



New documents trigger questions about special treatment for Congress under Obamacare

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An influential Obamacare opponent who was the architect of a Supreme Court challenge that threatened to unravel the law is raising questions over whether the District of Columbia's health exchange looked the other way so that employees of Congress and others could illegally enroll in a program meant to cover small businesses.

Michael Cannon, the director of health policy studies at the libertarian Cato Institute, said that his latest findings indicate cause for a Department of Justice investigation that he believes could lead to criminal charges.

The root of his argument, alongside John Malcolm, a legal expert at the conservative Heritage Foundation and former deputy assistant attorney general in the Department of Justice's Criminal Division, rests on documents Cato and the conservative Judicial Watch obtained under the Freedom of Information Act (included below). Cannon and Malcolm wrote about their concerns in a *Washington Examiner* [opinion piece](#) published Tuesday.

One of the documents is a letter from official at the D.C. Health Benefit Exchange Authority saying that no one was denied coverage through the district's small business exchange, even though it was possible to fill out incorrect information. This raises questions, Cannon said, about whether anyone has improperly received coverage.

"If an employer puts down false information, then the D.C. exchange didn't bother to look it up," Cannon said. "Not only could ineligible large employers be participating but they could have been doing it beforehand."

FOIA documents they obtained earlier this year suggest that members of Congress and their staff filled out inaccurate personal information on an application for health insurance to qualify for the same coverage as people who work at small businesses, defined under the law as those with less than 50 workers.

Members did this because under Obamacare they are no longer allowed to be on the Federal Employees Health Benefits Program, the program other government workers use. Instead, the law said they were supposed to receive the same coverage as people on the exchange, many of whom are self-employed. When members [learned](#) that they and their staff would be losing the employer contributions they had under FEHBP, which add up to as much as \$12,000 a year, the Obama administration through the Office of Personnel Management [created a work-around](#) that allowed them to keep the contributions and sign up through the small business exchange.

Cannon has long spoken out about his opposition to this arrangement, saying it is illegal. He noted that middle-class people who do not receive subsidies under Obamacare are paying more for health insurance each year under the law.

"Why is it that these people over here get a pay cut, and they don't get a workaround?" Cannon said. "If members are concerned about it they can pass a bill that increases salaries for staff that would allow an equivalent of what they would have gotten from FEHBP."

The application that members of Congress and their aides were asked to fill out in November 2013 for health insurance had them attest to several questions they could not answer accurately, according to documents from the DC Health Benefit Exchange Authority obtained by Judicial Watch through the Freedom of Information Act. They had to attest that they had fewer than 45 members and 45 employees, even though Congress has 535 members overall and employs thousands of staffers.

The document also asked applicants to check a box attesting that they employ 50 or fewer full-time equivalent employees. As "employer type" they selected "State or Local Government," and wrote in "U.S. House of Representatives" or "U.S. Senate" rather than their names, provided dates of birth that cannot be verified with a specific name and had to attest they didn't have any dependents.

At the end of the application they were prompted to type in an electronic signature next to the statement, "I've provided true and correct answers to the questions on this form to the best of my knowledge. I know that if I'm not truthful there may be a penalty."

Criminal charges for such entries, according to Cannon and Malcolm, could include healthcare fraud, wire fraud, falsifying documents, making false statements to federal officials, triggering false claims from the federal treasury and conspiracy to defraud the U.S.

Nicholas Bagley, an administrative law expert and professor at the University of Michigan School of Law who is sympathetic to Obamacare, has been critical of Cannon and Malcolm's argument, saying that the Office of Personnel Management under the Obama administration intended for members and aides to receive the small business coverage, known as SHOP, so no one was breaking the law.

"It's nuts ... to argue that congressional officials may have violated criminal laws in applying for SHOP coverage," he said in an email interview, adding that he doesn't know of other experts who have taken the criminal argument seriously.

"And for good reason," he continued. "It's not criminal for members of Congress and their staff to rely on an authoritative rule to maintain their health coverage. And OPM's rule is the law until it's superseded or a court strikes it down."

It's unclear whether there would be an appetite for an investigation into whether anyone else may have filled out false information on the application. Sen. Ron Johnson, R-Wis., has called for an end to the work-around and through the Homeland Security and Governmental Affairs Committee, of which he is chairman, has asked the Office of Personnel Management for details about how the rule for Congress was developed.

President Trump has threatened to upend the health insurance benefits members of Congress receive, after Republicans failed in July to pass a bill to repeal and replace portions of Obamacare.

He tweeted, "If ObamaCare is hurting people, & it is, why shouldn't it hurt the insurance companies & why should Congress not be paying what public pays?" and, "If a new HealthCare Bill is not approved quickly, BAILOUTS for Members of Congress will end very soon!"

Unlike the laws that dictate coverage for most Americans who use the exchange, which require an act of Congress for significant overhaul, the small business rule can be changed through administrative action.

Cannon has challenged the way Obamacare has been administered in the past. He was the architect of the *King v. Burwell* Supreme Court case that argued that the text of the law precluded individuals from receiving Obamacare subsidies if they lived in states that did not establish their own exchanges. The subsidies were ultimately upheld by the Supreme Court.

"This has the appearance of a cover-up," Cannon said about the latest documents. "Shortly after a FOIA request exposed potentially criminal false statements by congressional officials, DC changed its application to eliminate the questions that triggered those statements. When congressional officials continued to make other potentially criminal false statements, DC officials just stopped asking all questions to which congressional officials were giving false answers. It now appears the DC government may not be enforcing the statutory employer-size restrictions at all."

Bagley said he didn't think that the case would go anywhere.