Written Statement of Simon Lazarus

Hearing Before the House Judiciary Committee Executive Overreach Task Force

"Executive Overreach in Domestic Affairs Part 1 – Health Care and Immigration"

March 15, 2014, 10 a.m.

My thanks to Chairman King, Ranking Member Cohen, all members of the Task Force, and other House members in attendance, for inviting me to testify in this inquiry.

I am Senior Counsel of the Constitutional Accountability Center, a public interest law firm, think tank, and action center, dedicated to realizing the progressive promise of our nation's Constitution and laws. With respect to the matters at issue in this hearing, CAC has filed *amicus curiae* briefs in the Supreme Court and the lower federal courts in *King v. Burwell*, on behalf of House and Senate leaders and committee chairs responsible for crafting the Affordable Care Act, and in *United States v. Texas,* on behalf of a bipartisan group of former House and Senate members who served while immigration law provisions at issue in that case were considered, and in *House of Representatives v. Burwell,* in the District Court for the District of Columbia, on behalf of Minority Leader Pelosi and other leading members of the Democratic minority. In *King*, the Supreme Court upheld, in June 2015, the Obama Administration's provision of Affordable Care Act tax credits and subsidies through federally facilitated as well as state-operated exchanges. In *U.S. v. Texas*, Texas and other states are currently challenging the legality of the Administration's November 2014 initiative titled Deferred Action for Parents of American Citizens and Lawful Permanent Residents, informally known as "DAPA." In *House v. Burwell,* the House majority challenges the funding of cost-sharing subsidies to lower-income purchasers of health insurance on ACA exchanges. I have written in various media on the subject-matter of this hearing, and have testified on those issues before this Committee, the Committee on Government Oversight and Reform, and the Committee on Rules. My written statement here draws in part on those previous efforts.

Opponents of the ACA and of DAPA have routinely condemned these and other administration initiatives as "executive overreach," in violation of the President's constitutional duty to "take care that the laws be faithfully executed."

Regrettably, I must observe, as I have on the other occasions noted above, that these claims of wayward Executive conduct import the Constitution and law into what are, in reality, political and policy debates. They twist or simply ignore the text, meaning, and manifest purpose of pertinent statutory provisions, as uniformly understood in Congress on both sides of the aisle as those laws were crafted and enacted. These charges mock the text and original meaning of the Take Care clause. They flout Supreme Court precedents, both long-established and very recent. And they

contradict the consistent practice of all modern presidencies, Republican and Democratic, to responsibly implement complex and consequential regulatory programs like the ACA and the immigration laws. These claims fault the Obama Administration for making reasonable adjustments in timing and for matching priorities with resources and technical, practical, humanitarian, and other relevant policy exigencies – including, in the immigration case, foreign policy – implementing enforcement priorities and techniques that have been directly and repeatedly endorsed by Congress.

Thus exercising presidential judgment in carrying laws into execution is what the Constitution requires. It is precisely what the framers expected, when they established a separate Executive Branch under the direction of a nationally elected President, and charged him to Take Care that the Laws be Faithfully Executed.[1] That is what the President and the members of his administration have done with the ACA implementation decisions at issue and with the DAPA immigration initiative – whatever one may think of their actions from a policy or political perspective.

Necessarily, the subject-matter of the hearing, as framed by its title, covers a lot of ground. In my statement, I will address what I believe are currently the most frequent and serious allegations of executive overreach on the health and immigration fronts.[2] I will of course welcome questions on either the issues I address or others, and will try to answer all as well as I can. I'll take the two areas in the order in which they respectively emerged as major issues – health first and immigration second.

The Legality of the Administration's Implementation of the ACA

1. <u>The claim (rejected by the Supreme Court) that the Administration "illegally" provided ACA-prescribed premium assistance tax credits to eligible individuals through federally facilitated as well as state-operated exchange market-places.</u>

Among the litany of unlawful implementation alleged by ACA opponents, the claim which has to date occupied by far the most political and public attention, not to say

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[1] Akhil Reed Amar, *America's Constitution: A Biography* 195 (2006): The sweeping provisions of Article II, including the Take Care clause "envisioned the president as a generalist focused on the big picture. While Congress would enact statutes and courts would decide cases one at a time, the president would oversee the enforcement of *all* the laws at once – a sweeping mandate that invited him to ponder legal patterns in the largest sense and inevitably conferred some discretion on him in defining his enforcement philosophy and priorities."

[2] Both Texas' lawsuit challenging the Administration's immigration initiative and the House majority's suit challenging ACA cost-sharing subsidy payments are themselves subject to serious objections that their proponents lack standing to bring their respective claims to federal court. I believe there is a strong likelihood that the Supreme Court will reject the radical expansion of standing doctrine requisite for either case to prevail, and have explained why in previous writings, but I will confine my written statement here to the merits of the "overreach" issues in which the Task Force appears to be interested. See http://balkin.blogspot.com/2015/07/the-next-wave-of-court-challenges-to.html and https://newrepublic.com/article/127504/next-supreme-court-obamas-immigration-policy

court-time, has been the theory that the ACA permitted tax credits to help low and moderate income individuals purchase insurance, but only in states which had established and run their own exchange market-place, not in states that had opted to let the federal Department of Health & Human Services handle that responsibility for their residents. Since 34 states took the federal exchange option in 2015, and 87% of all exchange-insured individuals were eligible to receive tax credits in the previous year, this theory – if upheld in court – would indeed have, in the words of its proponents, driven "a stake through the heart of Obamacare." More specifically, as explained by the four conservative justices – Scalia, Kennedy, Thomas, and Alito – who dissented from the Court's 2012 decision to uphold the ACA's "individual mandate,"Without the subsidies . . the exchanges would not operate as Congress intended and may not operate at all."[3]. The argument for reading the statute in a manner that would thus cause it to fail was shaped most prominently by Case Western Reserve Law Professor Jonathan Adler and Cato Institute Health Policy Studies Director Michael Cannon, in a law review article published well after the ACA was enacted. It rested on a subsection of the law, that pegs the amount of the credit to which a particular individual is entitled each year to "monthly premiums" for policies which "cover the taxpayer and were enrolled in through an *exchange established by the state* under [a specified section of the statute]." (Emphasis added) ACA supporters countered that the Adler-Cannon theory ripped an isolated four-word phrase out of context, and that when that phrase was read in the context of the overall law, and numerous specific provisions, their perverse, gutting interpretation proved to be incorrect.

