

Subpoena on Trump Obamacare Stance a Dilemma for Democrats

By Shira Stein

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- HHS is already giving lawmakers documents
- Fight seen as political no matter what

An anticipated congressional subpoena for documents related to the White House and Justice Department's decision not to defend the constitutionality of the Affordable Care Act is setting up a legal battle over executive privilege.

House Democrats are likely to start issuing subpoenas to the White House and Justice Department after May 27, the deadline five committee chairmen gave for responding to their requests for voluntary turnover of documents and testimony. The administration could balk, as it has in the past, citing its right to keep confidential its officials' private deliberations.

A prolonged fight over executive privilege would delay the ability of House lawmakers to obtain information and could call into question the point of issuing subpoenas in a case that many see as political no matter what the documents show.

At issue is the administration's two-sentence memo in March to the U.S. Court of Appeals for the Fifth Circuit saying a federal judge's decision that the ACA is unconstitutional should be upheld. That's unusual because the government is generally tasked with defending its own laws. The Fifth Circuit has scheduled oral arguments in the expedited appeal of the case, *Texas v. United States*, for July.

The chairmen of the House Committees on Oversight and Government Reform, Energy and Commerce, Ways and Means, Education and Labor, and Judiciary sent letters to the Department of Health and Human Services, Justice Department, and White House April 8 asking them to produce documents, communications, and testimony related to the administration's decision.

According to follow-up letters May 13, the White House hasn't acknowledged receiving the request and the Justice Department has yet to comply with the requests.

Lawmakers can't necessarily wait at length to see if the White House will turn over these documents, so they have to issue subpoenas quickly, Molly Clafin, a former oversight counsel on the Senate Judiciary Committee, said in an interview. This leaves Congress in a difficult position because subpoena fights can take months or years.

These standoffs happen no matter which party is in power in the White House. The Obama administration consistently ignored congressional subpoenas about the ACA, Michael Cannon, director of health policy studies at the libertarian Cato Institute, said in an interview.

To Subpoena or Not?

Congress isn't going to get the documents they're asking for unless they turn to their only option left—a subpoena, Claflin said.

Subpoenas aren't used often or lightly, so congressional staffers are likely weighing that, she added. She's now the chief oversight counsel at American Oversight, a nonprofit ethics watchdog based in Washington.

Another factor that could make it more difficult to get these documents is that the House is a party to the Texas lawsuit, a former congressional oversight staffer said on condition of anonymity.

The administration will likely argue the document requests from the House committees are additional discovery outside the normal legal process, the staffer said.

It's standard for the Justice Department not to disclose discussions and documents exchanged prior to the final decision under executive privilege, especially as that information gets closer to the president, said William Moschella, a principal associate deputy attorney general in the George W. Bush administration, in an interview. He's now an attorney with Brownstein Hyatt Farber Schreck.

HHS Is Complying

In contrast with the White House and the DOJ, the HHS has started to produce documents in response to the committees' April request, a senior Democratic aide on the House Oversight Committee told Bloomberg Law.

Depending on what documents it hands over, the HHS could complicate things for the Justice Department and White House, Andrew Wright, a former associate counsel to President Barack Obama, said in an interview.

The HHS could inadvertently waive privileges that the DOJ is trying to hold, and it could help shape the political environment in a way that makes things more difficult for the White House and the DOJ, said Wright, a partner at K&L Gates in Washington.

Political Points

Even if they set off a protracted legal fight that leads nowhere, Democrats could score a political win with voters by issuing a subpoena. They would notch points simply by keeping health care in front of the public, Thomas Miller, a fellow at the conservative American Enterprise Institute, said in an interview.

In addition, Cannon said, "Democrats are trying to build a narrative that the Trump administration is not being transparent and has something to hide."

And if documents are eventually forthcoming, House Democrats could learn to what degree politics intersected with policy in the White House's decision to tell a court Obamacare is unconstitutional.

"If there was very little evidence that a thoughtful legal analysis and policy strategy went into it, that would continue to expose Republicans to a vulnerability on health care," David Kendall, a senior fellow for health policy at the centrist think tank Third Way, said in an interview.

The documents could help Democrats and the public learn how much the White House is putting its thumb on the scale when it comes to policy and legal matters. If this was a political decision, it would be another example of the Justice Department acting as an arm of the Trump White House instead of as a separate entity, Claflin said.

Or the information could yield no revelations that weren't already in plain sight. Knowing more about the Trump administration's internal deliberations on this case won't yield a lot of policy insight, predicted Christopher Holt, director of health care policy at the center-right think tank American Action Forum, in an interview.

That's because the administration's decision is in line with its policy agenda to strike down the ACA, he said.

Moschella, the former DOJ official, said the government doesn't take a position like that in a high-profile legal case without clearing it at a high level. That means President Donald Trump or people close to him likely were involved.

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