Statement before the House Committee on Energy and Commerce

Subcommittee on Oversight and Investigations

Hearing

The ACA's Cost Sharing Reduction Program: Ramifications of the Administration's Decision on the Source of Funding for the CSR Program

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Summary Points

- The federal district court ruling in *House v. Burwell* reaffirmed the longstanding rules of appropriations law. Advance payments to insurers to reimburse the expenses of cost sharing reductions (CSRs) mandated by the ACA were never appropriated by Congress.
- The Obama administration's overly broad inference of permanent appropriations by Congress would provide no limiting principle to prevent future administrations from paying for virtually any ACA program by linking it to section 1401 premium tax credits.
- For the last six years, the Obama administration has been frustrated by its inability to get Congress to support more funding for a number of its less-popular objectives under the ACA. It keeps trying to stretch appropriations law and administrative guidance to spend money without necessary consent or authority.
- If we are ever going to reduce the partisan rancor and operational gridlock in remedying the long list of dysfunctional components of the ACA, taking illegal shortcuts and making expedient administrative revisions in the law must be replaced by offering a more persuasive case for legislative changes in the underlying statute.

Thank you Chairman Murphy, Subcommittee Ranking Member DeGette, and Members of the Subcommittee for the opportunity to testify today on the Obama administration's funding decisions regarding the cost sharing reduction program under the Affordable Care Act (ACA).

I am testifying today as a health policy researcher and a resident fellow at the American Enterprise Institute (AEI). I also will draw upon previous experience as a senior health economist at the Joint Economic Committee and health policy researcher at several other Washington-based research organizations.

My testimony will outline the background behind this issue and highlight the key governing principles of appropriations law and practice. I will summarize the main legal arguments and developments thus far in litigation concerning the administration's funding practices and then place them within a broader context. After briefly touching on the foreseeable parameters for the future economic and health policy consequences of any final ruling that might strike down the current funding for cost sharing reduction subsidies, I will conclude with an overview of what is at stake here in upholding the constitutional authority of Congress to determine spending by the federal government.

On July 30, 2014, the U.S. House of Representatives voted to authorize a lawsuit that challenged the legality of the Obama administration's funding of cost sharing reduction (CSR) subsidy payments to insurers providing Silver-level coverage to eligible lower income enrollees in ACA Marketplace plans. On May 12, 2016, Judge Rosemary Collyer of the United States District Court for the District of Columbia granted summary judgment to the House in *United States House of Representatives v. Sylvia Matthews Burwell* (*House v. Burwell*). The judgment enjoined any further reimbursements under

Section 1402 of the ACA until a valid appropriation is in place. However, Judge Collyer issued a stay of the injunction pending any appeal by the parties, and federal government attorneys on behalf of Burwell and the U.S. Department of Health and Human Services (HHS) remain certain to do so later this month

Although the litigation is likely to continue for many more months, if not years, the ruling reaffirmed the longstanding rules of appropriation law in concluding that the advance payments to insurers to reimburse them for the expenses of CSR coverage subsidies mandated by the ACA were never appropriated by Congress. The court decision upheld the rule of law and signaled that at least this particular example of the Obama administration's repeated efforts to stretch implementation of the 2010 law beyond legal norms and the plain meaning of the ACA's statutory text had gone past permissible limits. If upheld on appeal, the ruling essentially leaves the ultimate funding decision back where it belongs – before the U.S. Congress.

This issue needs to be seen within the context of many questionable maneuvers by this administration to rewrite and re-interpret the legal requirements of the ACA in implementing its provisions. Other legal challenges remain on the horizon to additional misuse of taxpayer dollars to benefit certain private insurers. This subcommittee's continuing investigation and oversight of those policies and practices are essential to maintaining political accountability and the rule of law.

