established by the State." Then there are seven different cross-references to that language. They never mentioned any other type of exchange. They never mentioned exchanges generally. It's all very tightly worded to refer only to exchanges "established by the State."

Then if you look at the legislative history, you'll find that that was the language in the Finance Committee's bill and when it passed the Finance Committee. But that bill only had one of those explicit "Exchanges established by the State" phrases. They added the other one in Harry Reid's office while it was being merged with the HELP bill under the direction of the Senate leadership and White House staff — Peter Orszag and Valerie Jarrett and Nancy-Ann DeParle, and everyone else who was going in and out of that room. So this restriction was added to the statute in multiple places at multiple points in the drafting process.

Sarah Kliff: This is where I have trouble sticking with your telling of things. Because my experience covering health care, covering the drafting process you talk about, is that Congress meant for every state to have subsidies. That it's a key leg of the three-legged stool you mention. This is something other people who covered the law, people like Julie Rovner at NPR, agree with me on.

I also spoke to Congressional staffers who worked on the bill. I understand this is not legally binding in any way, but still, they say, "Of course we meant for all states to have subsidies, regardless of who was providing the exchange." Your telling of it, to me, is inaccurate.

Michael Cannon: A couple of things. First, there are a lot of legislators who didn't read or understand this law, but voted for it anyway. The provisions they did not read and did not understand are still law. "If you like your health plan, you can keep it," for example. The Members of Congress who said that either didn't understand what was in this bill or were lying. But either way, it's the law.

What was happening here was, the senators and staff who wrote this language were just trying to put something together that would get 60 votes, so that they could go to conference with the House. To get 60 votes, they needed to create the expectation that states would be running the exchanges. That was crucial to get to 60 votes.

It seems perfectly reasonable to me that some senators or staffers would then say, "Well, we'll offer the subsidies only in exchanges established by the state. That will create the necessary incentive for states to do it." And there are lots of reasons why they wouldn't even discuss it. They may have believed it's not worth mentioning because all states would establish exchanges even without the incentive. Or it's not worth mentioning because they figured this provision isn't going survive conference.

Would you also agree that at the time, everybody thought that states were going to implement the law? That everyone thought states were going to establish exchanges?

Sarah Kliff: This is something I'm curious to hear your take on. I think there was always the thought that maybe one or two states could screw up and not be ready to open their exchanges in time. Or you might have a state like Texas, where the legislature only meets every other year, and they couldn't get it authorized in time. Under your reading of what Congress meant to do, was the plan to punish a state that like that by barring subsidies? That's really hard for me to see, and goes back to my initial point about Congress always expecting all states to have subsidies.

Michael Cannon: States had more than three years to establish exchanges. The strongest evidence we have that Congress expected all states to do so in that timeframe is that Congress provided zero funding for federal exchanges in the law.

It may have been the case that, if this legislation had gone to conference, someone would have objected to the conditional nature of the Senate bill's Exchange subsidies. That someone would have said, "This would knock out one leg of the three-legged stool! Did you pay attention to those town hall meetings in August? We can't let the Tea Party grab onto this because they'll blow up the whole thing! We have to change that!"

But that didn't happen. When Scott Brown won, Democrats only had one bill they could get through Congress. That's how this provision became law.

You didn't ask about it. Julie [Rovner, a health policy reporter with NPR] didn't ask about it. That doesn't mean that Congress wasn't meaning to do it. That doesn't mean it's not the law. It just means that there was so much else going on that no one examined this. No one questioned them on it.

Sarah Kliff: Are you 100 percent convinced it was Congress's intent to withhold subsidies in the federal exchange?

Michael Cannon: There are two ways to interpret that question. Did *the people who wrote this language* mean to withhold subsidies in federal exchanges? My answer to that is, I'm 100 percent convinced that they meant to do that.

The other way to think about it is, "Did *the people who voted for this law* intend to withhold subsidies in federal exchanges?" That's a different question, but the answer is the same. I'm 100 percent convinced that's what the members of Congress who enacted this law meant to do, just the same way I'm 100 percent convinced they meant to throw people off of their existing health plans even though they said, "If you like your health plan, you can keep it."

What members of Congress might have ideally wanted is different from congressional intent, which is determined by what they actually vote on. If the language of a statute is clear, then that constitutes congressional intent.

Sarah Kliff: What's the goal of the lawsuit? Is it to destroy Obamacare? What do you want this lawsuit to do?

