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Outspoken critic of Obamacare helped to turn LePage against state exchange

Michael F. Cannon predicted that relying on a federal exchange instead would force Congress to revisit the law.

By Steve Mistler
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One of the nation's most dogged and successful opponents of the Affordable Care Act helped dissuade the LePage administration from creating a state-run exchange where residents could buy health insurance last year, according to documents obtained by the Maine Sunday Telegram.

Michael F. Cannon, director of health policy studies at the libertarian Cato Institute in Washington, D.C., met with LePage and other administration officials more than two years ago and persuaded LePage to rely on a federally operated exchange to offer coverage for uninsured Mainers.

As a result, Maine became one of the 36 states that sent residents to healthcare.gov, the poorly prepared federal website that nearly imploded under the demand, heightening public skepticism over the ACA, also known as Obamacare, and fueling conservative calls to kill it.

The second enrollment period for Obamacare began last Saturday. Early reports indicate that healthcare.gov is operating more smoothly and public interest is high. However, a new threat that Cannon foresaw as early as 2011 now looms – likely increasing premiums or making coverage unaffordable for the approximately 40,000 Mainers who received a subsidy to buy insurance on the marketplace last year.

Cannon has been described in recent national news reports as the man who could kill Obamacare. He told the Telegram last week that his ultimate goal is for Congress to repeal the law "root and branch," an ambition reflected in his visits to dozens of statehouses in 2012 to urge Republican lawmakers to reject the state-run exchanges. Cannon said he offered several reasons to states for rejecting a state exchange, but in 2011 he and other critics of the law discovered a new weapon that jumped to the top of the list.

The discovery focused on language in the 1,000-page ACA that bears on the health exchange subsidies. Depending on how that language is interpreted by a U.S. Supreme Court ruling next year, the law could be dealt a crippling blow.

“I made lots of arguments to the governor and this is one of them,” Cannon said. “I said, by blocking the state exchanges you can force Congress to reopen, or get rid of, this very bad law.”

REPUBLICANS UNITE

The LePage administration declined to comment for this story. However, Cannon’s role in shaping Maine’s health exchange decision is revealed in close to 2,000 pages of internal Le-Page administration documents obtained by the Maine Sunday Telegram under the Freedom of Access Act. The newspaper requested the records Nov. 20, 2013, and the administration produced them in September, about 10 months later.

Included are emails, internal memoranda and other documents from the governor’s office and several state agencies involved in the decision. The documents shed light on the internal debates taking place behind the administration’s public statements.

LePage fiercely opposed the law, and he and Republican lawmakers repeatedly vowed to fight it. In February 2011, the governor and the Legislature applauded Attorney General William Schneider’s decision to join nearly 25 other Republican-controlled states challenging the constitutionality of the law’s individual mandate, which compels most Americans to buy health insurance.

With deadlines for implementing the law looming, however, LePage and his advisers wanted to ensure that Maine was prepared if the ACA survived. The state had already begun spending $1 million in federal funds to set up a health exchange and had applied for, and received, $7 million more.

The documents show that at one point Katrin Teel, Gov. Le- Page’s health policy adviser, and other gubernatorial advisers discussed drafting an executive order that would allow LePage to initiate a state exchange, and the administration repeatedly asked for guidelines and clarification from the federal government.

In addition, the governor’s office closely monitored the progress of exchange bills moving through the Legislature, L.D. 1498 and L.D. 1497. Conservative groups such as Cato, the American Legislative Exchange Council and the Maine Heritage Policy Center were pressuring lawmakers to resist the law and not create a state exchange.

Republicans were united in their opposition to the law, but some were concerned that leaving the insurance marketplace to the federal government would be bad for Maine, a sacrifice of the opportunity for local control held dear by many Mainers – especially Republicans.

Democratic Rep. Sharon Treat of Hallowell said some Republicans told her they were fearful of a federal exchange. Treat served on the Legislature’s Insurance and Financial Affairs Committee, which reviewed the two exchange bills, one of which she sponsored.

She said Republicans on the committee held several private caucuses during work sessions on the exchange bills. “I just concluded that they were having great difficulty coming to a consensus on what to do,” she said. “I felt like they were really internally divided.”

A FUNDING GAP

It’s unclear from the documents whether the LePage administration anticipated the botched launch of healthcare.gov or the court case that challenges the legality of premium subsidies in the federal exchange. However, those outcomes were at least partially foreseen by Cannon, who has been described as the health care law’s “most relentless antagonist.”

By early 2012, he was crisscrossing the United States to advise Republican lawmakers and governors to reject the state exchanges, citing the federal government’s inability to force states to build their own, the costs and its ill-prepared plans for a federal marketplace.

One of his biggest challenges was convincing Republican lawmakers that creating a state exchange was not mandatory.

“That’s one of the things I was reminding them,” he said. ” ‘You don’t have to do this. Don’t just do something, stand there!’ ”

Cannon contended that the law was vulnerable to a legal challenge because of how the Obama administration had implemented the health exchange system. The law makes it clear that the government can offer subsidies to consumers who buy coverage in a state-run exchange, but it does not explicitly provide for subsidies for coverage purchased on the federal exchange. The Internal Revenue Service extended the subsidies to the federal exchange when it wrote the rules that implemented the law.

