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Health Policy by Litigation

Katie Keith and Joel McElvain

Since its enactment, the Affordable Care Act (ACA) has faced numerous legal challenges. Many of these lawsuits have focused on the implementation of the law and the limits of executive power. Opponents challenged the ACA under the Obama Administration while supporters have turned to the courts to prevent the Trump Administration from undermining the law. In the meantime, Congress has remained gridlocked over the ACA and many other critical health policy issues, leaving the Executive Branch to adopt its preferred policy approach. Without active participation from Congress, litigation has become the only remaining vehicle to challenge the Executive's actions. The intensely political nature of health policy disputes, combined with Congress's seeming inability to act in recent years, has left the courts as the de facto policymakers on many critical issues. This article briefly discusses the history of litigation over the ACA and some reasons why this litigation has been so enduring. The article then identifies other areas of health policy that are or could be future targets for litigation. Finally, the article comments on the potential impact of the courts on future health reform efforts.

A Brief History of ACA Litigation

Legal challenges to the ACA have been both swift and enduring. Republican attorneys general challenged the law's constitutionality mere minutes after the ACA was signed into law, leading to the first of what would be many more ACA-related lawsuits to ultimately reach the Supreme Court.[1] As of this writing, the

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Supreme Court has grappled with the ACA on seven separate occasions.

Supreme Court Decisions. In *National Federation of Independent Business v. Sebelius* (*NFIB*), the Court held that the ACA's provision requiring individuals to maintain health coverage or to pay a tax penalty (26 U.S.C. § 5000A, the so-called individual mandate) was constitutional, but that states could not be compelled to accept the Act's expansion of the Medicaid program.[2] In *King v. Burwell*, the Court interpreted the ACA to allow subsidies for the purchase of health insurance to be made available for residents in all states (regardless of whether the state established their own health insurance exchange or deferred to the federal government to do so).[3] And in *Burwell v. Hobby Lobby* and later *Zubik v. Burwell*, the Court considered the application of the ACA's contraceptive mandate to employers that object to this type of coverage for religious reasons.[4]

The Supreme Court continues to be confronted with major questions of policy under the ACA. In its 2019 term, the Supreme Court 1) held that insurers are owed more than $12 billion in outstanding risk corridor payments and 2) ruled that the government has the authority to adopt broad religious and moral exemptions to the ACA's contraceptive coverage requirement.[5]

And yet another lawsuit — one that threatens the entire ACA — will be heard by the Supreme Court sometime during its coming term beginning in October 2020. This lawsuit, now known as *California v. Texas*, is an attempt led by the Texas attorney general, joined by 17 other Republican attorneys general and governors and two individuals, to revisit the Court's holding in *NFIB* after Congress zeroed out Section 5000A's tax penalty in the Tax Cuts and Jobs Act of 2017.[6] The plaintiffs' theory is that, because Section 5000A no longer raises revenue, it can no longer be construed as a tax, as it had been in *NFIB*, and cannot be upheld under Congress' authority to regulate interstate commerce. The plaintiffs then go one step further, arguing that the provision, even in its now-toothless form, is so essential to the ACA that the entire law must fall alongside it.

A coalition of Democratic attorneys general, led by California, and later joined by the U.S. House of Representatives, intervened in the lawsuit to defend the ACA. They argue that the plaintiffs do not have standing to sue and that Section 5000A remains constitutional or at least fully severable from the rest of the law. The Trump Administration declined to defend the constitutionality of Section 5000A, and it contended that major ACA consumer protections, including provisions that protect people with preexisting medical conditions, should also be struck down as inseverable from that provision.[7] The Trump Administration later changed its position to join the plaintiffs in asking that most of the ACA be invalidated.[8]

A district court agreed with the plaintiffs, finding Section 5000A to be unconstitutional and the rest of the ACA to be inseverable (and thus invalid).[9] The Fifth Circuit Court of Appeals affirmed in part in a 2-1 decision, holding that the plaintiffs had standing to sue and that the penalty-less Section 5000A was now unconstitutional.[10] But the Fifth Circuit remanded the question of severability back to the district court for further analysis.[11] The Fifth Circuit, acting on its own, considered whether to rehear the appeal before the full court, but determined not to do so in a narrow 8-6 vote.[12] The 21 Democratic attorneys general and the U.S. House of Representatives appealed this decision to the Supreme Court, which agreed to hear the challenge during its next term with a decision expected in 2021.