Michael Cannon: I want the political process to work the way it should have worked back in 2013 [during the law's implementation]. Under the law as written, when the states refuse to establish exchanges, that blocks the major taxing and spending provisions in this law. If the president had followed the law, Congress would have addressed that in 2013.

When the Obama administration decided to go beyond the very clear limits that the law imposes on its authority, the first thing that happened was, it disenfranchised voters in those 36 states that were electing state officials that promised to block the law. When the president rewrote the law that way, he effectively told millions of people, "Your vote doesn't count." That's what this lawsuit is about.

If the Supreme Court rules for the plaintiffs, it will be saying that the president has been violating the law

If you think about it, I’ve been exercising whatever power I have in our democracy to educate people about what I thought was the right thing to do. When the president disenfranchised those voters, he kind of disenfranchised me, too. I'm one of the millions of people to whom he said, "What you say doesn't count." That's my connection to this.

Sarah Kliff: If the Supreme Court rules in your favor, what do you think will happen to Obamacare?

Michael Cannon: Unfortunately, there's going to be a lot of dislocation that we would not have seen if the President had followed the law and we'd addressed all these issues in 2013.

There are going to be a lot of people who lose their subsidies. The reason it will be so painful for them to lose their subsidies, for most of those people, is because Obamacare increases the cost of the insurance to the point where they can't afford it.

Sarah Kliff: You're also knocking out the individual mandate in a way, too, because so many of these people would qualify for hardship exemptions. They wouldn’t be able to afford coverage without the subsidies.

Michael Cannon: Right. They won't be able to afford exchange coverage once they are exposed to its full cost. That will be painful. But they also won't be penalized for not buying it.

So what you do then is, you let the political process work. I would get rid of all the features of the law that are making their coverage so expensive. You get rid of community rating. You get rid of all the coverage mandates that are in Obamacare.

I guess what I'm talking about, if that happens and the Supreme Court rules in our favor, is my preference would be that Congress should repeal the whole thing.

Sarah Kliff: There is an alternate scenario where states decide, "Okay I want those billions of dollars in subsidies. I'm going to build an exchange to get them."

Michael Cannon: That's an interesting option, but it's hard for them to do that. And it’s not at all clear that states would want to do that.

Remember, if the Supreme Court rules for the plaintiffs, it will be saying that the president has been violating the law on a massive scale. That's going to affect the debate over what states should do. "The president has been violating the law, should we just give him a Mulligan and establish an exchange?"

"Are the subsidies legal or are they not?" I'm convinced that they're illegal.

Yes, you're going to have some pressure from insurance companies to establish an exchange because they're going to want those subsidies. But you'll get even more pressure from opponents of this law than you got before. They'll know not only was the president breaking the law, but they can block the individual mandate now. You might even get employers opposing an Exchange, saying, "Wait a second. We don't want to be subject to the employer mandate when the people in the next state are not."

Sarah Kliff: We started open enrollment on Saturday. The White House has said repeatedly, "Don't worry about signing up. You're going to get subsidies."

Michael Cannon: Here's what the White House is asking people to do. They are asking people to sign up for coverage that those people may not be able to afford on their own, with the promise of subsidies that two federal courts so far have ruled are illegal; that the Supreme Court may take away in the middle of a coverage year; and that the enrollee may have to pay back to the IRS. The administration is telling people, "Don't worry." Are they out of their minds?

Sarah Kliff: Let's say we get to June and you guys get a positive ruling. Can the government keep giving subsidies to the people that were getting them through this open enrollment?

Michael Cannon: It depends on what the Supreme Court says. But if the Court rules for the plaintiffs, the Supreme Court will be saying that those subsidies are illegal.

What you're asking is, "Can the president hand out money without congressional authorization?" Do we even have to ask that question? Or are you asking, "What if the president does it anyway?"

Sarah Kliff: What do you think of the people who put the blame on you? There are people who are going to say, if your case wins, "Why did you guys take away health coverage from millions of people?"

Michael Cannon: The first thing I'd say in response is, "If those subsidies are illegal, would you favor or oppose ending them?" So far, no one has said they would favor allowing the president to subsidize people illegally.

Then the question becomes, "Are they legal or are they not?" That's what we've been debating all this time. I'm convinced that they're illegal.

Then I ask, "If you were convinced the president was doing something illegal, what would you do?" Well, this is what I would do. This is what I'm doing. Any dislocation, any disruption, any harm that is caused by those people losing those subsidies, the responsibility for that falls at the feet of the president himself.