While the ACA tax credits litigation wound through the federal courts, opponents of the Act ceaselessly cited their claim as evidence of the Obama administration's allegedly chronic disregard for the law and the Constitution – including before this Committee. In June of last year, however, the Supreme Court put that canard to rest. Writing for a six-justice majority, Chief Justice John Roberts rejected the challengers' a-contextual, hyper-literalist approach to statutory interpretation: "A fair reading of legislation," he said, "demands a fair understanding of the legislative plan." The focus on how a law is actually designed to operate is evident throughout the Chief Justice's *King v. Burwell* opinion – starting with its introductory sentence: "The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market." The opinion goes on to detail how the particular "interlocking reform" under challenge in the case – tax credits and subsidies for eligible exchange purchasers – is integral to other essential components, namely, mandating insurers to cover all applicants regardless of their health status, and mandating individuals to buy insurance or pay a tax penalty. Because of this underlying "plan," Roberts said, "It is implausible that Congress meant the Act to operate" with no tax credits available in states that opted to let the federal government operate their exchanges.

I don't think I can explain the significance of that ruling better than my co-panelist Elizabeth Slattery did the day of the decision. It was, she wrote on a Heritage Foundation legal blog – and I give her great credit for injecting humor into what was

[3] *Nat'l Fed'n of Indep. Bus. V. Sebelius,* 132 S.Ct. 2566, 2674

certainly a deeply disappointing occasion – "a terrible, horrible, no good, very bad day for conservatives who pinned their hopes of blocking Obamacare on the Supreme Court."[4]

I provide this detail of Chief Justice Roberts' *King v. Burwell* holding, and the approach to statutory interpretation on which that holding rested, and my co-panelist's reaction, not to do a victory lap or rub it in, but for four serious reasons central to this hearing:

1st, it is important to spotlight the chasm between the rhetoric about the alleged illegality and even unconstitutionality of the Administration's interpretation of the ACA tax credit provisions, on the one hand – and what the relevant law actually was and is, as the Supreme Court decisively held. That chasm should engender skepticism when we hear similarly over-the-top claims that, in other instances, the Obama administration is "trampling on the law and the Constitution."

2nd, I can't help but note Ms. Slattery's candid acknowledgement that conservatives, at least the brand of conservatives she had in mind, brought the *King v. Burwell* lawsuit, not because they were riled up that the Obama administration was implementing the law on the basis of an erroneous interpretation, but in order to "block" its implementation. This was of course a result at the top of their political agenda, but an effort that belongs in the political arena, not the courts – as the Chief Justice quite plainly recognized.

3rd, If, as Ms. Slattery says, these conservatives "pinned their hopes" on the Court, it reflected an expectation, however unspoken, that the five conservative justices would vote in lock-step to rubberstamp that political agenda – no matter if it took bending the law to do it. (In an unguarded moment prior to the Supreme Court's acceptance of the case for review, counsel for the *King* ACA opponents made that cynical expectation all but explicit.[5]) That too is something to bear in mind, in other instances when the same sorts of charges of rampant executive infidelity to the law and the Constitution are bandied about.

4th, and most important, it is critical to focus on Chief Justice Roberts' rationale in *King* – that laws should be interpreted to faithfully implement Congress' operational plan, as manifest in the text and structure of the overall statute, not to subvert it. Here is how he concluded his opinion:

> In a democracy, the power to make the law rests with those chosen by the people. . . . [I]n every case we must respect the role of the Legislature,

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[4] *In King v. Burwell Decision, Supreme Court Justices Acted As Lawmakers, Not Judges,* Daily Signal, June 25, 2015, http://dailysignal.com/2015/06/25/in-king-v-burwell-decision-supreme-court-justices-acted-as-lawmakers-not-judges/

[5] Counsel Michael Carvin told a reporter, "I don't know that four justices, who are needed [to grant review of the case] here . . . are going to give much of a damn about what a bunch of Obama appointees on the D.C. Circuit think," and added, with a smile, when asked if he believed, that on the merits, he could lose any of the five conservative Supreme Court justices, "Oh, I don't think so." http://talkingpointsmemo.com/dc/michael-carvin-halbig-supreme-court

> and take care not to undo what it has done. . . . *Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.* Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt." (Emphasis added)

Chief Justice Roberts could not have made it more clear that this approach will apply, not just to one case, but certainly to other challenges aimed at rendering the ACA dysfunctional, and, presumably, to other legal challenges similarly aimed at "undoing" legislative designs, thereby producing what the Chief Justice called "the type of calamitous result that Congress plainly meant to avoid."

Again, my co-panelist Ms. Slattery has nailed this point: "The ruling in *King v. Burwell,*" she wrote, "could have broader implications for those trying to curb the [purported] excesses of our imperial president." She included "immigration reform" in a short list of administration initiatives to which she believes those implications will apply. I agree entirely with Ms.Slattery about the implications of the Chief Justice's approach to interpreting laws. However, what she here, echoing many other administration critics, tosses off as "excesses of our imperial president" actually amount to, as the Supreme Court held, carrying out the legislative plan as intended by the Congress that enacted it. Which is to say, carrying out, to a T, the President's constitutional duty to "take care that the laws be faithfully executed."

It is difficult to avoid concluding that what some administration opponents condemn as lawless "excesses" are in fact any policies or actions that conflict with their own political agendas. And their beef is not so much with the administration, as with the Supreme Court, and, indeed, with laws and the Constitution as they are understood and executed by Court and the administration – and, as we shall see, by past Supreme Courts, administrations, and, indeed, Congresses dating back decades, controlled by both parties.

2. <u>The claim that the Administration violated the ACA and the Constitution, by postponing and adjusting statutory effective dates for regulations and other actions implementing it.</u>

Opponents of the Administration – and, of the ACA – first charged that President Obama broke the law and abused his constitutional authority, when, on July 2 of 2013, his administration announced a one-year postponement of the January 1, 2014 effective date for the ACA requirement that large employers provide their workers with health insurance or pay a tax.[6] Critics labeled this a "blatantly illegal move" that "raises grave concerns about [President Obama's] understanding" that, unlike medieval British

[6] White House Statement, "We're Listening to Businesses about the Health Care Law" (July 2, 2013), available at <http://www.whitehouse.gov/blog/2013/07/02/we-re-listening-businesses-about-health-care-law>.

monarchs, American presidents have, under Article II, Section 3 of our Constitution, a "duty, not a discretionary power" to "take Care that the Laws be faithfully executed."[7]

These portentous indictments ignored what the Administration actually decided and how it delimited the scope and purpose of its decision. The Treasury Department's announcement provided for "transition relief," to continue working with "employers, insurers, and other reporting entities" to revise and engage in "real-world testing" of the implementation of ACA reporting requirements, simplify forms used for this reporting, coordinate requisite public and private sector information technology arrangements, and engineer a "smoother transition to full implementation in 2015."[8] The announcement described the postponed requirements as "ACA mandatory" – i.e., not discretionary or subject to indefinite waiver. On July 9, Assistant Treasury Secretary Mark Mazur added, in a letter to House Energy and Commerce Committee Chair Fred Upton, that the Department expected to publish proposed rules implementing the relevant provisions "this summer, after a dialogue with stakeholders."[9]