Background for How We Got Here

The court case involved several sections of the ACA that provide subsidies to eligible low-income enrollees in certain Marketplace insurance plans. Section 1401 authorizes refundable tax credits to make their insurance premiums more affordable, while section 1402 reduces various cost sharing expenses that would otherwise be imposed by insurers. Section 1412 requires the Secretary of the Treasury and the Secretary of HHS to establish a program to make eligibility determinations in advance for the premium tax credits under section 1401 and the cost sharing reductions under section 1402.

Although section 1401 was funded by adding it to a preexisting list of permanently-appropriated tax credits and refunds (31 U.S.C. section 1324), section 1402 was not added to that list. Judge Collyer accordingly found that the section 1402 reimbursements to insurers were not funded through that same, permanent appropriation, nor anywhere else within applicable federal law.

Appropriations Law 101

Under article 1, section 9 of the U.S. Constitution, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Although authorizing legislation establishes or continues the operation of a federal program or agency, appropriations legislation is needed to provide funds for authorized programs. An appropriation must be expressly stated; it cannot be inferred or implied. Moreover, "a direction to pay without a designation of the source of funds is not an appropriation."[1]

In the case of section 1402 subsidies, the ACA first requires insurers to provide coverage with reduced cost sharing for those eligible enrollees, and it then provides that the HHS Secretary shall make periodic and timely payments to the insurance issuer equal to the value of the reductions. However, the ACA does not designate a source of funds to make the cost sharing reimbursements. Nor do any of its provisions specifically appropriate money for cost sharing reductions. Nothing in section 1402 prescribes a process for the "periodic and timely payments to the issuer equal to the value of the reductions." Nor does it condition the insurers' obligations to reduce cost sharing on the receipt of offsetting payments.

The Obama Administration's Arguments for Funding CSRs Anyway

The administration initially assumed that the cost sharing reduction reimbursement payments required an annual appropriation by Congress. Its Fiscal Year 2014 budget request described cost sharing payments as "annually-appropriated accounts."[2] Its May 20, 2013 *Sequestration Preview Report* for FY 2014, issued by OMB, also listed "Reduced Cost Sharing" as subject to sequestration in the amount of $286 million (7.2% of the requested appropriation). Including those payments on a list of sequestration-bound programs further acknowledged that no permanent appropriation was available for section 1402 reimbursements.

Congress decided not to appropriate funds for the CSR reimbursement payments for FY 2014. For example, on July 14, 2013, the Senate Appropriations Committee issued a report, in appropriating funds to HHS and other agencies for FY 2014, that stated its recommendations did not include a mandatory appropriation, *requested by the administration*, for reduced cost sharing assistance … as provided for in sections 1402 and 1412 of the ACA." (emphasis added). Two subsequent continuing resolutions signed into law, on October 17, 2013, failed to include an appropriation for section 1402 reimbursements; nor did the Consolidated Appropriations Act for 2014, signed by President Obama on January 17, 2014.

In early 2014, the Obama administration apparently changed its mind and determined that it did not need an annual appropriation to make the advance CSR reimbursement payments to insurers. It has proceeded to do so since then. In response, the House filed its lawsuit in federal district court.

The administration offers a number of legal rationales to try to find authority for its CSR funding practices. The primary one is that those subsidies are inextricably intertwined with the ACA's advance premium tax credits, which are permanently appropriated within section 1401.

A lesser argument points to another ACA provision that would apply prohibitions on use of CSR-subsidized plans to pay for abortions, as either a redundancy -- given the longstanding Hyde amendment restriction on annual HHS appropriations – or evidence that Congress did not consider CSR payments part of such appropriation programs.

Administration legal briefs in *House v. Burwell* also contend that another congressional provision enacted in the October 2013 Continuing Appropriations Act, which required HHS to certify eligibility both for premium tax credits and reductions in cost sharing before making those subsidies available, is further evidence that Congress had not already precluded the CSR payments from being made by failing to appropriate any funds for them.

Another administration legal argument notes the absence of standard language ("authorized to be appropriated such sums as are necessary") in section 1402 for CSR payment funding means that Congress felt it unnecessary, because those payments were already funded permanently.

