

Brief of the Week: The Affordable Care Act and 'Executive Lawmaking'

Jamie Schuman

January 13, 2015

When South Texas College of Law professor Josh Blackman was researching his first book on the Affordable Care Act, he flagged all of the times he thought the Obama administration overstepped its authority in implementing the statute. [King v. Burwell](#), the latest conservative challenge to the health care law, gave Blackman a chance to use that material.

King [asks a narrow question](#): Can the executive branch extend tax credits to people who buy insurance through the federal marketplace? [Blackman's amicus brief](#), which he wrote with the Cato Institute, argues that the Internal Revenue Service's decision to expand subsidy eligibility beyond state-run exchanges is part of a dangerous pattern of "executive lawmaking."

"By radically and unilaterally modifying the core mechanisms Congress selected, the executive has warped the ACA, reengineering the statute based on the administration's present-day policy preferences," the libertarian think tank and Blackman argue in the brief.

Ilya Shapiro, a senior fellow at Cato and friend of Blackman's, is counsel of record.

The U.S. Supreme Court [will hear King on March 4](#). The justices will consider whether an ACA provision that provides tax subsidies to people who buy insurance from "an exchange established by the State" also covers plans purchased from the federal marketplace.

The IRS says it does. As more than 30 states do not have their own exchanges, a decision to strike down this policy would strike a blow to a key component of the ACA: millions of low-income people could no longer be eligible for the tax breaks.

The petitioners in *King*—four Virginia residents who oppose the ACA—say the plain meaning of the clause limits subsidies to plans bought through state exchanges. The government argues the IRS regulation is constitutional because the ACA's goal is to make insurance more accessible.

In July, the U.S. Court of Appeals for the Fourth Circuit [ruled for the government](#).

Blackman (left) said his amicus goes beyond the subsidy issue to argue that it would not be unreasonable for the justices to reverse the circuit court.

Using research from his book, “Unprecedented: The Constitutional Challenge to Obamacare,” Blackman details executive actions that he says disregard the ACA’s “three pillars”—the individual and employer mandates, as well as the subsidies.

Blackman and Shapiro first take aim at the president for letting people keep plans that were scheduled to be cancelled for not providing “minimum essential coverage.” Obama ignored the ACA requirement that people whose insurance does not meet that standard must pay a penalty, they argue.

The pair next attacks the executive branch for delaying penalizing certain employers who do not offer minimum coverage to workers.

They say the IRS rule similarly ignores the ACA. The statute urges states to establish exchanges and punishes them—by denying their residents tax credits—for not doing so. The regulation at issue destroys this dynamic, the brief argues.

Blackman and Shapiro argue that the administration’s actions violate the separation of powers and threaten the “rule of law.”

“Under any liberty-protecting system of government, you can’t simply have the president and other national officials ruling arbitrarily based on their own whim,” Shapiro said.

Shapiro said he chose to collaborate with Blackman, who is 30, because his friend is “building a reputation as a prolific, smart, active, young intellectual and academic.”

Blackman is now working on a new book, which will chart legal challenges to the ACA from 2013 through the next presidential election. The working title is “Unraveled: Obamacare, Religious Freedom and Executive Power.”

Blackman also has a keen interest in using statistics and other data to help predict how courts will rule. He directs judicial research for the analytics consulting firm LexPredict, and founded [FantasySCOTUS](#), a “fantasy football”-style league for Supreme Court buffs.

As for Blackman’s prediction on whether *King* will be 5-4 like previous health-care challenges? The expert in analytics and the ACA said he’s going to recuse himself from weighing in.