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Trump's new attack on the ACA also hurts the Justice Department

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Since the inception of the Affordable Care Act, President Barack Obama served as its legal guardian. In the span of five years, his administration defended the law before the Supreme Court in four high-profile cases. The Trump administration, however, quickly abandoned that role. In 2018, then-Attorney General Jeff Sessions argued that key portions of Obamacare were unconstitutional following the tax cut legislation. Now, the Justice Department contends that the entire ACA must go.

The strategy is patent: Incinerate the law so a new, greater health-care reform can rise from the ashes. President Donald Trump stated the matter bluntly: "If the Supreme Court rules that Obamacare is out, we'll have a plan that is far better than Obamacare."

In the short term, this position will have little impact on the ACA litigation. Other parties, including the House of Representatives, can defend the entire law. But in the long run, this move is counterproductive. The Justice Department has amassed a treasure trove of good will and credibility among federal courts over the years. But going forward, judges may be less willing to afford the executive branch this unique type of deference. Because of this hard-to-justify decision, the Trump administration will have an even harder time prevailing in other cases.

This story begins in 2012, during the first constitutional challenge to Obamacare. Recall that five justices ruled that Congress lacked the power to compel people to buy insurance. But Chief Justice John Roberts found a way to save the ACA by construing the penalty, which raised revenue, as a tax.

Fast-forward to 2017. The GOP-controlled Congress reduced the penalty to \$0. Did that change kick the legs out of Roberts's saving construction? Texas and a host of other red states thought so. They filed suit and argued that the individual mandate was unconstitutional. But the states didn't stop there. They argued that if the mandate fell, the entire law must fall - from the protections for people with preexisting conditions, to the Medicaid expansion, to regulations on medical devices. Everything.

Generally, the executive branch has an obligation, where possible, to defend the constitutionality of federal laws. And if part of the law is constitutional, the executive branch usually tries to salvage the remainder of the statute. Sessions took a different path. In June 2018, he informed Congress that the Justice Department would no longer defend the constitutionality of the individual mandate. I agreed with his decision - the \$0 penalty can no longer be saved as a tax. The attorney general has an independent duty to assess the constitutionality of federal laws,

based on binding Supreme Court precedent. Sessions acted within the bounds of permissible discretion.

However, Sessions made another judgment call: If the court declares the mandate unconstitutional, then the court must also set aside the protections for preexisting conditions. I disagreed with this decision, but found that it still had a patina of defensibility. In 2012, the Obama administration also argued that the mandate could not be separated - or severed - from the preexisting condition protections.

Fast-forward to December 2018. A federal-district court judge in Texas found that the individual mandate was unconstitutional. He also agreed with Texas' proposed remedy: The entire ACA must be set aside. On appeal, I expected the Justice Department to file a half-measure brief: The lower court's ruling should be reversed in part, such that only the mandate and the preexisting condition protections are set aside. But the government changed course again. Now, the executive branch argued that the trial court's decisions should be affirmed in its entirety. The entire Affordable Care Act must go. This decision was shocking.

At a minimum, Attorney General William Barr should do what his predecessor did - explain why he is no longer defending other portions of the law. That task may be hard. According to reports from Politico, the White House pushed this position over Barr's objection. Even if the attorney general can make the case, there still may be fallout.

In litigation, lawyers have a duty to advocate for their client, often to the point of making borderline frivolous arguments. Courts are well aware of this phenomenon and treat the advocates accordingly. The Justice Department, however, stands in a different stead. Traditionally, the federal government will vigorously advance a cause but hold back certain arguments that go too far. That role usually includes a robust defense of federal laws.

Reasonable people can disagree about where that line should be drawn. But that line exists. The decision to jettison the entire ACA crosses a new legal Rubicon. This move will invariably weaken the deference that courts usually afford to the Justice Department. And in the long term, that new posture will make it harder for the administration to defend its other policies.

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