

WILL THE AFFORDABLE CARE ACT SURVIVE 2015? CONGRESS, THE SUPREME COURT AND POLITICAL REALITY

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In this article...

Look at the possible implications if the U.S. Supreme Court rules against the ACA or if Congress repeals it altogether.

AS WE ALL KNOW, THE 2014 MIDTERM election resulted in Republicans controlling both houses of Congress. The mantra of many congressmen since 2010, both returning and newly elected, has been that they would vote to repeal Obamacare if given a chance to do so. It is just possible that their ship has come in.

The House of Representatives voting for repeal would hardly be newsworthy, for they have already done that (or voted to otherwise undermine the ACA) 54 times.¹ In contrast, a successful Senate vote to repeal the ACA would be monumental and — assuming everyone were to vote along party lines — might just happen this year.

Many will shrug their shoulders at this potential, for it is clear that the GOP doesn't have the 60 votes necessary to overcome a Democratic filibuster. However, a liberal supporter of the ACA who therefore dismisses the threat of repeal is forgetting an arcane Congressional procedure known as "reconciliation," which could change everything.

The reconciliation process dates back to 1974 when Congress was in the midst of a Constitutional dispute with President Richard Nixon. To avoid the need for a two-thirds vote to cut off debate (i.e. end a filibuster), the Senate instituted this process to limit the debate on a bill to 20 hours.

The original intent of reconciliation was for it to only apply to fiscal issues (such as its use to pass three major tax cuts during the George W. Bush administration), and revisions such as the "Byrd Rule" have attempted to confine its usage to that original purpose.²

Still, when exercised, the power is enormous, for one party can pass a law by simple majority vote in both houses, negating the filibuster procedure that was designed to protect the

minority opinion.

Sound familiar? It should, for reconciliation is exactly how the ACA was passed in the first place. As you'll remember, Sen. Ted Kennedy's death increased the likelihood that a final vote for the ACA (under normal, legislative procedure) would fail, because a Republican replaced him in the ensuing special election.³

Reconciliation was just one of a convoluted series of legislative maneuvers that were required to enact the law. The entire process, and particularly the use of reconciliation, raised the ire of the GOP leadership and Republican voters.⁴

Oh, the sweet irony. With both chambers in control, the GOP could arguably now use the same procedure to repeal the law in its entirety — a possibility that the new GOP leadership mentioned explicitly upon arrival to Washington⁵ and throughout the Republicans' Congressional retreat in Hershey, Pennsylvania, in mid-January.⁶ Although there is division within the party over whether the use of reconciliation would be wise,⁷ under the playground rules that are so common in Congress, some Republicans now are enticed by the possibility of "tit-for-tat" retribution.

All of this means nothing in terms of the law's survival; President Obama would obviously veto any repeal and it is clear that Senate GOP leaders do not have the two-thirds majority vote to override that roadblock. However, the futility of repeal may make the vote all the more attractive to a Republican-led Congress.

Through reconciliation, members can honor their battle cry of "repeal" without having to create the "replacement" that they have also promised. The underlying issues of cost, access, outcomes and viability that precipitated the ACA in

the first place would not go away with the law; rather, they would land solidly back in the lap of the new leadership. However, with a guaranteed veto the GOP can anticipate the adulation of its base without having to address the realities of our health care system.

Rarely are Republicans and Democrats simultaneously giddy over the same issue, but this is one of those exceptional times, as voting to repeal the ACA would not only be futile, it could be politically disastrous for the GOP. Five years into the rollout of a reformed health care delivery system, the number of uninsured Americans has fallen to 12.9 percent of the population, a number lower than ever seen since tracking of the number began in 2008.⁸

States where expanded Medicaid hospitals are located have seen a significant drop in uncompensated care. For example, HCA reported in May 2014 that the system experienced a 29 percent drop in uninsured hospital admissions and a corresponding 22.3 percent increase in Medicaid admissions in their hospitals that operate in states with expanded Medicaid coverage under the ACA.⁹

The growth of health care spending grew 3.6 percent in 2013, which was “the lowest annual increase since 1960, when the Centers for Medicare and Medicaid Services began tracking the statistic.”¹⁰ Republicans dispute whether these improvements to our health care economy should be attributed to the ACA, but the consistency of improvement since the law was signed in 2010 has certainly not been lost on the public.