Critics assert that in doing so, the IRS violated the Constitution by exercising a power reserved for Congress.

Cannon and Jonathan Adler, a professor of law and director of the Center for Business Law and Regulation at Case Western Reserve University, co-authored an opinion article in The Wall Street Journal in November 2011 that laid out their legal argument about subsidies on the health exchanges and the strategic value for ACA opponents of opting to go with the federal exchange.

“In other words, states that refuse to create an exchange can block much of Obamacare’s spending and practically force Congress to reopen the law for revisions,” Cannon and Adler wrote.

NOT LIFTING A FINGER

While LePage and Republicans were still waffling over how to handle the health exchange issue, Cannon found an ally in the Maine Heritage Policy Center, a conservative think tank with close ties to the LePage administration.

After several hearings and revisions to the exchange bills pending before the Legislature, Joel Allumbaugh, a health policy adviser for the center, emailed Teel, LePage's health adviser, on March 2, 2012, with an offer. He'd been in touch with Cannon and shared some of his research, along with his testimony before lawmakers in Illinois. Allumbaugh said Cannon was coming to Maine on March 20 and wanted to meet with LePage.

Teel then sent a memo updating LePage's senior staff on the exchange bills. She relayed Cannon's argument that the subsidies through the federal exchange are not legal. LePage's advisers eventually agreed to meet with Cannon on March 20.

On March 14, Republicans on the Legislature's Insurance and Financial Affairs Committee moved to block the state exchange. It appeared to surprise the LePage administration, which was still looking for a way to initiate and expedite the state exchange if necessary.

Teel sent a memo to LePage's senior staff about the Republicans' decision.

"It is clearly a bold move (and may perhaps work out in Republicans favor)," Teel wrote on March 14. "I communicated a strong desire to continue with the earlier agreement giving the governor the trigger, thus protecting Maine regardless of the Supreme Court ruling on the ACA or fall elections. However, they are now united in their decision to halt creation of an exchange in Maine."

Cannon met with LePage and his advisers six days later and outlined a number of reasons why LePage should halt the state exchange. He told the Telegram that the legality of the subsidies through a federal exchange was among his arguments.

Cannon believed that blocking the subsidies through the rejection of state exchanges would create the political climate to force Congress to reopen the law in 2013. He also noted that blocking the exchanges would protect Maine businesses from the employer mandate that required certain businesses to provide their employees health insurance. It would also prevent roughly 37,000 uninsured Mainers from having to buy insurance, he said.

Cannon said LePage was largely receptive to the presentation.

In June 2012, the U.S. Supreme Court rejected the first major legal challenge to Obamacare, ruling that Congress was properly exercising its power to tax when it mandated in the ACA that individuals have health insurance. In November, Obama secured a second term.

During a Nov. 15, 2012, interview with Bloomberg, LePage maintained that he wouldn't "lift a finger" to implement the ACA in Maine.

WAITING FOR A RULING

The U.S. Supreme Court will take up the legality of the subsidies in a few months. In the case, King v. Burwell, plaintiffs have argued that the federal government cannot provide subsidies, known as Premium Tax Credits, if insurance plans are purchased through the federal exchange.

If the court agrees, 5 million Americans who have received premium assistance will lose it after 2015, according to the U.S. Department of Health and Human Services. That includes 90 percent of the 44,000 Mainers who bought plans during the last enrollment period, together with any others eligible for subsidies who are buying plans now for coverage in 2015.

Health experts siding with the Obama administration in the case say that premiums for some people could double without subsidies, and the ACA requirement that everyone have health insurance could be eliminated.

If that happens, said Andrea Irwin, legal counsel for Maine Consumers for Affordable Health Care, healthy people who don't have to buy insurance may not do so, particularly if it becomes unaffordable.

"We are working as hard as ever to enroll more people," Irwin said. "We anticipate even more Maine people getting subsidies and getting this coverage and using it, and relying on it, to help pay for their medical bills and take care of their families. If the Supreme Court rules against that in Maine, it will be devastating for people."

The group's executive director, Emily Brostek, said she hopes the court case won't discourage enrollment and noted that subsidies will be available in 2015 regardless of the court decision.

"People shouldn't be making decisions for the 2015 coverage year based on this case," she said.

Observers believe a court decision striking down federal exchange subsidies will mean that sicker people will dominate the risk pool, driving up premiums for everyone and creating what some describe as a death spiral for Obamacare.

Cannon takes the position that eliminating the subsidies would reveal the true cost of the law.

"That is what makes Congress reopen the law," he told the Telegram. "If enough people in enough states had to face the full cost of Obamacare exchange coverage, there would be blood in the streets, a huge backlash."

In a separate interview with Vox.com, he said, "Any dislocation, any disruption, any harm that is caused by those people losing those subsidies, the responsibility for that falls at the feet of the president himself."