Administration attorneys also have noted as further support for the funding of CSR payments:

- Subsequent absence of any congressional appropriation riders limiting or eliminating funding for CSR payments (unlike, for example, riders restricting funding for ACA risk corridor payments to insurers),
- Past assumptions in CBO scoring of ACA provisions that CSR payments were "direct spending" and therefore expected to be adequately funded by appropriations, and
- Various negative budgetary and coverage consequences of failure to permanently appropriate CSR funds.

They also dismiss post-enactment requests by the administration for CSR funding as legally inconsequential.

This long list of imaginative, if not legally decisive, arguments was rebutted and dismissed by Judge Collyer. The plain text of the ACA outweighed them in most cases, when other important textual distinctions did not already. The congressional prerogative to refuse to appropriate funds cannot be overridden by rewriting the ACA's statutory text.

In particular, the CSR payments and premium tax credit provisions use different eligibility standards, operate differently, and are funded differently. Only section 1401 makes permanent appropriations – and just for premium tax credits. The CSR payments operate independently of the federal tax system. They are free of any income-based reconciliation process for individual beneficiaries (unlike advance premium tax credit payments).

Most of all, the administration's overly broad approach to inferring permanent appropriations by Congress in this case provides no limiting principle to prevent future administrations from paying for virtually any ACA program on the theory that it is linked in some way to section 1401 premium tax credits. However, the district court ruled in *House v. Burwell* that every permanent authorization does not also necessarily constitute a permanent appropriation. Any negative consequences due to Congress's continuing refusal to appropriate funds in this, or other cases, flow from its prerogative and powers under the Constitution.

Will Insurers Still Collect CSR Reimbursements, One Way or Another?

Another recurring contention by backers of the administration's CSR funding practices is that although insurers participating in ACA marketplaces still will be compelled to provide cost sharing reductions to eligible plan enrollees, they ultimately will prevail in the U.S. Court of Federal Claims under the Tucker Act to recover reimbursements that are owed to them under the ACA. Although Judge Collyer did not rule directly on this point, attorneys for the House argue persuasively that the ACA text does not confer an actionable right upon the insurers.

The Tucker Act does not create a substantive cause of action, but only jurisdiction for certain claims against the United States government. Its Judgment Fund does not waive sovereign immunity. Its general appropriations for payment of judgments against the federal government does not provide an all-purpose fund for judicial disbursement.

Unlike other Tucker Act cases involving money-mandating statutes but insufficient appropriated funds to pay successful claims,[3] the CSR reimbursement issue here would involve a complete absence of any valid, congressionally appropriated funds. Hence, no insurer would have any basis for claiming an actionable interest in the payments authorized (but not appropriated) by the ACA.[4]

A different line of argument by some critics of the *House v. Burwell* decision is that it is likely to trigger other damaging consequences in insurance markets, including higher overall costs to taxpayers. Such projections require a number of assumptions about how health insurers and their customers will react to the loss of CSR reimbursement payments, as well as the timing of any transition to new payment rules. The initial valid premise is that insurers participating in ACA Marketplaces will still be required by law to

provide CSR coverage to eligible enrollees. The likelihood that premiums for such plans would rise then would trigger higher advance premium tax credit subsidies for individuals choosing Silver plan coverage. One model of the fiscal effects projects that the costs of essentially swapping CSR reimbursement subsidies for larger premium tax credits, including spillover effects on other Marketplace enrollees, would increase taxpayer costs by a net $47 billion over ten years and increase Silver plan premiums in ACA Marketplaces by an average of $1040.[5]

A good bit of such worst-case modeling relies on a number of narrow assumptions regarding timing; no insurer exits, and early exits from plans by healthier individuals. Other simplified assumption relate to spreading higher premium costs across a broader set of non-Silver and even non-Marketplace plans; the combined effects of risk selection, risk adjustment, and single pool pricing in particular market segments; and lack of any countering responses by Congress, the executive branch, or competing insurers. Those assumptions make such modeling far easier, if not more predictively accurate.