On September 5, 2013, the Treasury Department issued those proposed rules. They detailed proposed information reporting requirements for insurers and large employers, reflecting, the Department stated, "an ongoing dialogue with representatives of employers, insurers, and individual taxpayers." The Department's release indicated its intent, through comments on the proposed rules, to continue fine-tuning ways "to simplify the new information reporting process and bring about a smooth implementation of those new rules."[10]

On February 10, 2014, the Administration, having completed that "dialogue," issued its final set of rules. In these final rules, the Administration further refined its phase-in procedures, with further "provisions to assist smaller businesses." Observing that "approximately 96 percent of employers . . . have fewer than 50 workers and are exempt from the employer responsibility provisions," the Administration sought "to ensure a gradual phase-in and assist the employers to whom the policy does apply. . . ." Toward that end, the final rules provide, for 2015, that:

> o The employer responsibility provision will generally apply to larger firms with 100 or more full-time employees starting in 2015 and employers with 50 or more full-time employees starting in 2016.

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[7] Michael W. McConnell, "Obama Suspends the Law," *The Wall Street Journal* (July 8, 2013), available at: <http://online.wsj.com/article/SB10001424127887323823004578591503509555268.html>.

[8] Mark J. Mazur, United States Department of the Treasury, "Continuing to Implement the ACA in a Careful, Thoughtful Manner" (July 2, 2013), available at <http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx>.

[9] Letter from Mark J. Mazur, United States Department of the Treasury to the Honorable Fred Upton, Chairman, Committee on Energy and Commerce, Washington, D.C., 9 July 2013, available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Upton-Treasury-ACA-2013-7-9.pdf>.

[10] United States Department of the Treasury Press Release, "Treasury Issues Proposed Rules for Information Reporting by Employers and Insurers Under the Affordable Care Act" (September 5, 2013), available at <http://www.treasury.gov/press-center/press-releases/Pages/jl2157.aspx>.

o To avoid a payment for failing to offer health coverage, employers need to offer coverage to 70 percent of their full-time employees in 2015 and 95 percent in 2016 and beyond . . . ."[11]

It is this process of dialogue and the timing adjustments and sequence resulting from that dialogue, that the resolution, and the lawsuit it purports to authorize, target as violative of the ACA and the Constitution. But the Administration explains these actions as sensible adjustments to phase-in enforcement, not a refusal to enforce. And its actions validate that characterization.

It bears emphasis that this Administration's approach to phasing in the ACA employer mandate, and other provisions of the law, is neither unprecedented, nor a partisan practice. Indeed, shortly after the initial July 2 announcement, Michael O. Leavitt, who served as Health and Human Services Secretary under President George W. Bush, concurred that "The [Obama] Administration's decision to delay the employer mandate was wise."[12] Secretary Leavitt made this observation based on his own experience with the Bush Administration's initially bumpy but ultimately successful phase-in of the prescription drug benefit to Medicare, which was passed in 2003 and implemented in 2006.

Experience so far strongly bears out Secretary Leavitt's expectation that delaying the employer mandate reporting requirements to simplify and improve them would facilitate smooth implementation of those provisions, without undermining the rest of the ACA, or Congress' broad goals in enacting it. The vast majority of the nation's six million employers – 96% -- employ fewer than 50 workers, and were therefore not covered by the employer mandate. Of those 200,000 that were covered, at least 92% already offered health insurance; so, during the phase-in period during which covered employers were not be penalized for failing to insure their employees, a relatively small number of workers would have remained uninsured because of the delayed implementation of the employer mandate. And even those workers would have, during 2014, been eligible for policies marketed on ACA exchanges and also for premium assistance subsidies.[13] To put the issue in realistic perspective, health law expert Professor Timothy Jost observed that 171 million Americans were covered by employer-sponsored group policies, compared to only 11-13 million in the market for individual policies, at which the ACA is principally targeted.[14] In light of these circumstances, the Congressional Budget Office estimated that fewer than half a million persons were likely

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[11] U.S. Treasury Department, Fact Sheet accompanying *Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act (ACA) for 2015.* http://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20021014.pdf

[12] Michael O. Leavitt, "To implement Obamacare, look to Bush's Medicare reform," *Washington Post* (July 12, 2013), available at <http://www.washingtonpost.com/opinions/to-implement-obamacare-the-right-way-look-to-bushs-medicare-reform/2013/07/12/c2031718-e988-11e2-8f22-de4bd2a2bd39_story.html>.

[13] Ezekiel J. Emanuel, "Obama's Insurance Delay Won't Affect Many," *New York Times* (July 3, 2013), available at < http://opinionator.blogs.nytimes.com/2013/07/03/obamas-insurance-delay-wont-affect-many/?_r=0>.

[14] Timothy Jost, Implementing Health Reform: The Employer Responsibility Rule, Part I, *Health Affairs,* February 11, 2014, http://healthaffairs.org/blog/2014/02/11/implementing-health-reform-the-employer-responsibility-final-rule-part-1/

to go without insurance during this phase-in period, as a result of the postponement of the employer mandate.[15]

Though "wise," was the postponement "illegal?" On the contrary, Treasury's Mazur wrote to Chair Upton, such temporary postponements of tax reporting and payment requirements are routine, citing numerous examples of such postponements by Republican and Democratic administrations when statutory deadlines proved unworkable.[16] Particularly relevant to – indeed, indistinguishable from – the Obama administration's experience implementing the ACA, are roll-outs of major new health and health insurance programs by past administrations. As Secretary Leavitt noted, when the Bush administration implemented the 2003 Medicare Modernization Act provisions establishing the Medicare prescription drug program, it waived enforcement of the unpopular late enrollment penalty for one year for some beneficiaries, delayed key elements of the law's methodology for calculating the share of premiums paid by some beneficiaries to reduce premiums, and limited enforcement of the law's medication therapy management requirement to ease the burden on insurers.[17] A study of implementation of Medicare mandates in the late 1990s following the enactment of the massive 1997 Balanced Budget Act found that almost half of the rules on the 1998 Medicare regulatory agenda with statutory deadlines had not been implemented on time.[18]

There is no material difference between these decisions by the Clinton and Bush administrations to postpone regulations and other incidents of major new health insurance laws and the Obama administration's approach to implementing the ACA: all were reasonably considered necessary temporary adjustments, and as such were certainly legal and constitutional; like these precedents, there is every reason to expect that the Obama administration's prudent phasing-in of the employer mandate, in dialogue with affected businesses, providers, insurers, and beneficiaries, will result in a program that optimally meets the needs of those stake-holders, while newly expanding access to quality health care for millions of Americans.

