



## Sitting in Limbo — Obamacare under Divided Government

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Nearly a decade after its enactment, the Affordable Care Act (ACA) remains in limbo. The Trump administration's recent decision to ask a federal appellate court to uphold a district

court ruling that invalidated the entire ACA underscores the ongoing conflict over health care reform. Yet the ensuing controversy over the administration's action illustrates the formidable barriers to overturning Obamacare.

What are the origins of the latest legal challenge to the ACA? On December 14, 2018, U.S. district judge Reed O'Connor ruled that the ACA was unconstitutional. The ruling came in response to a case, *Texas v. Azar*, brought by 20 Republican state attorneys general. They argued that because Congress reduced the ACA penalty for not buying health insurance to zero in 2017, the law's individual mandate was no longer constitutional, given that the Supreme Court had previously upheld it under Congress's taxing powers. They further contended that the

mandate was not severable from the rest of the law and thus the entire ACA was now unconstitutional. O'Connor agreed and struck down all ACA provisions, from insurance regulation and subsidies to Medicaid expansion, Medicare reforms, and much more (though the ACA remains in effect, pending appeal).

Legal scholars have criticized O'Connor's decision as "clearly wrong,"<sup>1</sup> claiming that it "makes zero sense"<sup>2</sup> and is "unmoored from the relevant doctrines. . . . [It] makes a mockery of the rule of law and basic principles of democracy."<sup>3</sup> Among the myriad problems they see with the ruling is its failure to recognize that because Congress zeroed out the individual mandate penalty but retained the rest of the ACA, lawmakers clearly intended for the

ACA to continue without the penalty. The ruling has been appealed to the U.S. Court of Appeals for the Fifth Circuit by 21 Democratic state attorneys general; Democrats in the House of Representatives have joined the case to defend the ACA. The Trump administration previously argued that the ACA's mandate and preexisting-condition protections should be struck down, but not the whole law. However, on March 25, 2019, the Justice Department reversed course, asking the appellate court to affirm the district court's ruling that the entire ACA should be invalidated. President Donald Trump promised that Republicans "will soon be known as the party of health care" and would develop a new plan to replace the ACA. But since Democrats have majority control of the House, there is no chance that any Republican health care bill could pass Congress. Moreover, as the party's failed effort to repeal Obamacare in 2017 revealed, Republicans don't have a

replacement plan that is workable as either policy (maintaining the ACA's coverage gains and consumer protections) or politics (unifying GOP lawmakers and attracting broad public support).

The administration's altered legal position will not affect the case's outcome. But it has reopened a debate that is politically perilous for Republicans, whose losses in the 2018 elections were in part due to fallout from the last repeal-and-replace episode. The Fifth Circuit is expected to reverse O'Connor's ruling, and whether the Supreme Court will eventually take the case is uncertain. Ultimately, *Texas v. Azar* may reveal less about constitutional law than it does about ACA politics. That Republican officials still seek to repeal the entire ACA despite the risk of enormous electoral damage to the GOP should they prevail underscores the persistence and intensity of opposition to Obamacare in some quarters. In this struggle, the courts have become another arena for partisan conflict.

Meanwhile, Obamacare is again living under divided government. Indeed, with the exception of 2017–2018, the ACA has operated under split Democratic and Republican control of the White House and Congress since its enactment. Divided government does not necessarily lead to legislative paralysis; it can also produce bipartisan cooperation and compromise. There is ample precedent for progress in health policy when the parties share institutional power. During the 1980s, Democrats and Republicans partnered on Medicare payment reform, and they did so again as part of the 1997 Balanced Budget Act. Republican presidents and Democratic congressional majorities expanded Medicaid eligibility

for pregnant women and children between 1984 and 1990. The Children's Health Insurance Program (CHIP) passed with bipartisan support during a period of divided government in 1996. In 2015, with Democrat Barack Obama in the White House and Republican majorities in the House and Senate, Congress reauthorized CHIP and replaced Medicare's sustainable growth rate formula with a new arrangement for updating physician payments.

Yet intensifying partisan polarization in Congress has made it more difficult to forge compromise, leading to more legislative deadlock.<sup>4</sup> Issues such as the opioid use epidemic can still secure bipartisan support. But Obamacare has never had much of a cross-party coalition in Washington (though crucially, three Senate Republicans joined Democrats to save the law from repeal in 2017). The ideological chasm between Democrats and Republicans in Congress makes it difficult to find common ground on policy. There also has been an increase in recent decades in competitive elections that determine party control of Congress. Such close competition impairs compromise because lawmakers have an incentive to deny the other party legislative accomplishments if they believe that opposition will help their party win a majority in the next election.<sup>5</sup> The protracted nature and intensity of the Obamacare debate and the absence of bipartisan efforts to revise the ACA reflect these broader patterns of polarization in American politics.

