

***“The President’s Constitutional Duty to Take Care  
That The Laws Be Faithfully Executed”***

**Written Statement of Simon Lazarus:  
Hearing Before the Committee on the Judiciary of  
The House of Representatives  
December 3, 2013**

My thanks to the Chair and members of the House Judiciary Committee for inviting me to testify in this inquiry into the provision of Article II, Section 3 of the Constitution, which provides that the President “take care that the laws be faithfully executed.”

I am Senior Counsel to the Constitutional Accountability Center, a public interest law firm, think tank, and action center dedicated to the progressive promise of the Constitution’s text and history.

Recently, opponents of the Affordable Care Act (ACA), have charged that President Obama broke the law and abused his constitutional authority, when, on July 2, 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.<sup>1</sup> Specifically, opponents claim that this decision ran afoul of the “Take Care” clause quoted above. Indeed, brandishing the “Take Care” clause appears to have become a favored talking point for opponents of an array of Obama administration policies and actions. I presume that this hearing will address several of these instances.

All of these efforts to import the Constitution into what are in reality political and policy debates are rhetorical make-weights. They mock the text and original meaning of the Take Care clause. They flout long-established Supreme Court precedent applying the relevant constitutional provisions. And they contradict the consistent practice of all modern presidencies, Republican and Democratic, to responsibly implement complex and consequential regulatory programs. These critics fault the Obama Administration for making necessary adjustments in timing and matching enforcement priorities with resources and practical, humanitarian, and other exigencies. But exercising presidential judgment in carrying laws into execution is precisely 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.<sup>2</sup> Certainly, in the policy areas with which I

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<sup>1</sup> 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>>.

<sup>2</sup> 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

am familiar, that is precisely what the President Obama and the members of his administration are doing – whatever one may think of their actions from a policy or political perspective.

In this written statement, I will focus on the ACA employer mandate issue, and address three other issues as to which ACA opponents have woven a Take Care clause claim into their policy and political attacks. I will also address one other Obama administration action that has come under similar constitutional challenge, the June 2012 decision of the Department of Homeland Security to defer action for certain undocumented young people who came to the U.S. as children and have pursued education or military service here.

An article I wrote on the ACA employer mandate issue appeared in *The Atlantic* on July 17 of this year. Another article, on the availability of ACA premium assistance tax credits and subsidies on federally facilitated as well as state-managed health insurance exchange market-places, appeared in *The New Republic* for May 2, 2013. In addition, I testified on the latter subject before the Subcommittee on Energy Policy, Health Care, & Entitlements of the House Committee on Government Oversight & Reform on July 31, 2013. This statement draws upon these writings. I ask that the Committee include my July 31 written testimony in the record of this hearing.

### **Phasing in the ACA Employer Mandate: “Blatant Illegality” or Routine Temporary Course-Correction?**

Critics have labeled the employer mandate postponement a “blatantly illegal move” that “raises grave concerns about [President Obama’s] understanding” that, unlike medieval British 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.”<sup>3</sup>

These portentous indictments ignore what the Administration actually decided and how it has delimited the scope and purpose of its decision. The Treasury Department’s announcement provides for one year of “transition relief,” to continue working with “employers, insurers, and other reporting entities” through 2014 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.”<sup>4</sup> The announcement described the postponed

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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.”

<sup>3</sup> Michael W. McConnell, “Obama Suspends the Law,” *The Wall Street Journal* (July 8, 2013), available at: <<http://online.wsj.com/article/SB10001424127887323823004578591503509555268.html>>.