In fact, Republicans may be misled in their thinking that most of the country agrees with them about repeal. Polls used by the GOP may not actually demonstrate majority support of their position. For example, last spring, the CNN “Political Ticker” reported that 57 percent of Americans were opposed to the ACA, but — of that population — 12 percent responded that the law “isn’t liberal enough.”¹¹

Weariness over the health care reform debate may be pushing more Americans to the fringes, for another poll conducted this January showed that 50 percent of Americans favored a single-payer system (i.e., “Medicare for all”), including one-quarter of Republicans.¹² The fluidity of polling on the issue overall should have Republicans doing some back-of-the-envelope calculations about their perceived mandate from American voters to rid the country of Obamacare.

The Republican Congress begins its tenure knowing that they could actually deliver on their greatest promise to their constituents, while also knowing that the repeal of the ACA could create such a backlash in the population at large that they will lose any chance in the 2016 presidential election.

As they walk that line, they are also aware that, if their base fully appreciates that they could repeal Obamacare but chose not to do so, they may lose their base altogether. Now that the election night balloons have long since deflated, this quandary will likely keep the GOP dancing in 2015, unless the U.S. Supreme Court can take them off the hook.

SEVEN WORDS COULD KILL THE ACA — The second, far-more-real threat to the ACA in 2015 will come from the U.S. Supreme Court’s ruling on *King v. Burwell*, which is expected



The second, far-more-real threat to the ACA in 2015 will come from the U.S. Supreme Court’s ruling on *King v. Burwell*, which is expected in late June.

in late June.¹³ Resting on seven words in the ACA, the case will examine federal financial subsidies (that make insurance possible for people without sufficient income) which are available “through an Exchange established by the State.”¹⁴

Under a literal translation, as argued by the plaintiffs, this clause means that subsidies are not possible to residents in the vast majority of states that opted to have the federal government run their exchange rather than opening their own.¹⁵

When this argument was first raised, it looked to most observers as if the plaintiffs were grasping at straws. However, as the possibility of delivering a fatal blow to the ACA became more apparent, that same, seven-word phrase became the nexus of at least four cases nationwide, leading to the current appeal to the U.S. Supreme Court.¹⁶

The fact that the Court accepted the case (“granted certiorari”) surprised many people, for that decision was optional; the Court chose to take the case and was not required by any necessity to do so.¹⁷ Under the Supreme Court’s rules, at least four justices must agree to grant certiorari, but we do not know who those four (or more) are. Nonetheless, the decision to take the case has led many to suspect that a political motivation lies behind the review.¹⁸

Make no mistake: If a majority of the Court’s justices accept the plaintiffs’ interpretation of these seven words, the

blow would be fatal for the ACA, and the repercussions would be enormous. Millions of Americans, “predominantly white, Southern, employed and middle-aged”¹⁹ would lose the subsidy on which they depend to purchase insurance.²⁰

ACA HAS RAISED HUGE AMOUNTS OF POLITICAL SQUABBLE, SOCIETAL DEBATE AND VITRIOL.

Economists believe insurance markets would be destabilized, and people who purchased a policy through a federally run exchange could see a rate increase as high as 43 percent.²¹ Furthermore, states will also see a significant loss of federal funds; Florida alone could lose up to \$3 billion in federal health insurance subsidies.²²

But that is only the beginning. A decision for the plaintiffs in *King v. Burwell* would not eradicate the ACA. By torpedoing the ability for all Americans to purchase insurance, the very fabric of the ACA — to make health care accessible and affordable to all — will be destroyed. Would the law be able to survive afterward? If not, what would be the implications? We all need to consider the prospect of the return of pre-existing exclusions to the insurance marketplace and the loss of other insurance reforms such as protection from patients being dropped from their plans when they become sick and need their coverage the most.

Young adults, who have been extended coverage under their parents’ policies, will be thrown back into an exponentially expanding uninsured pool and the notorious Medicare Part D “doughnut-hole” could be reopened if the ACA were to be eradicated.

