

## Testing Obamacare

**President Obama illegally rewrote the ACA. Will the Court reverse him?**

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Two weeks from today, the Supreme Court will hear arguments in *King v. Burwell*, the most important challenge to Obamacare since the Court upheld the constitutionality of the individual mandate in 2012 (thanks to Chief Justice Roberts's bizarre legal interpretation). Given the possibility that the case could punch a very large hole in the health-care law's implementation, it has unsurprisingly been the subject of much commentary and analysis. Unfortunately, most of that commentary and analysis has been wrong.

For example, the case has nothing to do with the constitutionality of Obamacare. No matter how the Court rules, it will not "strike down" the Affordable Care Act. The case concerns one provision of the law, subsidies provided through the exchanges, and whether those subsidies can be offered through federally run exchanges as well as through exchanges "established by a state." That's an important provision, to be sure, but even if the Court rules that subsidies cannot be offered through a federal exchange, most provisions of the law will remain in effect.

In fact, it could be argued that the plaintiffs are actually seeking to have the law implemented *precisely as written*.

Nor would a decision to strike down the subsidies necessarily mean that millions of Americans will lose their insurance overnight. No doctor is going to rush into someone's hospital room and pull the IV out of his arm. Insurance plans don't work that way, not in the real world.

One can fairly say that those raising the alarm about canceled or unaffordable policies have had a rather late conversion, since Obamacare itself notoriously forced the cancellation of some 6 million insurance plans that failed to meet its criteria. Obamacare also drove up the cost of insurance for millions of Americans. But that is exactly why those now complaining about unaffordable insurance have something of a point. Because Obamacare outlawed many affordable policies and drove up premiums generally, its operation is extremely dependent on shifting much of that cost to taxpayers through subsidies. Therefore, if some of those subsidies are ruled illegal, there will be Americans who will have difficulty paying their premiums — especially at Obamacare's inflated prices. In a sense, removing the subsidies simply brings the law's full cost home.

Does that mean some people may choose to give up coverage? Possibly, but fewer than commonly thought. To date, roughly 10.5 million Americans have signed up for insurance through an exchange. But roughly 2.75 million of them live in the 14 jurisdictions (13 states plus

the District of Columbia) that have state-run exchanges. They would be unaffected no matter how the Court rules.

That leaves a bit less than 8 million Americans participating in the 37 federally run exchanges that are the subject of the suit. It is estimated that perhaps as many as 87 percent of them receive a subsidy. But it is important to remember that the subsidies are highly progressive. Many middle-income Americans are technically receiving a subsidy, but it could be just a few hundred dollars or even less per year. In fact, according to the Urban Institute, roughly 48 percent of those receiving subsidies have incomes above 200 percent of the poverty line, and therefore receive lesser subsidies. These Americans might not be happy about losing their subsidies, but they could pick up the difference and continue to pay their premiums and receive coverage.

Over the long term, it is possible that a lack of subsidies could speed Obamacare's descent into adverse selection, since younger and healthier Americans would be most likely to drop their overpriced coverage. But adverse selection was likely to happen eventually anyway.

What about those who genuinely cannot afford insurance without the subsidies? Congress will almost certainly step in and find a way to preserve their coverage. Republicans in Congress have already proposed several Obamacare alternatives. So far, President Obama has refused to even acknowledge that they exist. But if the Court rules against the administration in *King v. Burwell*, it will force the administration to the bargaining table.

More worrisome would be the possibility that those who received subsidies that they shouldn't have might have to repay them. However, historically, the IRS has been lenient about demanding repayment from those who, in good faith, relied on IRS advice that later turned out to be incorrect. If the IRS does insist on repayment, Congress is very likely to intervene. Besides, if some Americans do have to repay illegal subsidies, at least some of the blame should lie with the Obama administration, which has steadfastly refused to warn consumers that the subsidies were in jeopardy.

Moreover, focusing on the subsidies misses the larger question. This case is not about who gets one more federal welfare payment. It's not even about the technical interpretation of statutory language. Rather, the question before the Court is whether a president — any president — has the power to unilaterally rewrite a law, simply because he doesn't like the way it actually passed Congress. The Obama administration is, in effect, asserting that it can spend money that was not appropriated by Congress. And in this case, because the employer-mandate penalties are triggered by subsidy eligibility, the administration is also claiming the power to impose taxes without congressional approval. That's a precedent that everyone should be wary of — no matter your ideology.

Of course every court case has winners and losers. The losers in this case will be those Americans who might have to pay for the full honest cost of their insurance — though, as I say, Congress can step in to help those most in need. The winners will include taxpayers, who will no longer have to bear as much of the cost of Obamacare's subsidies. Businesses, especially small businesses, will also be winners, since they might be able to escape the employer mandate. That

means workers will be winners too, since employers will find it easier to hire and offer higher wages.

And, if a court ruling finally forces President Obama to the bargaining table, we could all be winners with a new health-care law that undoes the damage Obamacare is doing to our health-care system.

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