

Obamacare's Federal Subsidies Challenged by Conservatives

POSTED JULY 25, 2012 IN [CURRENT EVENTS](#) BY [AARON KASE](#)

Less than a month after a [Supreme Court ruling that upheld](#) most of the controversial [health care reform law](#), an academic paper is challenging the legality of federal subsidies designed to help low- and middle-income individuals purchase health insurance.

The paper, written by [Jonathan Adler](#), a law professor at Case Western Reserve University, and [Michael Cannon](#), director of health policy studies at libertarian think tank the Cato Institute, asserts that based on the language in the [2010 Patient Protection and Affordable Care Act](#), subsidies may only be applied to insurance exchanges set up by individual states, not exchanges implemented by the federal government.

The exchanges are designed to allow people who don't receive insurance through their employer to easily compare and shop between different plans. States are expected to set up exchanges on their own; however, in cases where states refuse to participate, the feds can intervene and set one up instead. The IRS in May said that federal subsidies for people with income up to [400 percent above the poverty line](#) can be applied to all exchanges under the law, regardless of whether they were set up by the states or Washington. At least seven states have already said that they will not set up exchanges on their own.

Illegal Rule

Adler and Cannon challenge the IRS ruling in their paper, arguing that the law does not in fact allow for subsidies to be applied to the federal exchanges. "The proposed rule did not identify any specific statutory authority for the extension of tax credits, cost-sharing subsidies, or the employer mandate to federal Exchanges," they write. "The IRS rule is illegal."

Using text from the law and quotes from deliberations by Montana Senator and Finance Committee Chairman Max Baucus, Adler and Cannon argue that Congress never intended the subsidies to apply to the federal exchanges at all, and in fact they were to be used as incentives to encourage states to implement their own exchanges.

Without subsidies, the exchanges would be almost pointless because not enough people would be able to afford the coverage.

Clear Intention

Sean Neary, director of communications for the Senate Committee on Finance, dismisses the notion that federally-run exchanges can be excluded from subsidies.

"The clear intention of the health care law is to provide consumers with tax credits to purchase quality, affordable health coverage through either a state or a federally-facilitated exchange," Neary says. "These regulations are completely consistent with the Congressional intention to ensure coverage under a federally-facilitated exchange is eligible for health care tax credits."

Neary notes that the Baucus quotes the authors use came from deliberations about tort reform, not about exchanges at all. "And nowhere does Senator Baucus say tax credits are only available through state exchanges. Not even close," he says. "Nor is there any reason to think this discussion limits the application of tax credits in any way."

Three Senate Democrats also [dismissed Adler and Cannon's assertions to NPR](#), and [legal scholars told Politico](#) that it's reasonable to believe that Congress intended the same rules to apply to state and federal subsidies.

Enacted, not Intended

Though the debate has revolved around congressional intent, ultimately it doesn't matter what lawmakers say they intended, it matters what the law says on paper, Adler argues.

"The law is what is enacted, not what was intended. In this case, the relevant statutory language is crystal clear," the law professor says, reiterating that a section of the law explicitly states that subsidies are for state-run exchanges. "Critics of our position have yet to identify any specific text – or even a contemporaneous statement in the legislative history – that undermines this clear language."

"Insofar as intent matters, it is to help us understand what was enacted, not to override the text," says Adler.

"Further, when considering statutory intent, what matters there is what was intended *at the time*, not what people intended later (at which point they may have changed their minds)."

If opponents of the bill want to challenge the legality of the subsidies in court, however, they will have to wait until 2014, when employers who have to pay a penalty if their employees take advantage of subsidies in the absence of an employer-sponsored plan could presumably sue based on the logic in Adler and Cannon's paper.