To save the portions of the ACA that Americans really like, Congress would have to fix it if left crippled by the Supreme Court. However, if constructing an alternative to the ACA has been politically difficult in the past five years, one can only imagine the chaos that would ensue if the current Congress had to start from the beginning.

And they might not even try, as evidenced by the announcement that Republicans in Congress will not try to reinstate financial assistance to people who would lose their insurance subsidy if the Supreme Court rules for the *King v. Burwell* plaintiffs,²³ despite the fact that 64 percent of voters would want them to do so.²⁴

Even if these same Congressmen are not worried about the impact on millions of Americans who would lose their insurance, or the underlying problems in the accessibility and accountability of our traditional health care system that precipitated the ACA, they should presumably at least be concerned.

Devastation of the ACA would throw this country back into the fiscal instability of our traditional health care delivery system, which was a major force behind not only the ACA, but numerous reform initiatives by several presidents, of both

parties, starting all the way back with President Truman.²⁵

IS DEFEAT THE GOAL OR THE THREAT? — From its inception, the ACA has raised huge amounts of political squabble, societal debate and vitriol. Many Americans hold the law to be an icon for what happens when a government runs amuck, and its defeat would present for these voters a win sweeter than any other conservative victory in recent memory. Presumably, no one would enjoy that defeat more than the newly elected GOP leadership.

At the same time, the defeat of the ACA would have enormous consequences on millions of individuals, the insurance industry, the ability of hospitals to continue to serve their populations without compensation, state coffers and the national economy.

The chaos that would ensue after a defeat of the ACA would likely consume the next two years of a Republican-controlled Congress. After years of vilifying the ACA, they might be forced to devise, write and pass the replacement that they’ve been talking about for so long — and that promises to be the biggest threat to their leadership itself.

In the meantime, while it would be easy for physician leaders to claim ignorance and sit back as the ACA drama unfolds in both Congress and the court, it is clear that there are significant risks should either endeavor succeed.

Regardless of any personally held political opinions, physician leaders must understand that the next two years could be very unstable as current health delivery reforms are disputed or thwarted altogether. As rocky as the last few years may have been, the next years may be significantly more challenging as physicians are left trying to deliver medicine in a system with an uncertain future. Never will the need for leadership be greater.



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REFERENCES

1. York B. No, House Republicans Haven’t Voted 50 Times To Repeal Obamacare. *Washington Examiner*, 2014. <http://www.washingtonexaminer.com/no-house-republicans-havent-voted-50-times-to-repeal-obamacare/article/2545733>.
2. Raz G, Binder S. “Reconciliation” May Not Save Democrats’ Health Bill. *NPR*, 2010. <http://www.npr.org/templates/story/story.php?storyId=123164823>. Sanders K. Scott Brown Says Opponents Delayed His Swearing-In To Pass Health Care Law. *PunditFact*, 2013. <http://www.politifact.com/punditfact/statements/2013/nov/12/scott-brown/scott-brown-says-opponents-delayedhis-swearing-pa/>. Scott Brown says opponents delayed his swearing in to pass health care law, *PunditFact*, November 12th, 2013.

