July 28, 2020

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Nadler:

As you are aware, in June 2018, I resigned from my employment as a career attorney with the U.S. Department of Justice. I did so to protest the Department's decision not to defend the constitutionality of the Affordable Care Act in *State of Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex.), the case that is now pending before the Supreme Court under the caption of *California v. Texas*, No. 19-840. You have asked me to provide the Committee with information related to my resignation. Given that I served, before my resignation, as one of the counsel for the United States in the *Texas* litigation, I cannot discuss the particular details of my participation in that matter. I trust that you will consider this letter to be an acceptable substitute in response to your request for my testimony on this matter.

Enacted in 2010, the Affordable Care Act was designed to expand health coverage in the United States. Among the Act's numerous provisions, it prohibits insurers from denying coverage to individuals with pre-existing conditions and from charging individuals higher premiums because of a medical condition. The Act creates subsidies to defray the cost for individuals to purchase comprehensive coverage and expands Medicaid to cover millions of additional lower-income Americans. By some estimates, the Act's coverage provisions have enabled more than 53 million people to obtain health coverage. Kaiser Family Foundation, *Pre-Existing Condition Prevalence for Individuals and Families* (Oct. 04, 2019). These coverage provisions are only one part of a larger statute that has restructured the national health market in a number of ways. For example, the Act created a Prevention and Public Health Fund to support state and local efforts to respond to public health emergencies, such as the COVID-19 pandemic, through epidemiological tracking, enhancements to laboratory capacity, and the expansion of diagnostic testing.

The Affordable Care Act, as it was originally enacted, also imposed a shared responsibility payment on certain taxpayers who did not maintain qualifying health coverage. 26 U.S.C. § 5000A. In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court upheld the constitutionality of Section 5000A as an exercise of Congress's taxing power. In December 2017, Congress enacted the Tax Cuts and Jobs Act of 2017 (TCJA), which zeroed out the amount of Section 5000A's shared responsibility payment.

In February 2018, the State of Texas, joined by several additional states, filed a complaint in federal court alleging that the TCJA's amended version of Section 5000A was unconstitutional, and that the Affordable Care Act in its entirety could not be severed from this amended provision. I was assigned as one of the career attorneys within the Department of Justice to prepare the government's defense of this case. At the time, I had been employed with the Department as a civil servant for more than twenty years, having served under politically-appointed officials of the Clinton, Bush, Obama, and Trump Administrations.

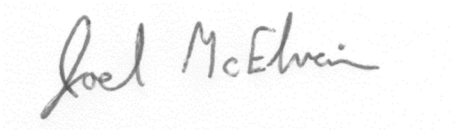
On June 7, 2018, on the day that the Department of Justice's brief in the *Texas* litigation was due to be filed, then-Attorney General Sessions sent a letter to Congress to state his decision not to defend certain provisions of the Affordable Care Act. Letter from Jefferson B. Sessions III, Attorney General, to Paul Ryan, Speaker, U.S. House of Representatives (June 7, 2018). In particular, the Attorney General stated his conclusion that the "proper course is to forgo defense of Section 5000a(a)." *Id.* at 2. He also stated that the Department of Justice would seek to invalidate the ACA's provisions that guarantee the availability of coverage for persons with pre-existing conditions. *Id.* at 3.

When I was informed of the Attorney General's decision to forgo the defense of important provisions of the Affordable Care Act, I stated my decision to resign from my employment with the Department of Justice. The Department has long understood that, except in rare circumstances, it has a duty to defend the constitutionality of federal statutes where a reasonable argument is available for that defense. I believed that the Attorney General's decision was inconsistent with this duty, and I did not believe that I could continue in good conscience to serve as an attorney in the Department under those circumstances.

In my view, Attorney General Barr acted similarly when, in March 2019, he directed the Department to take the position that the Affordable Care Act should be invalidated in its entirety. The invalidation of the Act would discontinue health coverage for millions of people, disrupt the health care market, and interfere in governmental efforts to respond to the COVID-19 public health emergency. The Attorney General appears to recognize that he is not compelled to advocate for these results. To the contrary, he has publicly intimated that he considers the Department's legal position to be weak. When he was asked to defend his decision in his testimony before a House subcommittee in April 2019, he responded, "Do you think it's likely we are going to prevail? … I'm just saying that if you think it's such an outrageous position, you have nothing to worry about. Let the courts do their job." Hearing: Department of Justice Budget Request for Fiscal Year 2020, U.S. House of Representatives, Comm. on Appropriations, Subcomm. on Commerce, Justice, Science, and Related Agencies, 116th Cong., 1st Sess. (Apr. 9, 2019), appropriations.house.gov\\events\\hearings\\department-of-justice-budget-request-for-fiscal-year-2020. More recent reporting indicates that Attorney General Barr continues to acknowledge that legal arguments are readily available in the defense of the Affordable Care Act. *See* Kaitlan Collins, et al., *Barr urges Trump administration to back off call to fully strike down Obamacare*, CNN (May 5, 2020); Susannah Luthi, *Trump will urge Supreme Court to strike down Obamacare*, Politico (May 6, 2020). I do not believe that these statements can be squared with the Department of Justice's duty to advance reasonable arguments to defend federal statutes in litigation.

I did not decide lightly to leave my employment with the Department of Justice. I considered it to be a great privilege to serve the public as a career attorney with the Department. My former colleagues who are civil servants have committed themselves to the Department's mission to defend the interests of the United States according to law, and to ensure the fair and impartial administration of justice for all Americans. It is regrettable that Attorney General Sessions and Attorney General Barr have not displayed the same commitment to these values.

Sincerely,



Joel McElvain

cc: Jim Jordan, Ranking Member, House Committee on the Judiciary