<sup>4</sup> Mark J. Mazur, United States Department of the Treasury, “Continuing to Implement the ACA in a Careful, Thoughtful Manner” (July 2, 2013), available at

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 expects to publish proposed rules implementing the relevant provisions “this summer, after a dialogue with stakeholders.”<sup>5</sup>

A month ago, on September 5, the Treasury Department issued those proposed rules. They detail proposed information reporting requirements for insurers and large employers, reflecting, the Department stated, “an ongoing dialogue with representatives of employers, insurers, and individual taxpayers.” It appears from the Department’s release that it intends, through comments that will be received 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.”<sup>6</sup>

In effect, the Administration explains the delay as a sensible adjustment to phase-in enforcement, not a refusal to enforce. And its actions validate that characterization – as any court that had occasion to consider the matter would surely agree.

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.”<sup>7</sup> 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 are therefore not covered by the employer mandate. Of those 200,000 that are covered, at least 94% already offer health insurance; so, during 2014 – the one-year period during which those employers will not be penalized for failing to insure their employees – a relatively

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<<http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx>>.

<sup>5</sup> 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>>.

<sup>6</sup> 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>>.

<sup>7</sup> 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](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)>.

small number of workers will remain uninsured because of the delayed implementation of the employer mandate. And even those workers will, during 2014, be eligible for policies marketed on ACA exchanges and also for premium assistance subsidies.<sup>8</sup>

Though “wise,” is the current 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.

Across federal agencies, failure to meet statutory deadlines for promulgating regulations or taking other regulatory actions is, inevitably, a routine feature of implementing complex regulatory laws like the ACA. 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. These, of course, are precisely the types of practical considerations that the Treasury Department has cited for postponing implementation of the reporting requirements pertinent to the employer mandate, and the mandate itself. Last year, 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 requisite scientific basis.<sup>9</sup>

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.”<sup>10</sup> 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.”<sup>11</sup> Even in cases where an agency outright refuses to enforce

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<sup>8</sup> 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](http://opinionator.blogs.nytimes.com/2013/07/03/obamas-insurance-delay-wont-affect-many/?_r=0)>.

<sup>9</sup> 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).

<sup>10</sup> The Administrative Procedure Act, 5 U.S.C. § 706.

<sup>11</sup> *Telecommunications Research and Action Center, et al. v. FCC*, 750 F.2d 70, 80 (1984).

a policy in specified types of cases – not the case here – the Supreme Court has declined to intervene. As former Chief Justice William Rehnquist noted in a leading case,<sup>12</sup> 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.”<sup>13</sup> The Obama Administration has not and is not about to abdicate its responsibility to implement the statute on whose success his historical legacy will most centrally depend.

Nor is the one-year delay of 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” (which, by the way, is not included in the title of this hearing). The framers could have prescribed simply that the President “execute the laws.” Why did they add “faithfully” and “take care?”<sup>14</sup> 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.<sup>15</sup> 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.”<sup>16</sup> But, while surely correct, that contention is beside the point here.

The Administration has not postponed 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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<sup>12</sup> Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).

<sup>13</sup> 470 U.S. at 833 n.4.

<sup>14</sup> 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.

<sup>15</sup> 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).

<sup>16</sup> McConnell, “Obama Suspends the Law.”

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.

**Is the Administration's Postponement, in Specified Instances, for One Year Enforcement of ACA Insurance Market Reforms an "Unreasonable Delay" under the APA, or a Violation of the Constitution's "Take Care" Clause?**

On November 14, HHS' Director of the Center for Consumer Information and Insurance oversight, Gary Cohen, sent a letter to all state insurance commissioners, in which he announced a "transitional policy" of permitting health insurers to "choose to continue coverage" for one additional year, for policies commencing between January 1, 2014, and October 1, 2014, that would otherwise be terminated or cancelled," because such policies are out of compliance with several of the ACA's insurance market reform protections.<sup>17</sup> The letter stated that "State agencies responsible for enforcing the specified market reforms are encouraged to adopt the same transitional policy with respect to this coverage." As this language indicates, the Administration was thereby not changing the law, or giving employers a waiver from a statutory requirement, but instead merely announcing a "transitional" *enforcement* policy for the federal government—one that state regulators are free to emulate or not, as they see fit. As of last week, many state insurance regulatory authorities, in states including Alaska, Arkansas, California, Colorado, Connecticut, Indiana, Maryland, Massachusetts, Minnesota, Nebraska, New York, Oklahoma, Oregon, Rhode Island, Vermont, Virginia, Washington, and West Virginia, as well as Washington, D.C., have declined to adopt the transitional policy, and, hence, will bar issuance of policies inconsistent with the ACA market reform requirements, as of January 1, 2014, as prescribed in the statute.<sup>18</sup> As with the one-year delay of finalization of the employer mandate reporting requirements and enforcement of the mandate, this "encouragement" of state regulators to permit a one-year transitional renewal of non-compliant individual insurance policies

