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Obamacare Filing Breaks All Kinds of Justice Department Norms

By Shira Stein

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A two-sentence letter the Trump administration sent to a federal judge saying Obamacare is unconstitutional is a breach of several departmental and legal norms, former Justice Department attorneys and legal scholars say.

The position change, in a two-sentence memo, came months after a federal judge in Texas ruled the law was unconstitutional in *Texas v. United States*. The judge reasoned in December that the entire law was invalid because Congress dropped its penalty for failing to have health insurance to zero.

The March 25 DOJ letter agreeing with that logic is a sizable lapse in the norms that usually govern the agency, several former DOJ attorneys said. The letter ignored a standard in defending the constitutionality of a U.S. statute that the agency's career staff sees as essential to the department's mission. The letter also was missing the signatures of typical career staff on such documents and was sent instead of filing a brief in the case—an unusual move.

If the Affordable Care Act is ultimately is held unconstitutional, more than 10 million people would lose health coverage they obtained through the Obamacare exchanges. Protections for pre-existing conditions would disappear, offices that test new ways of paying for Medicare and Medicaid would be shuttered, and about 13 million people who have been added to Medicaid would be dropped from the program.

Eleanor Tyler, a Bloomberg Law analyst, said conversations about constitutionality generally take place between Congress and the public. The DOJ filing shifts that conversation to the courts and could be an "escalation in the war between the executive branch and Congress," she said.

"This looks a lot to me like a breakdown of our norms for division of powers," Tyler said. That "puts us in a position of never really knowing what the law is."

The only external change to the Justice Department since its last filing in the case is a new attorney general, William Barr. Barr encouraged the Supreme Court to strike down the individual mandate and, with it, the entire law in 2012.

Defending Constitutionality

The Justice Department has a set of internal norms creating a strong presumption that it will defend a law on the U.S. books when its constitutionality is challenged.

The only exceptions to that presumption are when there is no reasonable argument left for the constitutionality of that statute or when Congress passes a law that hinges on executive power. Neither of those applies in this case, the former DOJ attorneys said.

A presumption that DOJ will defend the constitutionality of a law prevents the executive branch from choosing which laws should be kept in place and which should be gotten rid of, Nicholas Bagley, a health-care legal scholar and former appellate attorney in the DOJ Civil Division, said in an interview.

This presumption that the DOJ will defend U.S. laws "goes to the heart of what it is the Justice Department stands for," Bagley, now a law professor at the University of Michigan, said. "For the Justice Department to so cavalierly toss the commitment aside is disturbing."

Notifying Congress

Another federal law requires the DOJ to submit a report to Congress if the attorney general decides not to defend the constitutionality of a law. The report needs to be delivered "in enough time to reasonably enable the House or Senate to intervene," the statute says.

Republicans in both the Senate and House said they weren't given advance notice about the memo being released.

It could be argued that the DOJ has already provided notification to Congress of its intent to not defend the constitutionality of the ACA with its letter last summer, several former DOJ attorneys said. That letter, penned by then-Attorney General Jeff Sessions, said the government would only argue that parts of Obamacare needed to fall, not the entire law.

That appears to no longer be the Justice Department's position. Logic would dictate that the agency should send a new letter, if only to correct the record, one of those attorneys said.

The House has already intervened in the case, so that could be part of the department's justification for not sending another letter.

Other Oddities

This letter was also filed the same day that the government was supposed to file a brief as a party that appealed the lower court's decision. It would have made more sense to send the letter in advance because now appellants can't revise their briefs to reflect the dramatic change in the government's position, the same former attorney said.

Lawyers will often seek the court's permission to file a different brief out of deference to the courts and an abundance of caution. But the government didn't seek permission and simply stated its new plan.

The timing of the letter is odd because the department is changing its position so dramatically in the middle of litigation, Katie Keith, a health-care policy research professor at Georgetown University, said in an interview.

Gregory Brower, a former DOJ and FBI attorney, said it's strange for the Justice Department to file a letter in a court docket to explain its position. Typically, parties would make this kind of change through a notice of non-opposition or a supplemental brief, he said in an interview. He's now with the law firm Brownstein, Hyatt, Farber, Schreck LLP.

Having this information filed to the court as a letter makes it more of a political document than a legal one, he added.

Among the career attorneys who might typically sign a filing like this are the director of the DOJ Civil Division's Appellate Staff, a deputy director, and any line attorneys who are working on the case. Only one career line attorney signed this filing.

It's also unusual to have the letter be addressed to the court clerk—who has no decision-making ability—instead of the judge, Brower said.

Implications

It's unclear if the DOJ is agreeing with the Texas judge's opinion and justification in this case, or if it is just agreeing with the outcome, Keith said.

This filing could have legal consequences for other Obamacare cases, Keith said. The administration could choose to stop defending the law against challenges in other lawsuits.

There's also a question of enforcement of the law. After the court's decision to strike down the ACA in December, the administration made it a point to reassure the public that it would enforce the law.

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