

King v Burwell: The Statutory Interpretation of Partisan Congress

Jeffrey K. Ryan

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There have been many controversies regarding the design, implementation, and operation of the healthcare exchanges under the Patient Protection and Affordable Care Act (ACA). There have been many lawsuits challenging the specific statutes of the Act, most recently the landmark Hobby Lobby challenge to exempt the employer mandated contraceptive coverage statute for employees based on religious objection. The court found for the plaintiff and exempted contraceptive cover by small, close held business based on religious objection. This is just one of the challenges to this law; however one of the most impactful aspects is currently being decided by the supreme justices; this case is King v Burwell, a challenge to subsidies being given to consumers who bought insurance through the federally run marketplace.

There are two major aspects of ACA, the individual mandate, which was upheld in the *Nat'l Fed'n of Indep Bus v Sebelius*, 132 S. Ct. 2566 in 2012, and the premium and cost-sharing subsidies, currently in decision. These two aspects of ACA are intended to drive consumers who were uninsured to the marketplace so they could obtain coverage, lowering the overall amount of uninsured Americans. The individual mandate portion of the law requires most consumers, who are eligible, to obtain health insurance or face stiff tax penalties for not doing so. The subsidies were intended to provide an incentive to consumers to do obtain coverage, especially for consumers who could not afford it or where a major prohibiting factor in was cost.

Once the law was implemented, it was left to the Internal Revenue Service (IRS) to design and create rules around how the law would function, including the procedure for providing subsidies and collecting penalties. The rule in question with King v Burwell is IRS rule 26 C.F.R. § 1.36B-2, which extended subsidies to consumers in states where the exchange was set up and run by the federal government, which is contrast to what lawmakers wrote. In 26 U.S.C. § 36B, the law explicitly states that consumers who enroll through an exchange established by a state are eligible for the subsidies, but does not mention the inclusion of federally established exchanges. Both sides argue the provision needs to be examined in the over context of the law, the government arguing that the legislative intent was implicit and covers federal exchanges, where the petitioner argues that the lawmakers were explicit in context as noted in other areas of the law, and thusly intended it as written.

In the end, this law has huge implications not only on the future of ACA but also to the consumer market, the insurance industry, and healthcare as a whole. Unlike past challenges that argue against the constitutionality of the law as a whole, this challenge is about the ability for an executive branch department to interpret, enforce and create statutes that are not explicitly codified by congress. This is about the rule of law, and statutory interpretation.

Legal Proceedings

Federal District Court

This issue originated in the district court of Virginia where David King, Douglas Hurst, Brenda Levey, and Rose Luck filed a complaint against then Secretary of Health and Human Services Kathleen Sebelius, (King v Sebelius 997 F.Supp 2d 415). The matter that went before the district court were two motions, a motion of summary judgement filed by the plaintiffs, and a motion to dismiss filed by the government. The motion of summary judgement alleged that the IRS did not have the statutory authority to extend subsidies to consumers in federally facilitated exchanges. The court granted the motion to dismiss the complaint based on relative regulations and subsequently dismissed the motion of summary judgment as moot (King v Seblius, 2014).

The court determined to grant the motion to dismiss based on justiciability and statutory interpretation. The sub points used to determine the legal standard included standing, the Administrative Procedure Act, and ripeness using the chevron standard for statutory construction. Based on these determinations, the judge conceded that even if the plaintiff's interpretation was reasonable, they did not meet the burden to prove that the government's interpretation was unreasonable and thusly dismissed (King v Seblius, 2014).

The court determined standing based on Article III and prudential standing. It was determined that to have standing that at least one plaintiff must be impacted by the statutory regulation and required legal relief of it. It was determined that the plaintiffs did not have Article III standing because they were not financially impacted but rather wanted rejected the financial benefit of the subsidy which is automatically applied. However, they did have prudential standing as the law in question applied to all taxpayers of which they are apart. The court determined that under the Administrative Procedure Act, the plaintiffs were challenging the IRS rule, and not the IRS ability to collect taxes. Due to this, and the precedent set in the similar case *Hobby Lobby Stores, Incorporated v Sebelius* 723 F.3d 1114 in 2013, the plaintiffs were not precluded from suing in an attempt to avoid potential tax penalty. It was also determined that the case was ripe for review as the plaintiffs as they would incur hardship through have to buy insurance or pay the penalty, and that although they had not currently suffered injury, the injury was immediately impending. In the eyes of the court the plaintiffs met all aspects of justiciability, however the failed to meet the statutory interpretation (King v Seblius, 2014).