Nor are such experiences limited to tax or health insurance administration. To take one particularly well-known example, the Environmental Protection Agency, under Republican and Democratic administrations, has often found it necessary to phase-in implementation of requirements beyond statutory deadlines, to avoid premature actions that were poorly grounded or conflicted with other mandates applicable to EPA or other agencies. In 2013, as one of many examples, EPA delayed promulgation of Secondary National Ambient Air Quality Standards for Oxides of Nitrogen and Sulfur, over the objection of some environmental groups, on the pragmatic ground that there is too much scientific uncertainty to enable the Agency to promulgate new standards with the

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[15] Congressional Budget Office, *Analysis of the Administration's Announced Delay in Certain Requirements of the Affordable Care Act* (July 30, 2013), http://www.cbo.gov/publication/44465

[16] Mazur letter, supra note 5.

[17] Corlette S Hoadley J, *Are the wheels coming off the ACA wagon? History suggests not*. The Hill Congress Blog, July 17, 2013, http://thehill.com/blogs/congress-blog/healthcare/311441-are-the-wheels-coming-off-the-aca-wagon-history-suggests-not

[18] Timothy Jost, Governing Medicare. 51 *Administrative Law Review* 39 (1999).

requisite scientific basis. The Clinton and George W. Bush administrations had similar experiences. As of April 2005, EPA had completed 404 of the 452 actions required to meet the objectives of Titles I, III, and IV of the Clean Air Act Amendments of 1990. Of the 338 requirements that had statutory deadlines prior to April 2005, EPA completed 256 late: many (162) 2 years or less after the required date, but others (94) more than 2 years after their deadlines." The Act required EPA to promulgate regulations addressing forty categories of air pollution sources by 1992. EPA's first hazardous air pollution rules came out years later. Synthetic chemical manufacturing almost two years late and amended through 1996 – almost four years after deadline. Petroleum refineries, final rules in 1994, allowed compliance long after deadline – up to 10 years while the law required within 3 years with possible one year extension. [19]

To be sure, some administrative "delays" have in fact constituted *de facto* decisions not to enforce or implement laws, indefinitely and for policy reasons. For example, during the administration of President George W. Bush, EPA was frequently criticized in such terms for shelving a broad spectrum of regulations and other initiatives. In at least one highly visible instance, involving the agency's mandate to determine whether greenhouse gases are pollutants requiring regulation under the Clean Air Act, the Supreme Court ordered EPA to institute formal proceedings to make such a determination. *Massachusetts v. EPA,* 549 U.S. 497 (2007) Even after this decision, the Bush administration dragged its feet complying with the Court's order, and was widely criticized for apparent "deregulation through nonenforcement." [20] Such intentional refusals to enforce or implement laws – such, for example, as Governor Mitt Romney's pledge in the 2012 presidential campaign to halt implementation of the ACA as soon as he took the oath of office – do violate the laws in question, and are, by definition, failures to faithfully execute the laws as required by the Constitution.

Applicable judicial precedent places such timing adjustments well within the Executive Branch's lawful discretion. To be sure, the federal Administrative Procedure Act authorizes federal courts to compel agencies to initiate statutorily required actions that have been "unreasonably delayed."[21] But courts have found delays to be unreasonable only in rare cases where, unlike this one, inaction had lasted for several years, and the recalcitrant agency could offer neither a persuasive excuse nor a credible end to its dithering. In deciding whether a given agency delay is reasonable, current law admonishes courts to consider whether expedited action could adversely affect "higher or competing" agency priorities, and whether other interests could be "prejudiced by the delay."[22] Even in cases where an agency outright refuses to enforce a policy in specified types of cases – not the case here – the Supreme Court has

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[19] EPA has completed most of the actions required by the 1990 Amendments, but many were completed late. GAO-05-613: Published: May 27, 2005. http://www.gao.gov/products/GAO-05-613

[20] Daniel Deacon, *Deregulation Through Nonenforcement*, 85 N.Y.U.L.Rev. 795 (2010); Felicity Barringer, *White House Refused to Open E-mail on Pollutants,* N.Y. Times, June 25, Five Lessons from the Clean Air Act Implementation Pace University Environmental Law Review (September 1996) (online at: http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1365&context=pelr

[21] The Administrative Procedure Act, 5 U.S.C. § 706.

[22] *Telecommunications Research and Action Center, et al. v. FCC*, 750 F.2d 70, 80 (1984).

declined to intervene. As former Chief Justice William Rehnquist noted in a leading case,[23] courts must respect an agency's presumptively superior grasp of "the many variables involved in the proper ordering of its priorities." Chief Justice Rehnquist suggested that courts should defer to Executive Branch judgment unless an "agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities."[24] The Obama Administration has not and is not about to abdicate its responsibility to implement the statute on whose success the President's historical legacy will most centrally depend.

Nor are regulatory delays in implementing the employer mandate an affront to the Constitution. In the relevant constitutional text, note the term, "faithfully," and the even more striking phrase, "take care." The framers could have prescribed simply that the President "execute the laws." Why did they add "faithfully" and "take care?"[25] Defining the President's duty in this fashion necessarily incorporated – or reaffirmed the previously implicit incorporation – of the concept that the President's duty is to implement laws in good faith, and to exercise reasonable care in doing so. Scholars on both left and right concur that this broadly-worded phrasing indicates that the President is to exercise judgment, and handle his enforcement duties with fidelity to all laws, including, indeed, the Constitution.[26] Both Republican and Democratic Justice Departments have consistently opined that the clause authorizes a president even to decline enforcement of a statute altogether, if in good faith he determines it to be violative of the Constitution. To be sure, as one critic has noted, a president cannot "refuse to enforce a statute he opposes for policy reasons."[27] But, while surely correct, that contention is beside the point here.

The Administration did not postpone the employer mandate out of policy opposition to the ACA, nor to any specific provision of it. It is ludicrous to suggest otherwise, and at best misleading to characterize the action as a "refusal to enforce" at all. Rather, the President has authorized a minor temporary course correction regarding individual ACA provisions, necessary in his Administration's judgment to faithfully

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[23] Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).
[24] 470 U.S. at 833 n.4.
[25] Initial drafts of what became what is now known as the "Take Care" clause provided simply that the President was to "carry into execution the national laws." In July 1787, in the Committee of Detail, charged with drafting language for the full convention to consider, there was debate over the phrase "the power to carry into execution," and when the Committee returned, that phrase had been removed, the new "take care language" emerged in place of the former phrase. As Farrand notes , some of the phrases under debate included (Max Farrand, *The Records of the Federal Convention of 1787, Volume II* 171): (He shall take care to the best of his ability that the laws) (It shall be his duty to provide for the due & faithful exec – of the Laws) of the United States (be faithfully executed) {to the best of his ability}. Ultimately, the Committee on Style adopted the phrase "take care that the laws be faithfully executed" into constitutional text in September 1787.

