

Congress of the United States
Washington, DC 20515

April 8, 2019

Mr. Pat Cipollone
Counsel to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Cipollone:

We are requesting documents and information regarding the involvement of the White House and Office of Management and Budget (OMB) in the troubling decision by the Department of Justice (DOJ) not to defend the constitutionality of the Affordable Care Act (ACA).

On March 25, 2019, DOJ announced in a letter filed with the U.S. Court of Appeals for the Fifth Circuit that it would no longer oppose the judgment of the district court in *Texas v. United States*, which held that the ACA is wholly unconstitutional. Previously, DOJ had argued that although it believed that certain portions of the law should be held unconstitutional, the rest of the law should stand.¹

DOJ's sudden and significant reversal from its previous position was reportedly driven by officials inside the White House and OMB—including Acting Chief of Staff Mick Mulvaney, Acting Director of OMB Russ Vought, and Director of the Domestic Policy Council Joe Grogan—over the opposition of Attorney General William Barr and Health and Human Services (HHS) Secretary Alex Azar.²

Previously, DOJ filed a brief with the district court on June 7, 2018, in which it argued that the many signature provisions of the ACA that do not implicate the law's requirement that individuals maintain health care coverage should continue to exist:

The ACA's other major provisions—concerning various insurance regulations, health insurance exchanges and associated subsidies, the employer mandate and Medicaid expansion, and reduced federal healthcare reimbursement rates for hospitals—are

¹ Letter from Attorney General Jefferson B. Sessions III, Department of Justice, to Paul Ryan, Speaker of the House (June 7, 2018) (online at www.justice.gov/file/1069806/download).

² *White House Obamacare Reversal Made Over Cabinet Objections*, Politico (Mar. 26, 2019) (online at www.politico.com/story/2019/03/26/trump-obamacare-reversal-cabinet-1238359).

severable from the individual mandate. ... The ACA contains numerous mechanisms designed to expand health insurance coverage through federal regulation. Each of these provisions can independently operate “consistent with Congress’ basic objectives in enacting the statute,” and therefore, this Court “must retain” them.³

In a letter to Congress explaining DOJ’s position in the litigation, then-Attorney General Sessions stated that he was acting “with the approval of the President of the United States.”⁴ The White House has now apparently instructed DOJ to take back these statements. This latest maneuver from the Administration is particularly troubling in that it seeks to override Congress’s legislative authority. In 2017, Congress voted to reduce the penalty for the ACA’s individual coverage requirement to zero. However, when President Trump had previously urged Congress to repeal the ACA, Congress elected not to do so. In voting to preserve the ACA and later reducing the individual coverage requirement penalty, Congress effectively confirmed that the portions of the law related to the individual coverage requirement can be separated from its many unrelated provisions—the direct opposite of the position that the White House has now directed DOJ to take.

The Constitution requires the President to “take care that the laws are faithfully executed.”⁵ In attempting to override the will of Congress, the White House has demonstrated clear disregard for this obligation. It has also demonstrated that it is willing to undermine DOJ’s independent responsibility to enforce the law, as well as a longstanding, bipartisan tradition of defending laws enacted by the United States Congress.

In addition to reversing DOJ’s prior legal position, the White House’s decision runs counter to several of its own policy priorities. President Trump has stated that he wants to use the Centers for Medicare and Medicaid Services’ Innovation Center to test drug cost models as part of his initiative to lower drug prices, yet this center was created by the ACA and will no longer exist if the law is found unconstitutional. This Administration has praised initiatives to crack down on health care fraud, but the ACA provided stronger tools to fight Medicare fraud. The President’s HIV plan relies on a number of provisions of the ACA to expand access to prevention and treatment for Americans with HIV and those at risk. It is not clear how this plan will operate if the law is overturned. The ACA significantly expanded access to substance use disorder treatment, which is an important part of the President’s push to reduce opioid use disorder. This effort will also be in peril.

If the Administration’s new legal position prevails and the entire ACA is struck down, there would be catastrophic implications for millions of American consumers and the United States health care system. Approximately 21 million Americans would be at risk of losing their health insurance—including 12 million individuals who gained coverage through Medicaid

³ Federal Defendants’ Memorandum in Response to Plaintiffs’ Application for Preliminary Injunction, Dkt. 92 at 16-17 (filed June 7, 2018).

⁴ Letter from Attorney General Jefferson B. Sessions III, Department of Justice, to The Honorable Paul Ryan, Speaker of the House (June 7, 2018) (online at www.justice.gov/file/1069806/download).

⁵ U.S. CONST. art. II, § 3, cl. 5.

expansion and another nearly 10 million who receive federal subsidies to purchase plans on the individual market.⁶ Striking down the ACA would also have serious implications for the 133 million Americans with pre-existing conditions like asthma, diabetes, and cancer.⁷ The ACA prohibits insurance companies from denying coverage or charging higher premiums to consumers for a pre-existing condition.⁸ It also prohibits insurers from selling policies that exclude coverage for pre-existing conditions and from instituting lifetime and annual limits on benefits.⁹

The day after DOJ announced that it would reverse its legal position, President Trump pledged at a press conference: "If the Supreme Court rules that Obamacare is out, we will have a plan that is far better than Obamacare."¹⁰ Reports indicate that the White House has engaged several conservative think tanks to develop this plan.¹¹ The President now asserts that Congress will vote on a replacement plan immediately following the 2020 election.¹²