Somewhat ironically, the Urban Institute analysis actually predicts that elimination of the CSR reimbursement payments would *reduce* the total number of uninsured American by about 400,000, primarily because more of them would become eligible for premium tax credits as Marketplace insurance premiums rise. However, the effects of eliminating CSR subsidies in raising insurance premiums might hit hardest somewhat wealthier policyholders who continue to purchase those plans without premium tax credits.[6]

The Contingencies of Future Consequences

The coverage and subsidy components of the ACA have many moving parts that can interact in less predictable ways if one of them (like CRS reimbursement payments) is altered. Even oversimplified assumptions about one-dimensional changes in policy are more likely to point in the right general direction than pinpoint the magnitude of its consequences. In the case of CSR reimbursements, proper application of appropriations law and enforcement of the ACA's statutory text would at least accomplish one fundamental principle: These issues are to be decided by members of the U.S. Congress, who remain politically accountable to voters.

The next Congress, and future ones, must decide whether to appropriate funds for CSR payments to insurers. The next House of Representatives may decide whether to reauthorize and continue to pursue its *House v. Burwell* litigation against the executive branch, settle it, or drop further appellate activity. The next Congress may instead reopen debate over the operations of the ACA, particularly concerning how certain types of insurance coverage might be subsidized differently (such as through flatter, age-adjusted tax credits rather than more income-related premium subsidies), and whether it allows more, or less, cost sharing. Political pressure will be brought to bear to preserve, or restore, CSR payment subsidies, as well as to end or alter them. The future fate of those subsidies might also be used to leverage broader changes in the underlying law governing health care.

Clearly, a number of upcoming electoral and political variables will determine control of Congress and the White House and reshape the resulting range of policy change. Hence, more static modeling of budgetary and coverage consequences, based on current parameters, could have a brief shelf life.

This particular legal controversy needs to be placed within a larger, unfortunate context. For the last six years, the Obama administration has been frustrated by its inability to get Congress to support more funding for a number of its less-popular objectives under the ACA. Hence, when it's not looking under the budgetary account sofa cushions at HHS and CMS for some more spare change, it keeps trying to stretch appropriations law and administrative guidance to spend money without necessary consent or authority.

The administration has a lengthy "rap sheet" in bypassing the Constitution, statutory law, and norms of administrative law. They extend beyond being flagged in federal district court this May for unconstitutional spending of funds for risk sharing reduction reimbursements that were never appropriated by Congress. HHS has made up ad hoc rules to renegotiate unilaterally the terms of an older budgetary deal with insurers in 2010 regarding another temporary reinsurance program for early retirees, in order to redirect funds from the U.S. Treasury to dispense more generous reinsurance subsidies, ahead of statutory schedule, to certain insurers offering qualified health plans in the ACA-regulated individual insurance market.[7] Contrary to the ACA's statutory requirements, this diversion of taxpayer funds essentially allows those insurers to pay less in special reinsurance taxes while gaining a larger proportionate share, ahead of schedule, of what those taxes are supposed to yield in revenue.

Earlier this year, Iowa state insurance regulators had to sue CMS to try to stop it from jumping ahead of other creditors in line for the liquidation of claims against a failed co-op plan – in violation of the ACA statute, well-established state practices in handling insurer insolvencies, an earlier court order to which Obama administration officials never objected, and even the co-op loan agreement terms and regulations promulgated by CMS several years earlier.[8]

At various times in recent years, the Obama administration has been tempted to promise more generous payment of risk corridor subsidies than congressional appropriations, and even some of the administration's earlier interpretations of the ACA statute, allow. Annual appropriations riders have kept those ambitions in check recently, but the administration remains poised to revisit the issue of "budget-neutral" risk corridor payments again.

