



Why Congressional Budget Office Reports are the Best Evidence of Congressional Intent about Health Subsidies

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Days after the November 2014 elections, the Supreme Court granted expedited review of a legal challenge to subsidies that are now helping millions of Americans afford private health insurance. Funded by the libertarian Competitive Enterprise Institute, *King v. Burwell* alleges that the 2010 Affordable Care Act precludes premium subsidies for the citizens of states that have not established their own marketplace “exchanges” to sell regulated insurance plans. Pointing to a single discordant phrase in 900 pages, plaintiffs claim that Congress threatened to withhold subsidies to force all fifty states to build and run exchanges on their own.

This statutory interpretation case will be heard at the Supreme Court on March 4, 2015. Previous jurisprudence has established that laws are to be interpreted in terms of overall purposes, and the goals of the Affordable Care Act certainly require the nationwide availability of premium subsidies. Nonetheless, arguments rage about Congressional intentions. Health policy reporters have combed through old notes; former Congressional leaders have penned OpEds; and one enterprising reporter dug up an old staff email. All confirm that those who debated health reform bills never imagined that subsidies could be withheld from residents of any states. In response, *King* plaintiffs point to a 2012 videotaped speech by an economist who advised reform designers. But all of this is after-the-fact. To properly assess Congressional intent, the Supreme Court needs *contemporaneous, objective evidence*.

The Value of the Full Record of Congressional Budget Office Reports

Political scientists know that such objective evidence can be found in the entire record of analyses prepared by the Congressional Budget Office for the 111th Congress. Called “CBO” for short, this agency has a legal mandate to generate nonpartisan revenue and cost estimates for bills and amendments. In addition, the office responds to requests from members of Congress to provide data on issues that come up in debates. Every Senator or Representative, not just members of the majority party or Congressional leaders, can ask for CBO analyses – or raise questions about previously issued CBO analyses. This institutional fact is crucial. *Because the Congressional Budget Office is responsive to requests and questions, the steady stream of major and minor analyses it prepares during debates over complex legislation like the Affordable Care Act amounts to excellent evidence of the full range of possibilities considered in real time by any party, faction, or highly engaged member of Congress.* Legislators pay close attention and regularly ask for additional analyses, because CBO cost estimates profoundly influence votes.

What the 2009-10 CBO Record Shows

In December 2010 – months after the Affordable Care Act was signed into law and well before the lawsuits challenging subsidies were conceived – the CBO published a topically organized compilation of 35 important January 12, 2015 <https://scholars.org>

reports it issued during the health reform debates. To complete the record, I dug into the most detailed lists for 2009 and 2010 on the agency's website and included 33 additional reports, estimates, responses, and presentations (everything except blog posts). I then arrayed all 68 analyses chronologically, noted who asked for each, and looked at how premium subsidies and state-level variations were assessed. Here is what I found:

- CBO reports in early 2009 included clear discussions of how key policy options for health reform would be scored and estimated – including subsidies that might be made available to help Americans afford insurance plans. Throughout 2009-10, the CBO always referred to “exchanges” in ways that encompassed both state and federally assisted options – and always modeled estimates based on the expectation of nationwide availability of consumer subsidies.
- In a steady stream of analyses rising to six to ten per month when Congress debated final committee and floor bills, CBO calculated cost estimates and addressed a range of issues and policy alternatives posed by both Democrats and Republicans. Although Democrats controlled the 111th Congress, nineteen out of the 68 CBO products analyzed GOP bills or responded to requests from Republican leaders, ranking committee members, or legislators.
- CBO mostly dealt with overall budgetary issues of spending, costs, and deficits – or looked at the specific impact of health reform proposals on Medicare beneficiaries, health care providers, and citizens at various income levels. *The record shows that no one from either party asked CBO to analyze or project subsidies available to people in some states but not others.* In a June 2009 analysis of a draft proposal from Democrats in the Senate Health, Education, and Labor Committee, CBO treated subsidies as phased in. But even that proposal, which did not survive in further deliberations, stipulated that subsidies would be available in all states from 2014 – and CBO calculated costs accordingly.
- After the Affordable Care Act became law in March 2010, members of Congress, especially Republican critics, continued to raise issues. In its responses, CBO continued to model exchange subsidies as available nationwide. No one in either party objected or asked for alternative estimations assuming partial subsidies at any point in the 111th Congress.
- Eventually, a June 2012 Supreme Court ruling made state-level Medicaid expansions optional under the Affordable Care Act. Immediately after the decision, a July 24, 2012 CBO report updated cost estimates to take into account the likelihood that many states would not soon expand Medicaid. However, with no objections from Republicans in Congress or the states at that time, CBO continued to model exchange subsidies as available nationwide and restated in footnote 14 its longstanding assumption that under the law, premium “subsidies will be available to people in exchanges run entirely by states, exchanges run entirely by the federal government, and exchanges run together by the states and the federal government.”

A Clear-Cut Bottom Line

Throughout hard-fought debates about health reform, lawmakers in both parties looked for ways to save taxpayer money. Partial subsidies would have greatly reduced costs, so the total absence of this kind of analysis among the 68 prepared by CBO for the 111th Congress (and its continuing absence in reports done for the next Congress) is the best objective evidence we have that no one in Congress considered premium subsidies restricted to certain states to be either possible or desirable. If Congress intended to threaten states with withheld subsidies, nobody said so.

See a **chronological listing** and a **figure** tracking month by month all CBO estimates, reports, and responses prepared during the health reform deliberations in Congress in 2009 and 2010. <https://scholars.org>
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