

Health Care in Motion

Timely, Substantive Updates on Policy Shifts · Actionable Advocacy to Protect Health Care

February 3, 2017

Clarity Remains Elusive on the ACA, As President Trumps Moves Forward with Supreme Court Pick

Washington answered one pressing question this week—who will be President Donald Trump's Supreme Court nominee—while many key questions on the future of the Affordable Care Act (ACA) and access to care remain open. Trump has selected Judge Neil Gorsuch of the United States Court of Appeals for the 10th Circuit as his candidate to fill Justice Antonin Scalia's vacated seat on the Supreme Court. Judge Gorsuch is considered a conservative textualist in the mold of the late Justice Scalia, and has weighed in on controversial cases involving access to care under the ACA.

Little clarity was obtained this week for health care issues, however. Congressional Republicans continue to struggle to coalesce around an ACA replacement plan, or even a timeline for such a proposal. This uncertainty has left insurers nervous about the 2018 Marketplaces, despite record enrollment in the 2017 Marketplaces. There may be at least some new information in the coming weeks, however, as early signals indicate that the Administration is beginning to promulgate its first health care regulations.

Advocates Should:

1. Review and understand Judge Gorsuch's record with respect to access to care. In particular, advocates should make sure they understand *Hobby Lobby Stores v. Burwell* and *Zubik v. Burwell*, two Supreme Court cases Gorsuch was involved with while the cases were reviewed by the 10th Circuit.
2. Continue to track key open questions facing access to care under the new Congress and Administration. In particular, advocates should:
 - Continue to meet with Congress to understand when to expect an ACA replacement to move forward;
 - Advocate for retaining certain key elements of the ACA in any replacement proposal;
 - Work with stakeholders such as insurers and departments of insurance to understand the future of the 2018 Marketplaces; and
 - Closely monitor the federal register for any health care regulations proposed by the Administration.

No Clear Path Forward on the ACA, as Open Enrollment Period Closes

During the last weekend in January, Congressional Republicans gathered in Philadelphia for a retreat where a major item on their to-do list was finding unity and a path forward with respect to repealing and replacing the ACA. No such path

Health Care in Motion

appeared, however, and a [leaked recording](#) made clear just how little agreement there is around fundamental questions, including the timeline for a replacement plan, who should be covered in a post Obamacare health care market, and future of Medicaid.

Uncertainty is the name of the game across Washington, not just at the Congressional Republican retreat. Some interesting developments and open questions to keep an eye on include:

- **Uncertainty on Repeal or Replace:** Congressional Republicans are finding repealing and replacing the ACA a daunting task, especially on the very ambitious timeline they initially set. Some on the Hill have indicated that an ACA replacement bill will likely not move forward until early spring. There have also been indications that Republicans have yet to coalesce around a specific proposal. Senators Cassidy (R-LA) and Collins (R-ME) put forward a replacement plan that is unique in that it allows states to decide to keep elements of the ACA. This proposal, however, has garnered little enthusiasm from fellow Congressional Republicans. Rather, the proposals that are garnering the most support thus far are the more conservative options originating from the House, such as Paul Ryan or Tom Price's proposals.
- **Open enrollment over; fate of the 2018 Marketplaces unclear:** Open enrollment for the 2017 Qualified Health Plans ended on January 31, 2017. Although the final numbers are not yet available, [initial numbers](#) suggest that it was a success, with 11.5 million individuals signing up for 2017 coverage. The success of the 2018 Marketplaces is more uncertain, however. Insurers have begun negotiations around participating in the 2018 Marketplaces and are [nervous](#) that the Government will not continue to provide subsidies and other critical financial supports. Some of these [concerns](#) stem from threats to repeal certain taxes implemented by the ACA, which are used to fund the subsidies.
- **Little known about pending health care regulations:** The Trump Administration submitted its first [Health and Human Services regulations](#) to the Office of Management and Budget this week. Little is known about this rule beyond that it is intended to stabilize the Marketplaces. Educated guesses about the contents of the rule include: tightening the rules around special enrollment periods, increased consequences for people who do not pay their premiums on time, or revisions to essential health benefits or network adequacy requirements. The timeline for the rule moving forward is also uncertain, as OMB review can take days, weeks, or even months.

Trump's Supreme Court Pick Familiar to Court Battles Over Access to Care Under the ACA

On January 31, 2017, President Donald Trump nominated Judge Neil Gorsuch for the Supreme Court. Judge Gorsuch is considered to be as conservative or even more conservative than the late Justice Antonin Scalia, who he would be replacing. Gorsuch should be familiar to advocates of access to care under the ACA, having previously voiced support for allowing employers' religious beliefs to limit the health care choices of employees.

Advice and Consent: The Process for Appointing a Supreme Court Justice

Similar to cabinet positions, the Constitution empowers the President to select Supreme Court Justices, but only with the "advice and consent of the Senate." When there is a vacancy on the Court, the President selects a nominee, taking into account the candidate's values and views, age, health, race, gender, and likelihood of confirmation. Justices are not required to be judges, or even lawyers, although most Presidents prefer to nominate judges with a clear judicial record so they can better predict the candidate's performance on the Supreme Court.