The federal district court ruling in *House v. Burwell* provides a broad warning shot to the Obama administration that its many previous maneuvers at the edges of the law and beyond remain in jeopardy. In this case, the legal transgressions involved violation of a fundamental provision of the U.S. Constitution – the power assigned to Congress to control funding through appropriations. Judge Collyer appropriately distinguished the case from the Supreme Court decision in *King v. Burwell*[9] because the latter involved interpretation of possible statutory ambiguity whereas the former was simply a matter of "a failure to appropriate, not a failure in drafting." There was no ambiguity involved in applying appropriations law to an otherwise clear statutory provision. She concluded that the key consequences in the case were that if the federal

government's argument prevailed, every permanently authorized benefit program would then automatically include a permanent appropriation (contrary to current law).

More fundamentally, the legal authority to spend taxpayer money must require more than just the consent of executive branch administrators and the businesses they regulate and subsidize. Laws passed by Congress are not just "suggestions" to be selectively revised or discarded by the executive branch. Elections matter and so do the decisions by the elected representatives in Congress they empower.

Challenging opponents to just go ahead and sue in court undermines the minimum level of respect we need for, and from, our government agencies and officials. Trust in the basic integrity of our government institutions and their adherence to the rule of law is a key foundation of democratic accountability, civil discourse, and economic progress. If we are ever going to reduce the partisan rancor and operational gridlock in remedying the long list of dysfunctional components of the ACA, taking illegal shortcuts and making expedient administrative revisions in the law must be replaced by making a more persuasive case for legislative changes in the underlying statute.

Almost 30 years ago, another White House got caught diverting funds for purposes expressly prohibited by Congress in the Iran-Contra scandal. Once you start swapping taxpayer dollars outside of legal channels to hide earlier mistakes, the temptation is to keep doing it more and more.[10]

Notes

[1] U.S. Government Accounting Office, GAO-04-261SP, *Principles of Federal Appropriations Law (Vol. I)* 2-17 (3d ed. 2004).

[2] Department of Health and Human Services, CMS. *Justification of Estimates for Appropriations Committees for Fiscal Year 2014*, at 7 (2013).

[3] See, e.g. *County of Suffolk, New York v. Sebelius*, 605 F. 3d 135 (2d Cir. 2010); *Greenlee County Arizona v. United States,* 487 F. 3d 871 (Fed. Cir. 2007).

[4] See, e.g., *OPM v. Richmond*, 496 U.S. 414 (1990). ("A claim for payment of money from the Public Treasury contrary to a statutory appropriation is prohibited by the Appropriations Clause of the Constitution.")

[5] Linda J. Blumberg and Matthew Buettgens, *The Implications of a Finding for the Plaintiffs in House v. Burwell*, Urban Institute Health Policy Center, January 2016.

[6] Seth Chandler, "Why the House Lawsuit over Cost Sharing Reductions Might Win but Won't Kill Obamacare," January 14, 2016, http://www.forbes.com/sites/theapothecary/2016/01/14/why-the-house-lawsuit-over-cost-sharing-reductions-might-win-but-wont-kill-obamacare/#4ecc81ddfcbf

[7] C. Boyden Gray, "Allocation of Funds Collected under the Affordable Care Act's Transitional Reinsurance Program between Treasury and Reinsurance-Eligible Issuers," May 23, 2016, http://galen.org/assets/Reinsurance-Opinion-Letter.pdf

[8] *Nick Gerhart and Dan Watkins v. U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, Sylvia Matthews Burwell, and the United States*, Complaint for Declaratory Judgment and Injunctive Relief, No. 16-cv-00151, United States District Court, Southern District of Iowa, Central Division, filed May 3, 2016.

[9] *David King et al. v. Sylvia Burwell, Secretary of Health and Human Services, et al,* 576 U.S. ___ (2015).

[10] See, e.g. Nicholas Bagley, "Legal Limits and the Implementation of the Affordable Care Act," University of Michigan Law School, Public Law and Legal Theory Research Paper Series Paper No. 492 (January 2016). Bagley warns that "the administration's efforts to put the ACA on surer financial footing may embolden the next president to further slip the reins of legislative control – a dynamic that could have especially serious consequences for foreign affairs, where the appropriations power 'remains one of the Congress's few effective legal tools to regulate presidential initiatives.'" Ibid. at 25.