<sup>17</sup> <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF>

<sup>18</sup> *The Commonwealth Fund Blog* posted on November 27 a review of states which have, have not, and are still deciding how they wish to respond to the Administration's "encouragement," together with explanations of the consequences of alternative state resolutions.  
<http://www.commonwealthfund.org/Blog/2013/Nov/State-Decisions-on-Policy-Cancellations-Fix.aspx?omnicid=20>

would clearly not be an unreasonable delay under the Administrative Procedure Act, and would not violate the constitutional Take Care clause.

**Does the *Deferred Action for Childhood Arrivals (DACA)* Program  
“Breach” the President’s Duty under the “Take Care” Clause –  
Or Appropriately Prioritize Enforcement Priorities, While Faithfully  
Implementing the Immigration Laws?**

Critics have also alleged that the Administration’s “Deferred Action for Childhood Arrivals (DACA) program constitutes a “breach” of the President’s duty to take care that the laws be faithfully executed. On June 15, 2012, President Obama signed a memorandum calling on the Department of Homeland Security to defer action for certain undocumented young people who came to the U.S. as children and have pursued education or military service here.<sup>19</sup> On August 15, 2012, the Department began accepting applications for deferred action status under the program. Contrary to the critics, this action violates neither the Constitution nor the immigration laws, and is, indeed similar to the prosecutorial discretion actions taken by other presidents, of both parties, that have been part and parcel of immigration enforcement policy for decades.

To begin with, it is specious to suggest that the Obama administration is systematically failing in its obligation to enforce the immigration laws. On the contrary, the administration has detained and deported noncitizens at record levels – approximately 400,000 annually, compared to 150,542 in 2002. The 400,000 figure is not an accident. Congress has provided funding to cover 400,000 removals per year. This is less than 4% of the total estimated population of unauthorized residents of the country – 11.5 million. Setting enforcement priorities is, obviously, essential, given this huge shortfall of available resources.<sup>20</sup> The criteria prescribed in the DACA program are entirely sensible, and in keeping with prioritization criteria long characteristic of immigration enforcement.

As 128 academic immigration law experts explained in a letter to the President outlining his authority to institute a program like DACA:

***Deferred action*** is a long-standing form of administrative relief . . . . It is one of many forms of prosecutorial discretion available to the Executive Branch. A grant of deferred action can have any of several effects . . . . it can prevent an individual from being placed in removal proceedings, suspend any proceedings that have commenced, or stay the enforcement of any existing removal order. It also makes the recipient eligible to apply for employment authorization. . . . [T]he U.S. Supreme Court has made clear that decisions to initiate or terminate

<sup>19</sup> Department of Homeland Security Press Release, “Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities” (June 15, 2012).