Chevron deference, which was determined in *Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837, is a tool used by the courts to determine statutory interpretation and is determined in a two-part analysis, the plain meaning and if it is ambiguous the permissible construction of the statute. Identifying the plain meaning of the statute is determined by the plain text, examining the stated definitions and determining if any ambiguity exists in the statute language. The plaintiffs argue that the plain text is explicit in the interpretation of what congress wrote, however the government argued that the use of the plain language in the section was ambiguous, and that the definition of exchange that is noted in other sections should be applied to this portion. The court view that each side had valid construction of the language but notes that the plaintiffs view is implausible when context is taken into account (King v Seblius, 2014). In step two, the court again finds against the plaintiffs that the agencies interpretation of the law were in congruence with their authority to make rules with the force of the law. Using chevron, the courts naturally provide the benefit of doubt in favor of the government as precedent was set with *Nat'l Elec. Mfrs Ass'n v U.S. Dep't of Energy*, 654 F.3d 496. Due to this, the court found in favor of the government of statutory interpretation, and subsequently granted the motion to dismiss (King v Seblius, 2014).

Federal Appellate Court

King v Sebelius was appealed by the plaintiffs when the motion to dismiss was granted. However, the case changed names when the Secretary of Health and Human Services (HHS) changed from Sec. Sebelius to Sec. Burwell when Sec. Sebelius resigned amid massive scandal from the fallout of the launch of the federal exchange. The case was appealed from district court to the United States Court of Appeals for the Fourth Circuit as *King v Burwell*, 759 F.3d 358. The holding of the Fourth Circuit court affirmed the district courts judgment.

The court thoroughly examined and discussed the primary aspects of the case that the lower court examined. They deferred to the same ruling in favor of the government that the second step of chevron

deference was the key aspect that swayed the view of the court. During the justiciable phase, they primarily focused on standing and the Administrative Procedure Act. After review and discussion, they reaffirmed the lower courts finding, that the plaintiffs had standing, and that the suit was not barred by the Administrative Procedure Act (King v Burwell, 2014). The court spent the majority of the decision discussing the chevron deference, and the various aspects and scenarios that went into the two-step analysis.

Of the two parts of the chevron analysis, they dissected step-one – meaning of plain language – the most. They determined that in 26 U.S.C. § 36B the language was ambiguous because there was not one particular way it could be directly interpreted. They noted that the plaintiffs could have a correct interpretation of the statute because of the explicit term “established by the states”, and noted that the language in other sections included broader language, so it stood to reason that the lawmakers could have written the section to promote and focus on the creation of state exchanges (King v Burwell, 2014).

However, the court also viewed the interpretation from the governments standpoint based on explicit definitions that are given in 42 U.S.C.S. § 1321 and §1311, and that the sections also outline a contingency plan for HHS to set up the exchanges if the states elected not to. In this reading, they determined that because the HHS was acting on behalf of the state in the contingency plan, the government interpretation was correct. It was because of both plausible statutory interpretations that the court ruled that step one of the chevron deference test was ambiguous, and thusly moved to determination in step-two.

The analysis the court performed for the second step of the chevron deference was relatively shorter compared to the time spent on the first step. This is because as determined in the Chevron case, the determination is based on an agency “action is based on permissible construction of the statute,” (Chevron U.S.A., Inc. v Natural Resource Defence Council, Inc., 1984). This means that the any reasonable doubt automatically defaults in favor of the government agency. In this analysis, the government provided a plausible justification to the actions of the IRS, and the court found the plaintiffs did not have a compelling argument for the legislative record they provided. Using the government’s position, the natural tendency to side with the agency in question, and several amicus briefs filed on behalf of the government, the court affirmed the district court ruling in favor of the government.