That the ACA faces yet another existential legal threat more than 10 years after its enactment underscores the enduring nature of ACA litigation. It also shows the strategic use of the courts by opponents of the law who, after failing to repeal more of the ACA in Congress throughout 2017, turned to the courts for judicial repeal.

Other ACA-Related Challenges. In the 10 years since its enactment, the ACA has faced — and, so far, largely survived — numerous legal challenges. But the law has not emerged unscathed.[13] Millions of people remain without expanded Medicaid coverage as a result of *NFIB*, and legal challenges have often brought uncertainty for patients, health insurers, and state and federal policymakers.

Beyond the law's constitutionality, legal challenges were brought over the Obama Administration's efforts to implement the ACA. This includes challenges to regulations on the contraceptive mandate, nondiscrimination protections, limits on out-of-network payments for emergency services, the risk adjustment program, and the health insurance tax.[14] These challenges had mixed success. Some Obama Administration policies, such as those involving emergency services and the risk adjustment program, were upheld as courts accorded deference to the Administration's interpretations of the statute. In other cases, such as challenges over nondiscrimination protections and the health insurance tax, the Administration's rules were set aside or struck down. Many of the successful challenges to ACA regulations were heard before a single judge sitting in the federal district court in the Northern District of Texas. Lawsuits were also filed

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over some of the Obama Administration's enforcement positions, such as the decision to delay enforcement of the employer mandate and the decision not to enforce certain ACA market reforms against "transitional" (also known as "grandmothered") plans.[15] These challenges failed.

Following the 2016 election, supporters of the ACA began using litigation to challenge Trump-era interpretations of the statute and other efforts to undermine the law and its protections for millions of Americans. Democratic attorneys general, often led by California, and patient advocacy organizations have filed lawsuits challenging a wide array of Trump Administration policies. This includes regulations to expand access to plans that do not have to comply with any or most of the ACA's major protections (such as short-term plans and association health plans) and the Administration's decision to end cost-sharing reduction payments to insurers.[16] An additional lawsuit challenges multiple Trump-era policies by arguing that the Administration, through its "death-by-a-thousand-cuts campaign," has failed to ensure that federal law has been "faithfully executed," as required under the Constitution.[17] Future challenges are likely if the Trump Administration approves waivers of the ACA's health insurance exchange provisions to allow a state to dramatically reshape its private health insurance market.[18]

Why So Much Litigation?

Some litigation would be expected — whether over the statute's constitutionality or over the way in which it is implemented — for any federal law as far-reaching and significant as the ACA. This is especially the case for a law as politically charged and controversial as the ACA. Even so, the sheer volume, and the continuing pace, of litigation — under both the Obama and Trump Administrations — raises fundamental questions about Congress' policymaking role and the limits of executive branch authority.

One explanation for the explosion of ACA-related litigation may rest on Congress's seeming inability to fulfill its traditional policymaking role — at least when it comes to critical issues of health law and policy — which thereby emboldens the Executive Branch.[19] Although Congress has taken legislative action on numerous occasion to modify some of the ACA's provisions, it remains at a standstill in addressing the two political parties' starkly competing visions of the appropriate scope of health coverage. With progress stymied in Congress, the White House is emboldened to adopt its preferred policy approach through administrative actions — and, in some cases, stretch the limits of its executive authority in doing so.

As the White House flexes its authority, the courts have become the main, if not the only, recourse to challenge Administration policies. This cycle has played out under both the Obama and Trump Administrations whose policies have been challenged by state attorneys general, regulated entities (such as insurers), and advocacy organizations. Simply put, litigation has become a primary avenue for interested parties to promote their health policy preferences.

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Health Policy Litigation: Beyond the ACA's Individual Market Reforms

This cycle — administrative action followed by legal challenges in federal court — seems to hold true in other areas of health policy as well. This section draws primarily from examples of the Trump Administration's health policy priorities, many (although not all) of which have been stymied in court.

A reworking of the Medicaid program, including but not limited to the Medicaid expansion's promise of health coverage to all residents with incomes up to 133% of the federal poverty level, has been a key Trump Administration health policy priority. The federal gov-

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ernment has issued guidance to states or approved waiver requests for new work requirements, eligibility and enrollment restrictions, and block grants, among other changes. Although these Medicaid initiatives appear to be intended, at least in part, as the Trump Administration's response to the ACA's expansion of Medicaid eligibility, in many instances the Administration has proposed fundamental alterations to the operation of the Medicaid program even for the traditional, pre-2014, Medicaid populations.