[26] *See* Stephen G. Calabresi & Saikrishna B. Prakash, "The President's Power to Execute the Laws," 104 Yale L. J. 541 (1994); *see* also Lawrence Lessig & Cass R. Sunstein, "The President and the Administration," 94 Colum. L. Rev. 1 (1994).
[27] McConnell, "Obama Suspends the Law." *The Wall Street Journal* (July 8, 2013), available at: <http://online.wsj.com/article/SB10001424127887323823004578591503509555268.html

execute the overall statute, other related laws, and the purposes of the ACA's framers. As a legal as well as a practical matter, that's well within his job description.

In effect, ACA opponents' constitutional argument to the contrary amounts to asserting that the Administrative Procedure Act itself ratifies unconstitutional behavior. As noted above, the APA recognizes that delayed implementation of rules, beyond statutory deadlines, can come within the Executive Branch's lawful discretion, as long as such delays are "reasonable." Opponents' claim is that the "take care" clause must be interpreted to condemn any deviation from a statutory deadline for implementing a regulation, no matter how reasonable. This implausible interpretation flouts, not only Congress' understanding as expressed through the text of the APA, but administrative and judicial precedent as well. And, one should add, common sense.

3. The claim that the Administration is unlawfully funding cost-sharing subsidies to help eligible individuals afford health care.

In terms that resemble their losing claim against the provision of tax credits on federal exchanges, ACA opponents currently allege that the Administration has been and continues to unlawfully fund cost-sharing subsidies prescribed by Section 1402 of the Act. These CSS subsidies complement the premium assistance tax credits, for lower-earning persons eligible for the tax credits (under ACA §1401), and assist those comparatively lower income individuals in purchasing health care itself from providers.[28] In November 2014, a lawsuit was filed in the District Court for the District of Columbia challenging the legality of the delay of the so-called employer mandate, noted in the previous section of this statement, and also challenging the Administration's funding of cost-sharing subsidies. In September 2015, the District Court hearing that case denied the Administration's motion to dismiss the suit; the Administration had argued both that the House lacked standing to bring its claim, and that the House's argument on the merits failed to state a valid legal claim. The parties have filed cross-motions for summary judgment, and are awaiting a decision by the District Court.

As noted above, my organization, the Constitutional Accountability Center, has filed an *amicus curiae* brief with the District Court in this case, on behalf of Minority Leader Pelosi and other leading members of the House Democratic Caucus.[29] These leaders of the minority party support the Administration, with respect both to their position that one house of Congress lacks standing to bring the case, and to their position on the merits that the Administration has authority to fund the CSS subsidies. Here, in a

[28] Premium assistance tax credits are available to persons purchasing insurance through ACA-sanctioned state-level exchanges who earn between 100% and 400% of the Federal Poverty Level (FPL). Cost-sharing subsidies are available to persons eligible for premium assistance tax credits and whose incomes are between 100% and 250% of the FPL. According to an HHS Report released Friday, March 11, 2016, 59 percent of enrollees on exchange market-places nationwide were receiving cost-sharing reductions. https://aspe.hhs.gov/pdf-report/addendum-health-insurance-marketplaces-2016-open-enrollment-period-final-enrollment-report .

[29] http://theusconstitution.org/sites/default/files/briefs/House_v_Burwell_Brief_Final.pdf

nutshell, is why – why the Administration has correctly interpreted the laws governing its authority to fund the subsidies, and why acting on that interpretation certainly does not run afoul of the President's constitutional responsibilities.

The current House leadership now argues that there is no appropriation for the cost-sharing reductions, even though, as it concedes, 31 U.S.C. § 1324 provides a permanent appropriation for the premium tax credits. The basis for the House's position is that Section 1401 of the ACA, which prescribes the tax credits, specifically references, and amends, 31 U.S.C. §1324, as a permanent source of funding, whereas there is no such reference in Section 1402, which addresses the CSS subsidies. But the House's interpretation is at odds with the ACA's plan for reforming and restructuring individual insurance markets, would render dysfunctional the mechanisms Congress adopted to effectuate that plan, and, most bizarre, would result in the Administration being obliged to withdraw *more* funds from precisely the same permanent appropriation source – 31 U.S.C. §1324 – than is the case with the Administration's interpretation, i.e. using that fund directly to reimburse insurers for funding the subsidies. Likewise, the House leadership's current interpretation conflicts with post-enactment congressional action confirming the shared original understanding that the premium tax credits and cost-sharing reductions are commonly funded.

No one doubts that the premium tax credits and the cost-sharing reductions are integrally related, and that both are critical to what the Supreme Court characterized, in *King v. Burwell,* as the ACA's "series of interlocking reforms designed to expand coverage in the individual health insurance market." The ACA "bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge"; it "generally requires each person to maintain insurance coverage or make a payment to the [IRS]"; and it "gives tax credits to certain people to make insurance more affordable." These three reforms, the Court made clear, "are closely intertwined"; the first reform would not work without the second, and the second would not work without the third.[30]

The CSS subsidies complement the premium tax credits that *King v. Burwell* held were indispensable to the ACA's legislative plan, and are no less critical to that legislative plan. Both the premium tax credits and the cost-sharing reductions work in tandem to ensure stable individual insurance markets open to all individuals, regardless of pre-existing conditions or health status generally, and accessible to moderate and lower-income individuals who, prior to the ACA, went uninsured.

