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5 on 45: The Trump administration's new challenge to the Affordable Care Act

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PITA: You're listening to 5 on 45 from the Brookings Podcast Network, analysis and commentary from Brookings experts on today's news regarding the Trump administration.

YOUNG: Hi. I'm Christen Linke Young, a Fellow with the USC-Brookings Schaeffer Initiative on Health Policy.

Much of my research focuses on the Affordable Care Act – a law that just cannot manage to stay out of court.

You may have heard that on the evening of Monday, March 25, there were shocking new developments in a lawsuit about the constitutionality of the Affordable Care Act. And at first you may have thought to yourself, "Why is my phone showing me news from 2012?" But it's still 2019 and this week's news is about the Trump Department of Justice rather unexpectedly changing their position in the latest lawsuit challenging the ACA.

So, let me take you through a little bit of the history and what to make of this week's developments.

As you probably know, the first major legal challenge to the ACA was a claim that law's individual mandate exceeded the authority that Congress has under the Constitution. The Supreme Court concluded in 2012 that the individual mandate could *not* be justified under Congress's authority to regulate the economy, but it *could* be justified under Congress's authority to tax.

But being constitutional did not make the individual mandate any more popular. And in 2017, after multiple failed attempts to repeal the ACA, Congress did succeed in making one specific change: it reduced the individual mandate penalty to zero dollars. So, the mandate technically remains in the text of the law, but violating it adds nothing to an individual's tax burden.

Meanwhile, opponents of the ACA remained hard at work on the project of thinking up legal challenges to the law – and the 2017 change gave them a new tack. A

lawsuit brought by several Republican Attorneys General makes the case: If the individual mandate is only constitutional as a tax, and it is now “worth” no money, is it really a tax anymore? And if not a tax, that means it is unconstitutional! Of course, striking down a zero dollar tax doesn’t really change much in the world. But the Republican AGs continue their claim: if the individual mandate is unconstitutional as not-a-tax, the entire rest of the ACA should be struck down as well.

This last step – that the entire rest of the law should be struck down – is the crux of this litigation. In legal terms, the question is whether the individual mandate is “severable” from the rest of the law. Importantly, severability is *not* a constitutional issue; severability is about what Congress would have wanted if it knew part of the law would be struck down. So the Republican AGs are arguing that despite *Congress* having reduced the tax penalty to zero, *Congress* believes that the individual mandate is so important to the rest of the ACA that the entire law should be invalidated if the zero dollar penalty cannot stand.

If that doesn’t make sense to you, it’s because... it just doesn’t make sense. Legal scholars from across the political spectrum – including some of the architects of prior legal challenges to the ACA – have agreed that this is not well reasoned and should not prevail.

Confronted with state AGs arguing this rather strange position, the Trump DOJ initially took a different view: they argued that most of the ACA should be left alone, but the law’s protections for people with pre-existing conditions should be struck down.

The case was briefed and argued in 2018. In December, a District Court agreed with the Republican AGs and wrote a sweeping opinion declaring the entire ACA invalid. It’s worth spending just a moment on the consequences of this initial ruling. If upheld on appeal, it would eliminate the ACA’s protections for people with pre-existing conditions. The financial assistance for families purchasing coverage and the ACA’s funding for Medicaid expansion would vanish. Consumer protections for employer-based coverage would be eliminated. Less well-known policies affecting Medicare and the Indian Health Service and the FDA would disappear. The Congressional Budget Office has estimated

that repeal of the ACA would result in as many as 24 million additional uninsured Americans, and similar results could be expected here.

Needless to say, this decision was promptly appealed.

Which brings us to this week's developments. On Monday evening, DOJ filed a short memo with the appeals court. They unexpectedly announced that they were reversing their prior position, and they now agreed with the Republican AGs and the lower court that the *entire* ACA should be struck down.

It is not entirely unprecedented for DOJ to tweak their position and litigation strategy as a case develops – but the magnitude of the pivot and the striking legal weakness of the argument the Trump DOJ has now embraced caught most observers by surprise. Just a few months ago, DOJ was explaining to Congress and arguing in Court that they thought most of the ACA was severable from the individual mandate, and now they've tossed that analysis out the window. And it's hard to find a serious legal scholar of any ideological persuasion who thinks this new position is anything but laughable. Indeed, I testified before Congress about this lawsuit last month, and even the witnesses called by the Republicans would not defend the lower court position, which the Trump DOJ has taken as its own.

This abrupt shift looks like a brazenly political move by the Department of Justice, totally divorced from any principled legal analysis about the issues in question. It looks like an attempt to use the courts to do what Congress refused to do throughout its last session: repeal the ACA. And, indeed, Tuesday evening news broke news that the move was dictated by the White House over the objections of policy and legal experts in the administration. So, while it's not news that the Trump Administration wants to do away with the ACA, the obviously political nature of this action was still shocking and a hit to the credibility of DOJ.

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