

Did Ben Nelson Doom Obamacare?

The ‘Cornhusker kickback’ comes back to haunt PPACA.

By David Catron – 8.4.14

During the [oral arguments](#) that preceded the recent appeals court ruling against the Obama administration in *Halbig v. Burwell*, an under-reported yet crucial discussion took place between two of the judges and counsel for the plaintiffs. Judge Harry T. Edwards pronounced himself confused as to why Congress would have concerned itself with what entity ultimately set up Obamacare’s insurance exchanges. Judge A. Raymond Randolph and attorney Michael A. Carvin did their best to enlighten the befuddled jurist:

JUDGE EDWARDS: I’m trying to understand ... who cares who sets up the exchange?

JUDGE RANDOLPH: Ben Nelson ...

MR. CARVIN: The enactors of the law ...

JUDGE RANDOLPH: Ben Nelson cared.

JUDGE EDWARDS: Who cares?

JUDGE RANDOLPH: Ben Nelson.

MR. CARVIN: They couldn’t get to 60... Ben Nelson said we are not going to have a Federally run exchange, we are going to implement basic principles of federalism and the states are going to run those exchanges or I don’t vote for it and it doesn’t get passed.

Is this the first time you’ve read about Nelson’s misgivings? Well, it would appear that you’re not alone. Many alleged reporters who claim to have thoroughly covered the Obamacare debate from the Pleistocene era until the present are also ignorant of the role he played in determining the destiny of the exchanges. Indeed, some these “journalists” have advised their readers that there couldn’t have been any serious discussion in Congress about differing rules for state and federal exchanges because no one told *them* about it.

Ezra Klein is, as usual, the poster child for journalistic [cluelessness](#): “Congress... didn’t tell anybody or ever debate it, no journalists or health wonks found out about it during the legislative process.” But Klein is by no means the only purveyor of this solipsistic balderdash. Jonathan Cohn [advises](#) his *New Republic* readers, “Like other journalists who were following the process closely, I never heard any of them suggest subsidies would not be available in states where officials decided not to operate their own marketplaces.”

This is an odd statement indeed considering that high-profile publications were reporting a lively debate over this very issue. And Ben Nelson’s name was frequently mentioned. In January of 2010, for example, *Politico* [reported](#) that he regarded federal control of Obamacare’s exchanges

as “a dealbreaker.” Nelson said that too much federal involvement would inevitably lead to government-run health care: “I wouldn’t support something that would start us down the road of federal regulation of insurance and a single-payer plan.”

He reiterated his objection to federal exchanges in [this 2010 video](#), wherein Greta Van Susteran presses him to provide a legitimate motive for ultimately voting in favor of health care “reform.” Nelson vehemently insists that no one bought his vote: “I had requirements... no government-run plan, no federal exchange... and adequate language to deal with abortion. Those were requirements, but no one was buying any vote.” Nelson clearly implies that these conditions had been met and this is why he flip-flopped and voted for the bill.

But we don’t have to take Nelson’s word. Ironically, it was confirmed by none other than Jonathan Cohn. In a 2010 NPR interview, during which he was asked about the ability of states to opt out of the exchanges, he responded [thus](#): “I believe that was part of the Ben Nelson compromise.” This obviously puts the lie to Cohn’s claim that there was never any serious concern about federally run exchanges. It also provides a plausible explanation for the law’s stipulation that subsidies can only flow through those established by states.

How does all this doom PPACA? To understand that, one must imagine the consequences of a Supreme Court ruling against the Obama administration in *Halbig, King* or one of the other lawsuits challenging the constitutionality of the IRS decision to treat federal exchanges like those created by the states. Most of the stories about *Halbig* in the “news” media have focused solely on the exchanges as conduits for tax credits and subsidies. However, the exchanges are far more than mere redistribution centers for taxpayer pelf.

As Michael Cannon and Jonathan Adler [point out](#) in “Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA,” the Obamacare exchanges play a key role in enforcement: “Exchanges... report to the IRS on whether individuals and employers are complying with the individual and employer mandates.” In other words, they facilitate the penalties and fines that result from noncompliance. Cannon and Adler also point out that “Exchanges play an important role in PPACA’s regulatory scheme.”

Cannon [writes](#) in *Forbes* that a Supreme Court ruling in favor of the *Halbig* plaintiffs would free 8 million people from the individual mandate. He goes on to say, “In the 36 states with federal Exchanges, a *Halbig* victory would free... all employers with more than 50 workers from the employer-mandate penalties to which the Obama administration is unlawfully subjecting them.” The numbers are staggering: “Census Bureau data indicate that in all, more than 250,000 firms and 57 million workers could be freed from those unlawful taxes.”

Meanwhile, in the 14 states whose politicians set up exchanges, people and businesses would be stuck with the individual and employer mandates. These states tend to be blue states that employers already regard as unattractive and where workers are overtaxed. They are already losing jobs and population to the very states that refused to set up exchanges, which suggests that

there would soon be political pressure on their governors and legislatures to kill the state exchanges. After that, Obamacare's days are numbered.

So, did Ben Nelson cause all of this? It's difficult to say definitively because the creation of the monstrosity known as Obamacare involved so many secret deals behind closed doors. But the circumstantial evidence suggests that the infamous "Cornhusker kickback" with which Nelson's vote was finally purchased included concessions that are now coming back to haunt PPACA. If Obamacare meets its demise as a result of the political skullduggery the Democrats used to get the thing passed, it would be a sublime manifestation of poetic justice.

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