3. Sussman B. How Obamacare Became Law. BrianSussman.com, 2013. <http://www.briansussman.com/politics/how-obamacare-became-law/>.
4. Howell T. Republicans Eye Reconciliation Route In Bid To Repeal Obamacare. *Washington Times*, 2015. <http://www.washingtontimes.com/news/2015/jan/1/obamacare-repeal-republicans-eye-reconciliation-ro/?page=all>.
5. Johnson F. Will GOP squander its best shot to repeal Obamacare? *National Journal*, 2015. <http://www.nationaljournal.com/congress/will-gop-squanderits-best-shot-to-repeal-obamacare-20150115>.
6. Taylor A. GOP divided over using budget process to derail Obamacare. Associated Press, 2015. http://hosted.ap.org/dynamic/stories/U/US_BUDGET_HEALTH_CARE_LAW?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT.
7. Obamacare Sign-Ups Increase Steadily. *Kaiser Health News*, 2015. <http://kaiserhealthnews.org/morning-breakout/obamacare-sign-ups-increase-steadily/>.
8. Millman J. Hospitals See Blue-Red Divide Early Into Obamacare's Coverage Expansion. *The Washington Post*, 2014. <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/05/12/hospitals-see-blue-red-divide-early-into-health-reform-watch-hospitals-see-blue-red-divide-early-into-obamacares-coverage-expansion-washington-post-5/12/14>
9. Think Health Care Costs Are Soaring? Think Again. Kaiser Health News, 2014. <http://money.cnn.com/2014/12/04/news/economy/healthcare-costs/>.
10. CNN Political Unit. CNN/ORC Poll: Are Obamacare's Flaws Fixable? CNN, 2013. <http://politicalticker.blogs.cnn.com/2013/11/27/cnnorc-poll-areobamacares-flaws-fixable/>.
11. Ferris S. Majority Still Supports Single-Payer Option, Poll Finds. The Hill, 2015. <http://thehill.com/policy/healthcare/229959-majority-still-supportsingle-payer-option-poll-finds>.
12. 759 F.3d 358 (4th Cir. 2014).
13. 26 U.S.C. §36B(b)(2)(A).
14. For a map of how states run their exchanges, and which would be effected by the Supreme Court ruling, see: Nussbaum A. Health Insurance Exchanges. Bloomberg, Bloomberg Quick Take, Dec 16, 2014. <http://www.bloombergview.com/quicktake/health-insurance-exchanges> , <http://www.bloombergview.com/quicktake/health-insurance-exchanges>.
15. For more on the history of the underlying cases and the details of the Burwell case see: 2014 Litigation Round Up, *Health Advocate E-Newsletter* of the National Health Law Program, 2014, 37(12). <http://www.mdhealthcarereform.org/storage/2015/2015-pdfs/2014litigationroundup1.9.15.pdf>.
16. Adler JH. Why Did The Court Grant Cert In King V. Burwell? *The Washington Post*, 2014. <http://www.washingtonpost.com/news/volokhconspiracy/wp/2014/11/07/why-did-the-court-grant-cert-in-king-v-burwell/>.
17. Viebeck E. Obamacare Supporters Blitz High Court Ahead Of Subsidy Arguments, The Hill, 2015. <http://thehill.com/policy/healthcare/230993-obamacare-supporters-blitz-high-court-ahead-of-subsidy-arguments>.
18. Sanger-Katz M. The People Most at Risk of Losing Insurance in the Supreme Court's Health Ruling. *The New York Times*, 2015. http://www.nytimes.com/2015/01/23/upshot/the-people-most-at-risk-of-losing-insurance-in-the-supreme-courts-health-ruling.html?_r=0&abt=0002&abg=1.
19. Cohn J. Here's What the Supreme Court Could Do to Insurance Premiums In Your State, New Republic, 2015. <http://www.newrepublic.com/article/120233/king-v-burwell-how-supreme-court-could-wreck-obamacarestates>. <http://www.newrepublic.com/article/120233/king-v-burwell-howsupreme-court-could-wreck-obamacare-states>.
20. Eibner C, Saltzman E. Assessing Alternative Modifications to the Affordable Care Act-Impact on Individual Market Premiums and Insurance Coverage. RAND Corporation, 2014. http://www.rand.org/content/dam/rand/pubs/research_reports/RR700/RR708/RAND_RR708.pdf.
21. Caputo, M. Supreme Court Challenge To Tax Credits Under Obamacare Casts Cloud Over Program's Future. *Tampa Bay Times*. <http://www.tampabay.com/news/politics/stateroundup/supreme-court-challenge-to-taxcredits-under-obamacare-casts-cloud-over/2208302>.
22. Radnofsky L. Republicans to Block Legislative Fix to Health-Care Law. *Wall Street Journal*, 2015. <http://www.wsj.com/articles/republicans-to-blocklegislative-fix-to-health-care-law-1422575627>.
23. Fram A. Poll: Most Say Restore Health Aid If Court Kills Subsidies. ABC News, 2015. <http://abcnews.go.com/Politics/wireStory/poll-restore-health-aidcourt-kills-subsidies-28537707>.
24. Starr P. Remedy and Reaction: The Peculiar American Struggle over HealthCare Reform. New Haven, Conn.: Yale University Press, 2013.
25. 759 F.3d 358 (4th Cir. 2014).