The text and structure of the ACA make clear that the cost-sharing reductions and the premium tax credits are both integrally-connected to each other and to the "interlocking reforms" adopted by the law. Indeed, from an operational standpoint, the ACA makes the two complementary mechanisms components of a single "program," which the Act directs the Government to "establish," to *ensure unified advance payments of both components*. Pursuant to this program, the Secretary of the Treasury must "make[] advance payment" of both premium tax credits and cost-sharing

[30] 135 S. Ct. at 2485, 2487

reductions "in order to reduce the premiums payable by individuals eligible for such credit," and to establish a program under which . . . advance determinations are made . . . with respect to the income eligibility of individuals . . . for the premium tax credit . . . and the cost-sharing reductions," and "make[] advance payments of such credit or reductions to the issuers of the qualified health plans in order to reduce the premiums payable by individuals eligible for such credit." In the same vein, the law defines the term "applicable State health subsidy program" as the program under this title for the enrollment of qualified health plans offered through an Exchange, including the premium tax credits under section 36B of Title 26 and cost-sharing reductions under section 1402."[31]

As with the premium assistance tax credits unsuccessfully challenged in *King v. Burwell,* the House leadership's narrow interpretation of CSS-funding authority would similarly generate, as the Justice Department noted in its most recent brief in the case, a "cascading series of nonsensical and undesirable results that" would follow "if the Act did not allow the government to comply with the statutory directive to reimburse . . . insurers for the cost-sharing reductions"). Two such bizarre results are especially worth noting. As detailed in an *amicus curiae* brief filed on behalf of fifteen economic and health policy scholars (including the Director of the Congressional Budget Office from 2009 through 2015), many individuals who purchase coverage on state individual insurance markets do not receive premium assistance tax credits. Any such individuals who have opted to purchase what the ACA prescribes as "silver" plans would see their premiums rise. Hence, they would be motivated either to buy cheaper and less protective plans, or, possibly, to purchase more protective "gold" plans, which, paradoxically, could become less expensive than silver plans, or such persons would drop coverage altogether. Obviously, such results would flout the "market improvement" design of the ACA.

Second, even more nonsensical, these scholars explain, "the amount of the premium tax credits offered to subsidized enrollees would increase ***across the board.***"[32] As a result, federal expenditures would increase – and from the same fund – the permanent appropriation provided by 31 U.S.C. §1324 – from which the House leadership's interpretation purports to save taxpayer dollars.[33]

Because these mandatory payments were so critical to the effective operation of the ACA, Congress did not leave the funds for their payment to the vicissitudes of the annual appropriations process. Instead, Congress provided for their payment out of a permanent appropriation via 31 U.S.C. § 1324. At the time Congress was debating and enacting the ACA, this understanding was shared on a bipartisan basis. During the debate, some members expressed concern that these permanently-appropriated subsidies would not be subject to the Hyde Amendment, which under certain

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[31] 42 U.S.C. § 18082

[32] Brief *Amici Curiae* for Economic and Health Policy Scholars In Support of Defendants, filed December 8, 2015. http://premiumtaxcredits.wikispaces.com/file/view/4552756-2--24176.pdf/569554697/4552756-2--24176.pdf

[33] http://www.urban.org/research/publication/implications-finding-plaintiffs-house-v-burwell

circumstances limits the use of annually-appropriated funds to pay for abortions.[34] To address those concerns, Congress adopted a provision to apply such funding restrictions to the subsidies that were permanently appropriated in the law, and in doing so, it made explicit that premium tax credits *and* cost-sharing reductions were the subject of permanent appropriations.[35]

Since the ACA's enactment, Congress has not used its ample legislative powers to reverse or even to defund the Administration's implementation of the CSS subsidy program – even though it has done just that with respect to other aspects of the Administration's ACA implementation, as members of this Task Force well know. On the contrary, post-enactment congressional action has *confirmed* that Section 1324 provides a permanent appropriation for the advance payments that the ACA mandates that the Secretary make to insurers for the cost-sharing subsidies. For fiscal year 2014, both houses passed an appropriations bill that conditioned the payment of cost-sharing reductions (and premium tax credits) on a certification by HHS that the Exchanges verify that applicants meet the eligibility requirements for such subsidies.[36] To comply with this provision, HHS subsequently certified to Congress that the Exchanges "verify that applicants for advance payments of the premium tax credit and cost-sharing reductions are eligible for such payments and reductions." Because there was no yearly appropriation for the payments, it would have made no sense for Congress to enact such a law if, as plaintiff now argues, Congress believed that there was no permanent appropriation available to fund the payments.

Finally, where is the Constitution in all of this? The answer is nowhere. What we have here is a routine dispute about statutory interpretation between one house of Congress and the Executive Branch. The Administration believes that, interpreted in line with long-established, common-sense requisites for construing statutes like the ACA, as recently confirmed and very pointedly applied to that statute by the Supreme Court, the ACA and 31 U.S.C. §1324 provide the latter provision as a permanent appropriation for fund the Section 1402 cost-sharing subsidies. The House asserts that it does not.

I strongly believe the Administration's interpretation is correct. If the case ever reaches the Supreme Court, I expect that view to be vindicated. After all, literally *every* challenge to an agency's interpretation of a law amounts to an allegation that it is acting – and spending – in excess of its authority. No more, as noted above, than adjusting regulatory deadlines, in the interest of effective implementation, does acting on a well-

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[34] *See, e.g.*, 155 Cong. Rec. S12660 (Dec. 8, 2009) (Sen. Hatch) ("this bill is not subject to appropriations").

[35] *See* 42 U.S.C. § 18023(b)(2)(A) ("If a qualified health plan provides coverage of [abortions for which public funding is prohibited], the issuer of the plan shall not use any amount attributable to any of the following for purposes of paying for such services: (i) The credit under section 36B of Title 26 . . . (ii) Any cost-sharing reduction under section 18071 of this title . . . .").

[36] Continuing Appropriations Act, 2014, Pub. L. No. 113-46, Div. B, § 1001(a) (2013).

based and reasonable interpretation of a law constitute failure to take care that it is faithfully executed.[37]

The Legality of the Administration's DAPA Initiative

As noted above, perhaps even more than with its implementation of the ACA the Administration has drawn strident laments of "unilateral rewrite of the law," "nullification," and even "clear and present danger to the Constitution," with its November 2014 program, Deferred Action for Children of American Citizens and Legal Permanent Residents, otherwise known as DAPA.[38] For similar reasons, these attacks on DAPA amount to political disagreements gussied up as legal and constitutional arguments. They should and, in my view, will be rebuffed by the Supreme Court just as sternly as was the bogus attempt to gut the ACA in *King v. Burwell* last year.

