



Michael Cannon says Obama staffers meant to restrict subsidies. Obama staffers disagree.

By [Sarah Kliff](#)
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Nancy-Ann DeParle, a former Obama staffer who was a key adviser to the president on health reform, says she doesn't talk to reporters much. But to respond to [Obamacare opponent Michael Cannon](#), DeParle decided to make an exception.

Cannon, who runs the health policy program at the libertarian Cato Institute, believes that DeParle and other Obama staffers who helped draft [Obamacare](#) purposefully meant to limit financial subsidies to states that established their own health insurance exchanges. This is heart of the argument in [King v. Burwell](#), the new Supreme Court case that argues the subsidies currently being distributed through federally run marketplaces are illegal.

DeParle, on her part, thinks this is ridiculous.

"It's a fairytale," she says. "This is absurd. His version of this is totally foreign to me.

"This restriction was added to the statute in multiple places"

As one piece of evidence in [our interview yesterday](#), Cannon cited the drafting of the health care law:

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.

This led to Nick Baumann at Mother Jones asking:

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And this led to my phone call to DeParle, who was Obama's deputy chief of staff for policy during the Obamacare debate. I asked her whether it was the intention, as Congress merged the two bills, to further restrict the subsidies.

"In the thousands of hours we spent debating this law and drafting it and sitting in meetings, I never heard anyone suggest that subsidies would be denied," she says.

As to why the phrase "exchanges established by a state" showed up more in subsequent drafts, DeParle doesn't see any particular significance to it. "You just have no idea how rushed we were," she says. "We all thought it was going to conference."

Conference is the part of the legislative process where the House and Senate go over their two different versions of a bill. But that didn't happen with the Affordable Care Act. After Scott Brown's election to the Senate, Democrats no longer had the votes to pass whatever legislation would come out of that conference process — and had to stick with the old version that had already passed the chamber.

I also reached Peter Orszag, who directed the Office of Management and Budget during the health reform debate. He says that he wasn't especially involved in the discussion over exchanges; more of his time was spent on the parts of Obamacare that dealt with trying to save money in Medicare. But as for what he remembers of it, he also says there was no large significance to the added words.

"I would ascribe it to a kind of cut-and-paste mindless drafting rather than any intentional, purposeful thing," he says. "I would have been very surprised if this were the intent [to limit subsidies] and I was never made aware of that fact."

One other issue Orszag points to: if it was the intention of Congress to withhold subsidies from non-compliant states, it would likely show up in the Congressional Budget Office score. The CBO would at least game out a spending scenario where it doesn't have to pay for subsidies in all 50 states, even if (and as Cannon points out in our interview) the expectation at the time was that nearly every state (or maybe all of them) would participate. This would have theoretically been good for Obamacare; it would have helped the law cost just a little bit less.

"It would have been something that helped the CBO score, something we'd want them to know if that was our intention," says Orszag. "And they would have done some sort of probabilistic modeling of where some states didn't get subsidies."

The Supreme Court won't rely on staffers' recollections

Legally speaking, Orszag and DeParle's explanations aren't likely to hold much water in front of the Supreme Court. They're ad hoc explanations. And what matters to the justices is what Congress intended to do, not what White House staff working with them intended. And they don't satisfy Cannon much either. During our interview, he made the case that Democrats may well have discussed limiting subsidies to state-based marketplaces even though there's no record. There's not much of a record, if any, of discussions about making sure there are exchanges on the federal marketplace either.

Now, with the Supreme Court decision pending, he contends that they could be hiding proof of those conversations.

"A possibility is there are emails and they talk about conditional tax credits and they don't want to show them to you," he says. "I don't know if that's the case."

I asked DeParle and Orszag about this and, for what it's worth, they said these emails do not exist.