



President Trump's Executive Order on An America-First Healthcare Plan

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Josh Blackman

In August, President Trump teased a future executive order concerning pre-existing conditions. (See [here](#) and [here](#)). At the time, I predicted that Trump was trying to aid the Supreme Court's deliberations in *Texas v. California*. I [wrote](#):

Ilya Shapiro and I filed the Cato Institute's [amicus brief](#) in *California v. Texas*. We proposed that the Trump administration could require, by executive action, insurers on the ACA exchange to comply with guaranteed issue and community rating. But why would such an executive action be needed if the ACA is in place? Well, the ACA is currently being challenged. And perhaps one factor that could aid the Court's deliberations would be an assurance that people with pre-existing protections could still obtain coverage on the exchanges, even if *guaranteed issue* and *community rating* (GICR) were found to be inseverable.

Here is an excerpt from our [brief](#). Note the last emphasized sentence in Footnote 12.

The analysis for individual market, on-exchange policies is different. Hurley and Nantz are not eligible for subsidies. Declarations, *supra*. But they could still purchase an unsubsidized plan on the exchanges. Halting GICR with respect to policies sold *on* the exchanges would be an unnecessarily overbroad remedy. So long as the plaintiffs can purchase off-market non-compliant plans, or none at all, their injuries will be remedied. Plaintiffs cannot demand a greater remedy to alter *all* policies offered on government exchanges. Moreover, people who seek to buy a government-sponsored product on a government exchange cannot complain about cumbersome regulations. [FN 12] Courts need go no further than issue a declaration with respect to individual market, off-exchange policies. "[T]he judicial power is, fundamentally, the power to render judgments in individual cases." *Murphy*, 138 S. Ct. at 1485 (Thomas, J., concurring). No more, and no less. Hurley and Nantz, meanwhile, and all those who object to being forced to purchase unwanted policies, will have other options.

[FN12]: This narrow remedy would address concerns raised by the Federal Respondents about creating a "potentially unstable insurance market." See Brief for the Federal Respondents at 44–45. **The executive branch could also require insurance providers on the exchanges to comply with the ACA's GICR provisions, regardless of the outcome of this litigation.**

Today President Trump signed the self-styled "Executive Order on An America-First Healthcare Plan." There are several references to the ACA litigation that, I think, are leading towards my proposal.

First, Trump accurately characterizes what the TCJA did—well sort of. The penalty was reduced to \$0. Usually Trump says that he repealed the mandate. I am sure the SG will quote this sentence if a Justice tries to cite press statements.

On December 22, 2017, I signed into law the repeal of the burdensome individual-mandate penalty, liberating millions of low-income Americans from a tax that penalized them for not purchasing health-insurance coverage they did not want or could not afford

Second, the order includes a history of the ACA's failures. I'm not really sure what purpose this discussion serves:

In an attempt to justify the ACA, the previous Administration claimed that, absent action by the Congress, up to 129 million (later updated to 133 million) non-elderly people with what it described as pre-existing conditions were in danger of being denied health-insurance coverage. According to the previous Administration, however, only 2.7 percent of such individuals actually gained access to health insurance through the ACA, given existing laws and programs already in place to cover them. For example, the Health Insurance Portability and Accountability Act of 1996 has long protected individuals with pre-existing conditions, including individuals covered by group health plans and individuals who had such coverage but lost it.

The ACA produced multiple other failures. The average insurance premium in the individual market more than doubled from 2013 to 2017, and those who have not received generous Federal subsidies have struggled to maintain coverage. For those who have managed to maintain coverage, many have experienced a substantial rise in deductibles, limited choice of insurers, and limited provider networks that exclude their doctors and the facilities best suited to care for them.

Additionally, approximately 30 million Americans remain uninsured, notwithstanding the previous Administration's promises that the ACA would address this intractable problem. On top of these disappointing results, Federal taxpayers and, unfortunately, future generations of American workers, have been left with an enormous bill. The ACA's Medicaid expansion and subsidies for the individual market are projected by the Congressional Budget Office to cost more than \$1.8 trillion over the next decade.

Third, the President references the pending challenge:

The ACA is neither the best nor the only way to ensure that Americans who suffer from pre-existing conditions have access to health-insurance coverage. I have agreed with the States challenging the ACA, who have won in the Federal district court and court of appeals, that the ACA, as amended, exceeds the power of the Congress. **The ACA was flawed from its inception and should be struck down.** However, access to health

insurance despite underlying health conditions should be maintained, even if the Supreme Court invalidates the unconstitutional, and largely harmful, ACA.

Alas, the SG does not argue that the entire law should be struck down. The government's position is far more nuanced. But the far more important sentence is the last one. Even if the law is "invalidated," access to pre-existing protections should be maintained. But how? Not through legislation. He is hinting at a future executive action.

No action is taken here. Rather, there is a policy section:

Sec. 2. Policy. It has been and will continue to be the policy of the United States to give Americans seeking healthcare more choice, lower costs, and better care and to ensure that Americans with pre-existing conditions can obtain the insurance of their choice at affordable rates.

I think here Trump is giving his administration guidance to prepare a "safety net" if the Supreme Court takes some action against Guaranteed Issue and Community rating.

Sec. 3. Giving Americans More Choice in Healthcare. The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services shall maintain and build upon existing actions to expand access to and options for affordable healthcare.

Stay tuned. We may even have 9 Justices when the ACA case is argued on November 10.

JOSH BLACKMAN is a constitutional law professor at the South Texas College of Law Houston, an adjunct scholar at the Cato Institute, and the President of the Harlan Institute. Follow him @JoshMBlackman.