Once the nomination is announced, the Senate Judiciary Committee meets the candidate to question him or her. The

Health Care in Motion

Committee will then vote to send the candidate to the full Senate for a vote with a positive, neutral, or negative report. A simple majority vote is required to accept or reject a nominee. A Supreme Court nominee, however, is vulnerable to a filibuster because a supermajority of sixty is needed for cloture, which allows the debate to end and for the final vote to occur. Senate Democrats do have the numbers to impose a filibuster if they remain united. However, President Trump has vocally urged Senator McConnell to get rid of the Senate rules allowing a filibuster (a course of action colorfully known as the “nuclear” option) if Democrats do take this approach.

Rejections for the Supreme Court are rare, happening only twelve times in our nation’s history. The last rejection of a nominee by vote of the full Senate was Robert Bork in 1987. Last year, however, the Senate Judiciary Committee refused to hold a confirmation hearing for Merrick Garland on the grounds that it was too close to the 2016 Presidential election for President Obama to fill a Supreme Court vacancy. Their refusal to consider Judge Garland will influence Gorsuch’s confirmation process, with Senate Democrats likely to object to his nomination.

Who is Neil Gorsuch?

Judge Neil Gorsuch has served on the United States Court of Appeals for the 10th Circuit for the past decade. He has the typical legal pedigree for a Supreme Court Justice, attending Columbia and Harvard, and then clerking for Judge David Sentelle of the D.C. Circuit, and Justices Byron White and Anthony Kennedy. On the political spectrum, he has longstanding ties to the Republican party, as his mother served as the head of the Environmental Protection Agency under President Ronald Reagan. At 49, he is fairly young and would likely be on the Supreme Court for several decades.

In many respects, Judge Gorsuch is a natural successor to Justice Scalia. He is an originalist who often uses textualism to justify his almost uniformly conservative judicial results. For example, in a past case, he [stated](#), “[o]urs is the job of interpreting the Constitution . . . [a]nd that document isn’t some inkblot on which litigants may project their hopes and dreams.” As a result of his judicial philosophy, he has often criticized liberals for advancing their policy goals through the court system rather than legislatures. Because of his very conservative approach, Judge Gorsuch is expected to be very [similar](#) to the late Justice Scalia, and would likely vote to limit gay rights, uphold restrictions on abortions, and invalidate affirmative action programs.¹

A History of Voting Against Access to Care Under the ACA

Advocates of the ACA have reason to be concerned about the nomination of Judge Gorsuch for Supreme Court, as he has previously urged the 10th Circuit Court to limit the ACA’s guarantee of access to certain health services, and to permit employers’ religious beliefs to limit the health care choices of their employees. In two recent high profile cases, Gorsuch sided in favor of employers who had religious objections to providing health coverage for contraceptive care to their employees. In [Hobby Lobby Stores v. Sebelius](#), a case in which a family-owned for profit company objected to ACA regulations requiring employers to provide free contraception coverage to their employees, Gorsuch voted in favor of the employer.² In his concurrence to the *Hobby Lobby* decision by the 10th Circuit, Gorsuch stressed that the courts must accept the parties’ own beliefs regarding the requirements of their faith and accept these assertions at face value. In [Little Sisters of the Poor v. Burwell](#), a case in which religious non-profit employers objected to their employees’ health insurance covering contraceptive care at no cost, Judge Gorsuch wrote a dissent stressing that the courts must show deference to the plaintiffs’ own articulation of the tenets of their religious beliefs. His concurrence and dissent in these cases helped raise his profile in conservative circles, and likely contributed to his nomination.

¹ For an in-depth analysis of Judge Gorsuch’s judicial record, please see SCOTUSblog’s summary [here](#).

² For an analysis of the Supreme Court’s decision in *Hobby Lobby Stores v. Burwell*, please see the Center for Health Law and Policy Innovation’s blog post on the case [here](#).

Health Care in Motion

Judge Gorsuch's support for the idea that the religious beliefs of a select few should trump access to essential health care for all is worrying to advocates of the ACA. Religious beliefs can conflict with access to care when religious groups object to certain medical procedures, such as contraceptive care, sexual reassignment surgery, and vaccinations. Many religious employers have successfully used religious liberties arguments, similar to the ones made by Judge Gorsuch, to push back on ACA requirements that health insurance cover contraceptive care at no cost to enrollees.

Currently, in [Franciscan Alliance v. Burwell](#), a Catholic hospital system and other plaintiffs are using religious freedom arguments to block the Department of Health and Human Services from enforcing its nondiscrimination rule promulgated under Section 1557 of the ACA when it comes to gender identity or termination of pregnancy. If the plaintiffs prevail, medical providers will be allowed to refuse services to patients on the basis of patients' gender identity or reproductive history. This case, which is at the district court level currently, will likely reach the Supreme Court within the next year or two, assuming Section 1557 survives ACA repeal. If confirmed, Gorsuch would be very likely to side with the plaintiffs in this case and other similar cases in which access to care comes into conflict with religious views.

Health Care in Motion is written by:

Caitlin McCormick-Brault, Associate Director at the Center for Health Law and Policy Innovation; Carmel Shachar, Clinical Instructor at the Center for Health Law and Policy Innovation; and Phil Waters, Clinical Fellow at the Center for Health Law and Policy Innovation.

For further questions or inquiries please contact Carmel Shachar, cshachar@law.harvard.edu.

Subscribe to all Health Care in Motion Updates