Parallel Cases

King v Burwell has not been the only case challenging the IRS rule. It was also challenged in Oklahoma, where the court struck down the IRS 26 C.F.R. §1.36B. In the opinion the court also cited and criticized the King decision. The court followed the same process as explained in the King case, however it determined that the language of the statute was explicit, and therefore made the determination in favor of the plaintiff in the first step of the Chevron deference. In its criticism of King, they court noted the “legal fiction” that was used to obscure and justify finding for the government, (State of Oklahoma, ex rel. Pruitt v Burwell, 2014). They found that although the Fourth Circuit viewed the plaintiff’s argument as common sense and plausible, they noted that the court obscured the base issue, which was the definition and application of “established by the state” in relation to the IRS rule. Due to this, the court granted Oklahoma’s motion for summary judgement, and vacated 26 C.F.R. § 1.36B.

In both cases, appeals were filed for a writ of certiorari, one on behalf of the government in the Oklahoma case, and one on behalf of the plaintiffs in King. However, the Supreme Court denied the Oklahoma writ and granted the writ in King v Burwell setting the oral arguments for March 2015 (King, et al., v Burwell, 2014). The main aspect that separates this hearing from the last major ACA challenge in

the Supreme Court is that this challenges the authority of an executive agency to provide federally funded subsidies to consumers who enrolled in federally run exchanges contrary to explicit codified language. Currently the court is relatively even with the justices either taking a conservative or liberal reading of the law, reaching back to federalist roots.

As expected, the justices thoroughly questioned both sides. The hearing began with determining whether the plaintiffs had standing, noting the justices questioning whether this should have been determined at the lower courts. The rest of the arguments were based around framing the specific statutory interpretation around the context of the entire law. Each side argued their main points taking direct questions from the justices, trying to speak to both direct outcomes of the decision along with hypothetical situations of similar nature poised by the justices. Several justices focused their questioning on the “dire outcomes” that might occur if they were to overturn the ruling in favor of the plaintiffs. Overall, the justices evenly questioned all aspects of the case, from statutory construction, constitutional coercions, and federalist interpretation. It seemed that eight of the nine were evenly split for both plaintiff and government, which will leave the deciding vote to Chief Justice Roberts, who did not ask any questions during the proceeding.

Societal Impact and Interpretation

This case will change the face of healthcare for either good or bad, depending on the personal views of the consumer. This provision was created for one clear purpose, to incentive states to create healthcare exchanges since the federal government could not just command states to do this as noted by the honorable Orin Hatch, senator from Utah.

“The Constitution does not permit the federal government to order states to do things. The federal government and the states are co-equal sovereigns. The federal government cannot command the states to do something any more than one state can command another state to do something. This is called the anti-commandeering principle and is well established in Supreme Court case law.” (Hatch, 2015)

This view of the law has been repeated by multiple lawmakers; that the intent to insure more Americans was to have the states take ownership of the exchanges. The intended tool to do this were subsidies that would benefit state consumers by enabling them to receive millions or billions in advanced tax subsidies, however with the IRS expanding this incentive to all exchanges, it defeated the purpose and subsequently states decided not to take on the expense and burden of establishing an exchange.

“...states wouldn’t have an incentive to create their own exchanges—to expend time and resources setting up an online insurance marketplace—because the subsidies would come either way. Fewer states would create exchanges, meaning the federal government would have to step in and create more exchanges of its own.” (Hatch, 2015)

Due to plain language interpretation, and the fact of how this statutory expansion changed the incentive for state participation, the Senator believes that the Supreme Court can only find for the plaintiffs. The questions he then poses are the same questions the justices asked during oral arguments, how would the dire consequences be dealt with due to the fallout of cutting millions of consumer’s subsidies, many of which would be automatically priced out of the affordability of healthcare insurance.