It bears particular emphasis that what these critics vilify as unlawful and unconstitutional are, in fact, immigration enforcement policies, practices, and legislation adopted and repeatedly deployed on a bipartisan basis, reaching back a half century. That broad-based congruence of established law and practice with the current enforcement practices under attack is evident in *amicus curiae* briefs recently filed in the Supreme Court, in support of the legality of DAPA, on behalf of former senior immigration officials from the Ford, Carter, Reagan, George H. W. Bush, Clinton, and George W. Bush Administrations, and on behalf of a bipartisan group of former members of the House and Senate.[39] And, especially pertinent in this forum, is a 1999 letter, attached to this statement, from 28 House members, including then-Judiciary Chair Henry Hyde and Immigration Subcommittee Chair Lamar Smith, recommending that the Immigration and Naturalization Service (soon to be absorbed in the Department of Homeland Security) adopt "Guidelines for use of Prosecutorial Discretion in Removal Proceedings," to ensure "consistency" in individual enforcement decisions. As detailed below, that letter spurred the Clinton, Bush, and Obama administrations to a succession

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[37] Because the cost-sharing subsidies dispute is transparently a statutory interpretation dispute, the House lacks standing to pursue its complaint under established Supreme Court precedent, for reasons spelled out in CAC's above-noted *amicus curiae* brief, http://theusconstitution.org/sites/default/files/briefs/House_v_Burwell_Brief_Final.pdf pages 9-11

[38] Prior to DAPA, DHS in 2012 instituted a prior initiative, Deferred Action for Childhood Arrivals, which was somewhat modified by the DAPA directives, and could potentially be affected by the final resolution of the case now pending before the Supreme Court. In this statement, I intend "DAPA" to encompass both initiatives.

[39] Brief of Former Commissioners of the United States Immigration and Naturalization Service as *Amici Curiae* in Support of Petitioners, pages 21-23, filed march 8, 2016 http://www.scotusblog.com/wp-content/uploads/2016/03/15-674tsacFormerCommissioners.pdf; Brief of Former Federal Immigration and Homeland Security Officials as Amici Curiae in Support of the United States, filed March 8, 2016, pages 5-11, http://www.fightforfamilies.org/assets/USvTexas-AmicusBriefofFormerImmigrationOfficials.pdf; Brief of Bipartisan Former members of Congress as *Amici Curiae* in Support of Petitioners, http://theusconstitution.org/sites/default/files/briefs/United_States_v_Texas_Amicus_Brief_Final.pdf

of increasingly transparent guides to the exercise of discretion, most recently, indeed, in DAPA.[40]

The Supreme Court has very recently reaffirmed and elaborated the Executive Branch's immigration enforcement responsibilities in terms that spell out a solid foundation for the steps this Administration took when it announced DAPA. Indeed, the very same week in which it upheld the ACA's individual mandate, on June 25, 2012, In *Arizona v. United States,* in an opinion written by Justice Anthony Kennedy, joined by Chief Justice Roberts, the Court held that "[a] principal feature of the [immigration] removal system is the broad discretion exercised by immigration officials," and that "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." As the Court explained, the Executive Branch's immigration enforcement discretion requires it to consider many factors in deciding when removal is appropriate, including both "immediate human concerns" and "foreign policy."[41]

The Administration was well within these parameters outlined by the Court, when the Department of Homeland Security issued the two directives that comprise the DAPA initiative. Specifically, these directives established priorities for DHS officials' exercise of their discretion when enforcing federal immigration law. They clarified that the federal government's enforcement priorities "have been, and will continue to be national security, border security, and public safety."[42] They further directed that in light of those priorities, and given limited enforcement resources, federal officials should exercise their discretion, on a case-by-case basis, to defer removal of certain parents of U.S. citizens or lawful permanent residents.[43] Under other longstanding federal law – but NOT the DAPA directives themselves – aliens subject to deferred action, like many other aliens who are temporarily allowed to remain in the country, become eligible for work authorization. Work authorization under these circumstances is prescribed by regulations adopted in 1981 by the Reagan administration, subsequently endorsed by Congress in the 1986 Immigration Reform and Control Act (IRCA).[44]

Congress has repeatedly conferred authority on executive branch officials to exercise discretion in enforcing the nation's immigration laws. For example, in the

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[40] See notes 54-55 below and accompanying text.

[41] 132 S.Ct. 2492, 2499 (2012)

[42] Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., for Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, et al. 2 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

[43] Memorandum from Jeh Charles Johnson, Sec'y, U.S Dep't of Homeland Sec., for León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [hereinafter DAPA Memo.].

[44] Brief of Former Commissioners of the United States Immigration and Naturalization Service as *Amici Curiae* in Support of Petitioners, pages 21-23, filed march 8, 2016 http://www.scotusblog.com/wp-content/uploads/2016/03/15-674tsacFormerCommissioners.pdf Brief of the United States of America, et al., Petitioners v. State of Texas, et al., https://www.justice.gov/opa/file/829896/download

Immigration and Naturalization Act (INA), Congress authorized the Secretary of Homeland Security to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the statute.[45] And in the Homeland Security Act of 2002, Congress directed the Secretary to establish "national immigration enforcement policies and priorities."[46]

This delegation of discretion is, in fact, essential in the immigration context because Congress has made a substantial number of noncitizens deportable, but has nowhere mandated that every single undocumented immigrant be removed. Most important, Congress has declined to appropriate the funds that would be necessary to effectuate such a mass removal. Contrary to frequent assertions that the Obama Administration has "abdicated" immigration enforcement, in fact the Administration has substantially increased removal rates, averaging 360,000 per year since 2008; resources for increasing that rate further have never been and are not available. So this Administration – as would any administration – must decide, out of the estimated 11 million undocumented persons resident in the United States, what categories should be included in the less than four percent to be targeted for removal, what categories should be included in the 96% who cannot be removed, in the near term at least, and how those 10.6 million persons should be treated in the meantime.

In effect, as a leading scholarly article has put it, Congress has made a "huge fraction of noncitizens deportable at the option of the Executive"[47]. In that vein, Congress has directed the executive branch to exercise broad discretion in determining who should be removed consistent with the nation's "immigration enforcement policies and priorities."[48] Hence, it is well recognized by reputable scholars across the ideological spectrum that, as Professor Jonathan Adler – the same Professor Adler who led the challenge to ACA tax credits that became *King v. Burwell* – wrote skeptically in *The Volokh Conspiracy* of Texas' current challenge to DAPA: "Immigration law is an area in which – for good or ill – Congress has given the executive wide latitude."[49] Likewise on *Volokh*, George Mason scholar Ilya Somin made precisely the same observation, likewise questioning Texas' case against DAPA.[50]

Unquestionably, the enforcement priorities established by the Administration in DAPA are lawful and consistent with guidance provided by Congress. Repeatedly, as,

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[45] 8 U.S.C. § 1103(a)(3).

[46] 6 U.S.C. § 202(5).

[47] Adam B. Cox & Christina M.Rodriguez, *The President and Immigration Law,* 119 Yale L.J. 458, 463 (2009)

[48] 6 U.S.C. § 202(5).