Several states have accepted the Trump Administration's invitation to use Medicaid waivers to impose work requirements, or community engagement obligations, on their Medicaid beneficiaries. Some of these waivers apply only to the ACA's Medicaid expansion population while others apply to the traditional Medicaid populations and in states that have not yet expanded their Medicaid program. Following lawsuits brought by Medicaid beneficiaries and consumer advocates, a federal district court invalidated the work requirement provisions that had been put in place by Kentucky, Arkansas, and New Hampshire.[20] The Court of Appeals for the District of Columbia Circuit, in a unanimous decision, upheld the district court's decision on these requirements in Arkansas.[21] The Trump Administration and Arkansas have sought review of this decision by the Supreme Court, which would have the discretion to accept the case or allow the court of appeals' decision to stand.

These roadblocks notwithstanding, the Trump Administration has since gone further, recently issuing guidance that purports to authorize states to seek to convert their Medicaid programs into block grant systems.[22] Tennessee and Oklahoma recently submitted applications for waivers that would transition parts of their Medicaid programs into a block grant.[23] If either of these waivers is approved, litigation would be a near certainty, given that the Medicaid Act's formula for payments for health services has long been thought not to be waivable.

Trump Administration officials have also focused heavily on health care price transparency, leading to challenges from regulated entities such as drug manufacturers and hospitals. Federal agencies have issued regulations to require prescription drug manufacturers to disclose list prices in their advertisements and to require hospitals and insurers to disclose their negotiated rates. The DC Circuit held that the Administration acted beyond its statutory powers in issuing the drug price advertisement rule, and an appeal of that decision is pending.[24] A separate challenge to the hospital price transparency rule has been less successful so far: a federal district court upheld the rule. An appeal from the decision is now pending before the DC Circuit.[25] The insurer price transparency rule remains in proposed form, but if it is finalized in its current form, a legal challenge to that rule is also likely. The Administration also recently completed a final rule on "interoperability," or data sharing procedures among health care entities; this rule could be the subject of litigation.

Still other Trump Administration health policy priorities are more ideological in nature. The Department of Health and Human Services issued a regulation to dramatically expand and consolidate its enforcement authority over 25 federal health care conscience laws, leading critics to argue that the rule elevates protections for health care workers who refuse to provide health services for religious or moral reasons.[26] This rule was quickly challenged by Democratic attorneys general and advocacy organizations, and three district courts issued preliminary injunctions to prevent the rule from going into effect.[27] The Trump Administration has appealed those decisions. The same outcome is expected with a new regulation to revise an interpretation of Section 1557 of the ACA, the law's chief nondiscrimination provision.[28] That rule has been challenged in at least five separate lawsuits as of this writing.[29]

It is worth noting that the challengers' legal wins at the district court level may be short-lived. In one of a series of health-linked immigration policies, the Department of Homeland Security finalized a highly anticipated "public charge" rule that, among other things, declared that an alien individual who would obtain public benefits could be deemed to be a "public charge" and thus inadmissible to the United States.[30] Five federal district courts issued preliminary injunctions — three of which applied nationwide — to prevent the rule from going into effect.[31] The Trump Administration appealed these rulings, resulting in a circuit split with only one appellate court upholding a nationwide preliminary injunction. The Trump Administration then asked the Supreme Court to stay that injunction, a request that the Court obliged in a 5-4 decision, allowing the public charge rule to take effect at least for the time being.[32] More recently, a federal district court enjoined the public charge rule in light of the COVID-19 crisis.[33]

A similar story played out over Trump-era rules to bar Title X funding from clinics that offer abortion services (among other changes). A number of district courts issued nationwide injunctions that were later stayed by appellate courts, thereby allowing the policy to go into effect while the litigation proceeded.[34]

With so many legal decisions still on the horizon (and new lawsuits being filed on a seemingly endless basis), courts will continue to play a key role in shap-

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ing the Trump Administration's health policy agenda and the future of the health care system. This is likely to remain true, regardless of the Administration in charge, unless Congress regains its institutional capacity to step in and more actively resolve pressing health policy issues.