“We need to help the people who will be hurt by losing their subsidies because of Obamacare’s broken promises. That means providing a

reasonable and responsible transition for those who may lose their subsidies while Congress works to repeal and replace Obamacare once and for all. And that's what we have to do: repeal and replace Obamacare. That's the only permanent solution to this and a host of other problems." (Hatch, 2015)

Although the Senator took a position that this enables the United States to repeal ACA, the policy director at the Hutchins Center on Fiscal and Monetary Policy, Louise Sheine argues that this is not the end of ACA. Rather, she argues that this decision could rectify what the IRS has done, forcing states to create or modify their existing exchanges in order to recover the subsidies their consumers would lose, as it would be both politically volatile and economically disastrous for a state not to attempt recovery.

"...it is likely that if the Supreme Court Rules in favor of King, some states currently operating within the federal exchange would tweak their systems to be classified as a state-run exchange in order to keep their subsidies. States who do lose subsidies may find the loss of funds too painful and decide to set up their own exchange in order to regain their subsidies. Therefore, a ruling in favor of King is not necessarily a death blow to Obamacare." (Louise Sheiner, 2015)

The specific deterrents that Sheine mentions includes an estimated premium increase of thirty-five percent for the those who remain covered, a loss of 29 billion in federal tax subsidies in 2016, and an estimated loss of coverage of 8.2 million consumers, (Louise Sheiner, 2015). This would be a devastating impact to the consumer market. Consumers who have sought care for the first time in years because they were able to obtain coverage will face an immediate loss of that coverage, and on average consumers that fall into this category are those who have poor health or have chronic illness. This could risk the lives and health of the consumers, which during an election year will greatly affect the probability of elected officials' ability to maintain office.

The issue of interpreting the plain language has been politically charged, much like the ACA debate as whole. Has it become the courts job to determine the application of law, and as postulated by Justice Scalia, is it the courts role to fix the botched laws of the legislative branch, or rather determine the rule of law regardless of the political environment. A brief filed by the CATO Institute on behalf of the plaintiffs acknowledges this reality.

"Political necessity required the Act's authors to give states a leading role in operating health-insurance Exchanges. In so doing, the Act's authors expressly conditioned premium-assistance tax credits on states establishing Exchanges and performing other tasks." (Cannon & Adler, 2014)

During the debates about the creation of ACA, it was feared by many lawmakers that the exchanges would lead the country to single payer system, much like the way Medicare has been established. It was a primary reason for the states to take such a large role in the creating and maintaining the exchanges and why congress wrote 26 U.S.C § 36B in such a way as to define and incentivize this initiative.

However, even finding for the plaintiffs as what the clear outcome of this case should be, there will be many ripple effects affecting consumers, in addition to other portions of ACA including the employer and individual mandates. These ripple effects are things that lawmakers should have taken into account from the beginning, however as noted by the Supreme Justices, ACA was not afforded the due

diligence that most major pieces of legislation its size are. Thusly many imperfections and fixes need to be addressed in the long term. These effects and outcomes were analyzed by the American Enterprise Institute, in which they not only acknowledge the immediate fix, but also recognize the opportunity for improvement.

“...there will be costs and benefits that differ among various parties in the event of a Supreme Court decision against the IRS rule and current federal exchange tax subsidies. Members of Congress and state officials must not simply default into restoring the current law’s many costs and regulatory burdens. Instead, they need to prepare now to take advantage of the opportunities that will be available to them to improve our health sector and the choices of coverage available to consumers if the Supreme Court rules against subsidies on federal exchanges.” (Miller & Turner, 2015)

In the end, whether the IRS rule is vacated or affirmed, there are still many contentious aspects and issues facing healthcare and the ACA. This landmark decision has the power to ensure that the executive branch is not overstepping its authority by creating and codifying laws, which by nature falls to the legislative branch. Additionally, it sheds light on how destructive and ambiguous law can be when decided and argued by a partisan congress as noted by the Supreme Court. In context with the rest of ACA, and in applying the first step of chevron deference on plain language, this case should be decided in favor of the plaintiffs, as the district court in Oklahoma found. By removing the blinders of the political spectrum and by only focusing on the law as written and codified, there can be no other way the statutory interpretation can be read.

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