Where does that leave health care reform? Because Obamacare has operated mostly under divided government and because Republicans could not pass comprehensive repeal-and-replace legislation when they governed both Con-

gress and the White House in 2017–2018, largely owing to narrow Senate majorities, an uneasy stalemate has ensued. Democrats have been unable to strengthen or build on the ACA, and Republicans have been unable to eliminate or severely weaken it. Barring a stunning Supreme Court decision to invalidate the entire ACA, the stalemate will continue until at least 2021. Meanwhile, congressional gridlock has shifted some of the action on Obamacare out of Washington, as states variously pursue plans to advance or undermine the ACA's goals.

Amid the recurrent threats to its existence, the ACA has proved remarkably resilient. Almost all its core provisions are intact. Enrollment in the ACA's insurance marketplaces has not declined precipitously, despite actions by the Trump administration designed to destabilize them and Congress's repeal of the individual mandate penalty (though these policies could have larger effects on insurance coverage in coming years). A growing number of states — now totaling 36 and the District of Columbia — have embraced Medicaid expansion. Public support for the ACA has increased, largely as a backlash to GOP repeal efforts and the rising political salience of the law's preexisting-condition provisions. Whereas the ACA was once defined by controversial provisions, both real and mythical, increasingly the law is associated with more popular consumer protections.

In key respects, Obamacare is stronger politically now than it ever has been. It is ironic, then, that the 2020 presidential election could see both parties nominate candidates who want to supplant the ACA. Trump's reelection campaign will probably embrace conservative plans to repeal the

law and shift more responsibility to the states. And multiple Democratic presidential candidates have embraced Medicare for All (though some Democrats support the incremental goal of expanding Medicare eligibility to more people, which would leave the ACA largely intact).

The paradox of Obamacare is that for all the controversy that has surrounded it, the legislative, legal, and administrative challenges it has endured, and myriad shortcomings in design and implementation, the ACA has produced important suc-

cesses and transformed the health care landscape, which makes it difficult to displace. Both liberals and conservatives may want to move beyond Obamacare, but enacting disruptive reform that aims to undo the ACA and replace it with new insurance arrangements is easier said than done.

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 An audio interview with Dr. Oberlander is available at NEJM.org

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## The Upcoming U.S. Health Care Cost Debate — The Public's Views

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U.S. health care costs — and not merely prescription-drug prices — have risen to the top of the national agenda. More than two thirds (69%) of the U.S. public has said that reducing these costs should be a top priority for President Donald Trump and Congress in 2019, ranking it behind only strengthening the economy (70%) on a list of 18 possible priorities (Pew, 2019) (see table, next page). Given a list of 13 possible health-specific priorities, about 9 in 10 Americans said both prescription-drug prices (92%) and lowering the overall cost of health care (88%) were extremely important (Politico–HSPH, December 2018). In addition, when asked how much of a problem each of 18 domestic issues was, respondents ranked affordability of health care first, with 70% saying it was “a very big problem” (Pew, September–October 2018). We reviewed 14 national public opinion polls

from 2018 and 2019 to elucidate the public's perspective on health care costs and possible solutions (see box for list of polls).

Although the United States spends 18% of its gross domestic product on health<sup>1</sup> — more than any other industrialized country — that is not the focus of the public's concerns. In fact, 69% of the public believes that the United States is spending too little on health (only 10% believes we're spending too much) (NORC–GSS, 2018); 56%, too little on Medicare (10%, too much); and 42%, too little on Medicaid (17%, too much) (West Health–NORC, February 2018).

Instead, the driving force for concern is the belief that health care services are unreasonably priced and that what people pay for care harms their household's financial situation. More than half (53%) of Americans say the cost of health care affects their own

household's financial situation “a lot” (Pew, March 2018). Forty percent say they're dissatisfied with the total amount they pay for care (Gallup, 2018).

So why, according to the public, are health care costs so high? When given lists of 12 or more possible reasons identified by policy experts and the media, respondents focus on charges by pharmaceutical companies (78% in one survey, 79% in another), insurance companies (70%, 75%), and hospitals (71%, 74%) as the main causes (KFF, 2018; Politico–HSPH, 2019).

Unlike many experts, the public does not see overuse of services as a significant contributor to the cost problem that concerns them.<sup>2,3</sup> Some 60% of Americans attribute high costs to unreasonably high prices for services and drugs; 23% believe that Americans are getting more health care and prescription drugs than they