[49] Jonathan H. Adler, *Not Everything the President Wants To Do Is Illegal,* Wash. Post (Aug. 8, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/08/not-everything-the-

[50] Ilya Somin, *Obama, Immigration, and the Rule of Law*, Wash. Post (Nov. 20, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/20/obama-immigration-and-the-rule-of-law/ (noting that in the immigration context, "Congress itself has delegated wide latitude to the president").

for example, in the 2010 Department of Homeland Security Appropriations Act, Congress has directed Congress to prioritize "the identification and removal of aliens convicted of a crime by the severity of that crime."[51] In a similar vein, the House report accompanying the FY 2009 DHS appropriations bill instructed the Department not to "simply round[] up as many illegal immigrants as possible," but to ensure "that the government's huge investments in immigration enforcement are producing the maximum return in actually making our country safer."[52]

Moreover, the practice of deferring removal of certain individuals in order to facilitate the nation's immigration enforcement priorities is a long-standing one and one that has been deployed by presidents of both parties. As the Supreme Court observed, in a 1999 decision written by the late Justice Antonin Scalia,[53] the executive branch has long "engag[ed] in a regular practice (which ha[s] come to be known as 'deferred action') of exercising [its] discretion for humanitarian reasons or simply for its own convenience."

Indeed, at least 20 instances have been found, stretching back into the 1950s, in which administrations of both parties have exercised enforcement discretion to confer deferred action treatment, or its equivalent, on a wide variety of categories of undocumented persons eligible for deportation.[54] Recognizing that there is nothing novel, let alone illegally novel, about the Obama Administration's application of deferred action in DAPA, opponents have asserted that DAPA is different because its scale makes it "far afield" from all these past examples. But on that score the opponents are also wrong. The Reagan and George H.W. Bush administrations created a program for "voluntary departure," functionally equivalent to what is now termed "deferred action on removal," that protected from deportation "the spouse and unmarried children under 18, living with [a] legalized alien,' and meeting certain additional specified criteria. The Bush administration expanded the Family Fairness program to cover what it estimated as up to 1.5 million people – approximately 40% of undocumented immigrants in the United States at that time. That 40% is essentially exactly the percent of the current undocumented population that is eligible for deferred action treatment under DAPA. (Evidently, considerably fewer than 1.5 million persons came forward to apply for protection under the Family Fairness policy – but that fact does not undermine that Reagan-Bush program's clear status as a precedent in all material respects for DAPA;

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[51] Pub. L. 111-83, 123 Stat. 2142, 2149 (2009)
[52] H.R. Rep. No. 111-157, at 8 (2009)
[53] *Reno v. American-Arab Anti-Discrimination Comm.*525 U.S. 471, 483-84 (1999)
[54] *United States v. Texas et al.*, Brief for the Petitioners, filed March 1, 2016, pages 48-59, http://www.scotusblog.com/wp-content/uploads/2016/03/15-674tsUnitedStates.pdf Brief of Former Federal Immigration and Homeland Security Officials as Amici Curiae in Support of the United States, filed March 8, 2016, pages 5-11, http://www.fightforfamilies.org/assets/USvTexas-AmicusBriefofFormerImmigrationOfficials.pdf

all persons eligible for DAPA may also choose not to apply, especially given the risks they will necessarily face by doing so.)[55]

Another tack DAPA opponents have taken, to evade the overwhelming weight of constitutional, statutory, and administrative precedent is to assert, or insinuate that DAPA is distinguishable, and defective, because the priorities it enforces and techniques it employs are codified in writing, instead of being left to the discretion of individual line DHS officials. For obvious reasons, this line of argument has no legal basis, and certainly lacks any basis in sound policy or common sense. But perhaps most telling is that, in laying out departmental priorities in this manner, transparent to DHS officials, to persons subject to the Department's jurisdiction, and, most importantly, to Congress, DHS has specifically followed directions from Congress, in particular from prominent members of the House Judiciary Committee. In 1999, 28 members of the House, from both parties, led by then-Judiciary Chair Henry Hyde and Immigration Subcommittee Chair Lamar Smith, sent to Attorney General Janet Reno and Immigration and Naturalization Service Commissioner Doris Meissner, a letter entitled "Guidelines for Use of Prosecutorial Discretion in Removal Proceedings." The letter expressed concern that increased funding, intended to be used to remove "increasing numbers of criminal aliens," had instead been used to deport "law-abiding" legal permanent residents and law-abiding family members of U.S. citizens. The letter went on to state its signatories' belief that "INS District Directors . . . require written guidelines, both to legitimate in their eyes the exercise of discretion and to ensure that their decisions to initiate or terminate removal proceedings are not made in an inconsistent manner."[56] Following this bipartisan request, INS Commissioner Meissner issued a policy statement summarizing agency priorities and specifying factors to be considered by INS personnel to effectuate those priorities in individual cases. After INS became absorbed in the new DHS, subsequent regimes continued to reiterate and refine that written guidance, leading eventually to Secretary Johnson's DAPA memoranda.[57]

.Finally, opponents assert that the directives were inconsistent with the immigration laws because they permit recipients of deferred action to apply for work authorization. But opponents face a major problem with this line of attack. The authority for deferred-action recipients to work derives not from the directives at issue in this litigation, but from pre-existing regulations, endorsed by legislation, that date back to the Reagan Administration.[58] As noted above, IRCA was enacted against the backdrop of

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[55] Brief of Former Federal Immigration and Homeland Security Officials as Amici Curiae in Support of the United States, filed March 8, 2016, pages 6-9. http://www.fightforfamilies.org/assets/USvTexas-AmicusBriefofFormerImmigrationOfficials.pdf

[56] Letter from Rep. Henry J. Hyde et al. to Janet Reno, Att'y Gen., and Doris Meissner, Comm'r, Immigr. & Naturalization Serv. (Nov. 4, 1999), http://www.ice.gov/doclib/foia/prosecutorial-discretion/991104 congress-letter.pdf A copy of the letter is attached to this statement.

[57] Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration,* 63 UCLA L. Rev. 58, 87-89 (2015)

[58] *See* 8 C.F.R. § 274a.12(c)(14).

regulations, promulgated in 1981 by the INS, that permitted deferred action recipients to apply for work authorization, and shortly after IRCA was enacted, the INS denied a request that it repeal its employment authorization regulation. Congress has never acted to limit the executive branch's authority to give work authorization to deferred action recipients, nor to limit the practice of deferred action more generally.

In sum, there is no end of sound and fury directed at the Obama Administration's decision to provide written, transparent guidance to consider, on a case-by-case basis application of unassailably public-safety promoting and lawful priorities through grants of deferred action treatment, for three years, to parents of U.S. citizens and legal permanent residents. But behind the hyper-inflated rhetoric, from a legal standpoint, there is simply no there there.

Conclusion

In sum, at least with respect to the health and immigration controversies reviewed here, when one peels back the litany of allegations of unlawfulness and, especially, unconstitutionality, they seem to add up to nothing more than a complaint – how brazen it is of the President to do his job!