



The possible effects of an ACA drafting error

By Steve Benen

March 26, 2014

It's understandable that much of the political world's focus yesterday was on the Supreme Court, where the justices were hearing a challenge to the Affordable Care Act's contraception policy. But there was a separate legal hearing on a different challenge to "Obamacare" about a mile away, which was arguably just as important – if not more so.

After the Supreme Court upheld the constitutionality of the ACA in 2012, it seemed the major legal questions had been settled. Sure, we'd still see occasional courts fights over more peripheral issue – such as the contraception provision, for example – but on a more fundamental level, the integrity of the overall structure was clearly on firm ground. The debate could safely shift to questions over enrollment and implementation.

Or so we thought.

While a majority on the Supreme Court appeared sympathetic to a challenge to the Affordable Care Act's mandate that insurance companies provide birth control, blocks away, two out of three judges on the D.C. Circuit Court seemed willing to gut the rest of the law based on what supporters say is, at worst, a mere drafting error.

"If the legislation is just stupid, I don't think it's up to the court to save it," said Judge A. Raymond Randolph Tuesday.

As a rule, federal appeals court judges conduct themselves with a little more professionalism, especially in the courtroom, but Randolph, a Bush/Quayle appointee, was apparently a little worked up.

If you've been ignoring this lawsuit, it's understandable. In January, a federal district court heard the case and not only sided with the Obama administration, the ruling practically mocked conservatives for filing such a ridiculous case.

But yesterday, it appeared two jurists on the D.C. Circuit decided the case wasn't so ridiculous after all.

As we discussed a couple of months ago, this gets a little complicated, but the conservatives pushing this case are arguing there's one out-of-context phrase in the Affordable Care Act that's so problematic, it should derail the entire federal health care system. Alec MacGillis had a good piece summarizing the dispute.

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. [...]

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.

Adam Serwer added that the lawsuit “is like arguing a typo in your passport invalidates your citizenship.”

But the right doesn't care if it's grasping at straws; it's clinging to an unusually malicious lawsuit because it offers a slim chance of taking health care benefits away from millions of American families.

It would work like this: if federal courts agreed with the conservative interpretation of a drafting error, then consumers who signed up for coverage through the federal exchange – healthcare.gov – couldn't receive any subsidies to help pay for insurance. This, in turn, would make coverage unaffordable for millions, which would very likely have catastrophic consequences for the entire system.

I try to avoid melodrama, but that's effectively what we're talking about here. A seemingly silly lawsuit, filed by ideologues who seem a little too eager to destroy the health care infrastructure it's taken years to build, could end up depriving millions of Americans health care security.

Two federal courts have already deemed the legal challenge quite foolish, but that may not matter to the Republican appeals court judges.

We probably won't see a ruling from the D.C. Circuit for a couple of months. If the administration loses, it's safe to assume it will seek an en banc ruling from the entire appeals court bench.