The Prospect of Litigation Should Inform Next Steps in Health Reform

Questions of health policy remain hot-button issues in American politics, and will continue to be a source of controversy, no matter the outcome of the 2020 elections. If candidates with a health policy reform agenda gain control of the White House, Congress, or both, reformers are likely to pursue initiatives to expand coverage and promote affordability. But litigation will certainly pose a threat to these reform efforts.

Opponents of Medicare for All could be expected to argue that such a statute, if enacted into law, would violate federalism principles of the Tenth Amendment, or the Fifth Amendment's protection against takings of property without adequate compensation. Similar claims may be expected even if Congress were to take the less dramatic step of enacting a "public option" to compete side-by-side with private insurance offerings. These sorts of claims may now seem to have little support in the case law, but much the same could have been said with regard to the constitutional challenges to the ACA before that statute was enacted into law.

Similarly, although surprise billing legislation is now working its way through Congress, some advocates have already begun pressing the argument that any such legislation would be an unconstitutional taking of property or would violate the First Amendment's guarantee of the freedom of association.[35] A similar challenge was brought against surprise billing protections in California, although that lawsuit was ultimately dismissed.[36] These arguments, again, seem to offer more creativity than genuine legal merit, but health reformers would ignore them at their peril.[37]

In an acknowledgment of the new environment in which litigation seems to be inevitable, a proactive Congress could, for example, insulate its statutes from constitutional attacks by regularly using severability clauses in any new health legislation, express congressional intent in legislative findings, or explicitly constrain Administration discretion in implementing federal law. Congress did the latter in a recent budget bill by directing the Trump Administration to ensure the continuation of "silver loading" (that is, a practice by health insurers of accounting for the costs of the Administration's termination of the ACA's cost-sharing payment directly on to the exchange's "silver" plans, in an effort to replace the foregone cost-sharing payments with the ACA's tax credits) and to provide for automatic re-enrollment in exchange plans for plan year 2021.[38] Each of these ACA policies had been targeted by the Trump Administration, but Congress blocked this effort for 2021.[39]

Even in the absence of wide-sweeping federal legislation, we can expect the next Administration's regulatory efforts to be the subject of litigation. Democratic presidential candidates have pledged to reverse the current Administration's policies with regard to short-term plans, association health plans, and Medicaid coverage, among other items. These changes would likely be challenged by state attorneys general, industry, and perhaps individuals opposed to such changes.[40]

One lesson of the current Administration's efforts in court appears to be that federal regulators act at their own peril if they proceed too quickly to implement their policy visions. Time and again, the Trump Administration has seen its regulatory efforts fail after choosing to forgo notice and comment periods before issuing a rule, or because it failed to carefully address competing policy considerations before adopting a new rule. The Institute for Policy Integrity, which tracks the outcome of litigation over administration policies, found that, of the major cases that it tracks, the Trump Administration has lost more than 90 percent of challenges to its policies under the Administrative Procedure Act.[41] The next Administration would be well advised to take the time to implement its policies in a way that is best suited to withstand the litigation challenges that will inevitably follow.

A new Administration will also need to grapple with the Trump Administration's legacy of reshaping the Judicial Branch. President Trump and the Senate have confirmed a record number of federal judges.[42] These appointments — particularly to courts of appeals — have undoubtedly strengthened the conservative make-up of the Judicial Branch. Although this is not necessarily an indication of how these judges will rule in any particular case, new (and old) health policy-related challenges will inevitably land in the courtrooms of these newly appointed judges.

One thing seems certain: the federal courts will continue to shape health policy regardless of who resides in the White House in 2021. Congress could do more to ward off judicial policymaking by enacting new substantive health care laws that address the ambiguities in prior legislation that had left gaps for the Executive and Judicial Branches to fill. But the experience of the past decade has shown that, at least since the enactment of the ACA itself, it has been difficult for Congress to act decisively with respect to major issues of health policy. Whether Congress's seeming paralysis

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is a result of the now-routine use of the filibuster rule in the Senate, the intense partisan divide on health policy issues, legislators' reluctance to risk electoral defeat over these politically charged issues, or some combination of all of these factors, the end result is that legislative action has left a gap for the Executive Branch and the courts to fill. The result has been an explosion of health policy-related litigation over the past decade, and this history suggests that legal challenges to health policy initiatives should continue to be expected, no matter which form these initiatives might take.

Note

Mr. McElvain reports income as salary from King & Spalding LLP, outside the submitted work

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