Congress is entitled to understand the communications that took place and pressures that were applied to achieve these troubling results, including whether this decision was in any way related to plans to replace the ACA. Further, there is no legal basis for withholding information from congressional oversight due to the pendency of an ongoing lawsuit. For these reasons, we request that you produce the following documents by April 22, 2019:

1. A list of all White House or OMB personnel who communicated with, directed, analyzed, reviewed, or were otherwise involved in DOJ's decision not to defend the Constitutionality of the ACA in *Texas v. United States*;
2. All communications among White House or OMB personnel between December 14, 2018, and March 25, 2019, including but not limited to Mick Mulvaney, Joe Grogan, Russ Vought, and any other personnel identified in response to Request

⁶ Center on Budget and Policy Priorities, *Latest Republican ACA Repeal Plan Would Have Similar Harmful Impacts on Coverage Health as All the Others* (June 20, 2018) (online at www.cbpp.org/sites/default/files/atoms/files/6-20-18health.pdf).

⁷ Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *Health Insurance Coverage for Americans with Pre-Existing Conditions: The Impact of the Affordable Care Act* (Jan. 5, 2017) (online at <https://aspe.hhs.gov/system/files/pdf/255396/Pre-ExistingConditions.pdf>).

⁸ 42 U.S.C. §§ 300gg(a)(1), 300gg-1, 300gg-4(a), 300gg-4(b).

⁹ 42 U.S.C. § 300gg-3; 42 U.S.C. § 300gg-11.

¹⁰ *Trump Vows to Have a Health Plan 'Far Better than Obamacare,'* Politico (Mar. 27, 2019) (online at www.politico.com/story/2019/03/27/trump-health-care-obamacare-1238927).

¹¹ *White House Working on Secret Healthcare Plan with Three Conservative Think Tanks*, Washington Examiner (Mar. 31, 2019) (online at www.washingtonexaminer.com/news/white-house-working-on-secret-healthcare-plan-with-three-conservative-think-tanks).

¹² *Trump, in Reversal, Says Replacing Obamacare Can Wait Until After Election*, Bloomberg (Apr. 2, 2019) (online at www.bloomberg.com/news/articles/2019-04-02/trump-in-reversal-says-replacing-obamacare-can-wait-until-2020?utm_campaign=pol&utm_medium=bd&utm_source=applenews).

- 1, regarding the decision not to defend the Constitutionality of the ACA in *Texas v. United States*;
3. All communications between Mick Mulvaney, Joe Grogan, Russ Vought, any other personnel identified in response to Request 1, and any DOJ personnel between December 14, 2018, and March 25, 2019, regarding the decision to not to defend the Constitutionality of the ACA in *Texas v. United States*;
 4. All communications between Mick Mulvaney, Joe Grogan, Russ Vought, any other personnel identified in response to Request 1, and any HHS personnel between December 14, 2018, and March 25, 2019, regarding the decision not to defend the Constitutionality of the ACA in *Texas v. United States*;
 5. All communications between Mick Mulvaney, Joe Grogan, Russ Vought, any other personnel identified in response to Request 1, and any personnel from any non-governmental entities, including but not limited to political action committees or think tanks, between December 14, 2018, and March 25, 2019, regarding the decision not to defend the Constitutionality of the ACA in *Texas v. United States*;
 6. All analyses, studies, reviews, assessments, reports, memoranda, or formal opinions regarding the potential impacts if the entire ACA is found to be unconstitutional. If no such materials exist, please say so in your response;
 7. All documents relating to any plans or policies to initiate an alternative health care law in the event the ACA is found unconstitutional; and
 8. All internal and external communications, including communications with personnel from any non-governmental entities, regarding any plans or policies to initiate an alternative health care law in the event that the Fifth Circuit Court of Appeals or the United States Supreme Court holds the ACA to be unconstitutional.

Thank you for your attention this matter.

Sincerely,



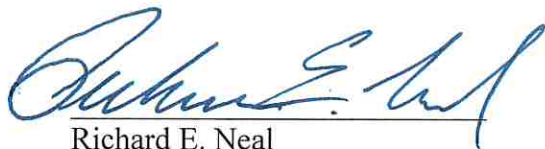
Elijah E. Cummings
Chairman
Committee on Oversight and Reform



Frank Pallone, Jr.
Chairman
Committee on Energy and Commerce

Mr. Pat Cipollone

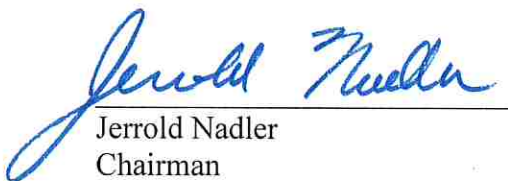
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Richard E. Neal
Chairman
Committee on Ways and Means



Robert C. "Bobby" Scott
Chairman
Committee on Education and Labor



Jerrold Nadler
Chairman
Committee on the Judiciary

cc: The Honorable Jim Jordan, Ranking Member
Committee on Oversight and Reform

The Honorable Greg Walden, Ranking Member
Committee on Energy and Commerce

The Honorable Kevin Brady, Ranking Member
Committee on Ways and Means

The Honorable Virginia Foxx, Ranking Member
Committee on Education and Labor

The Honorable Doug Collins, Ranking Member
Committee on the Judiciary