<sup>20</sup> See Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 Tex. L. Rev. 59 (2013).

enforcement proceedings fall squarely within the authority of the Executive [citing *Heckler v. Chaney*, 460 U.S. 821, 831 (1985)]. In the immigration context, the Executive Branch has exercised its general enforcement authority to grant deferred action since at least 1971. Federal courts have acknowledged the existence of this executive power at least as far as back as the mid-1970s.<sup>21</sup>

Moreover, the Obama administration's decision to use deferred action in the systematic manner it has with DACA is not at all exceptional. In 2005, for example, the George W. Bush administration announced deferred action for the approximately 5,500 foreign academic students caught in the aftermath of Hurricane Katrina – quite appropriately. In 2009, then-DHS Secretary Napolitano announced deferred action for the widows of U.S. citizens for two years, to “allow these individuals and their children an opportunity to stay in the country that has become their home while their legal status is resolved.” Secretary Napolitano also used defer action to keep immigrants who are the spouses, parents, and children of military personnel together with their families. Agency memoranda providing guidance for deferred action programs frequently stated that such exercises of “prosecutorial discretion . . . are designed to ensure that agency resources are focused on our enforcement priorities, including individuals who pose a threat to public safety, are recent border crossers, or repeatedly violate our immigration laws.”<sup>22</sup> The DACA program implements similar criteria and is well within the immigration enforcement approaches of this and past administrations.

Just a year and a half ago, a 5-3 majority of the Supreme Court opined that “A principal feature of the removal system is the broad discretion exercised by immigration officials . . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all . . . .” The Court – in an opinion by Justice Anthony Kennedy, joined by Chief Justice Roberts, and Associate Justices Ginsburg, Breyer, and Sotomayor – went on to specify that “Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime.”<sup>23</sup> That very recent analysis by a broad-based Supreme Court majority is completely at odds with the critics' cramped interpretation of the President's immigration enforcement discretionary authority, let alone their equally cramped interpretation of the Constitution's Take Care clause.

Indeed, these critics' reliance upon the Take Care clause seems particularly out of place, for it is precisely that provision which, construed as it has always been by the courts, is the source of the President's broad authority to exercise prosecutorial discretion. As the Supreme Court held in the leading case, *Heckler v. Chaney*, cited above, decisions not to indict or to institute civil proceedings have “long been regarded

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<sup>21</sup> Letter from 128 academic immigration law experts to President Obama, Washington, D.C., 28 May 2012, available at <http://www.law.uh.edu/ihehg/documents/ExecutiveAuthorityForDREAMRelief28May2012withSignatures.pdf>.

<sup>22</sup> Wadhia at 68.

<sup>23</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’” Obviously, faithful execution does not empower the President to disregard statutory requirements, but it requires applying specific requirements in a manner that is faithful to effective implementation of the overall statutory scheme, to the other affected laws, and to the Constitution. That is precisely what the Obama Administration is attempting to do as it phases in an exceptionally complex and consequential new law.

**The Obama Administration Has Correctly Determined that ACA Premium Assistance Tax Credits and Subsidies Must Be Available to All Eligible Americans, Whether They Reside in States That Operate Their Own Exchanges Or in States with Federally Facilitated Exchanges**

Affordable Care Act opponents have taken the Treasury Department to task – and to court – for adopting a regulation in May 2012<sup>24</sup> that affirms that ACA premium assistance tax credits and subsidies are available to all eligible Americans nationwide, whether they reside in states that have elected to operate their own insurance exchange market-places or in states that have elected to have the Federal government operate the exchange covering their residents. These critics, of whom my co-panelist Michael Cannon was among the first and most energetic, assert that Treasury’s interpretive regulation “rewrites the law.” In fact, however, it is Mr. Cannon and his allies who would rewrite the ACA. And from their standpoint as die-hard ACA opponents, for a good reason. Their invitation to the courts to impose their interpretation is, in their own terms, a play “for all the marbles.” In the 33 or so states now utilizing federally facilitated exchanges, their proposed reinterpretation would, they gloat, “sink” the ACA “drive a stake through the heart of Obamacare,” and “threat[en]” its “survival.”<sup>25</sup>

When the law was enacted in March 2010, no one, on either side of the aisle, had ever heard of, let alone embraced, the Cannon interpretation. The ACA’s fiercest critics agreed with its most fervent supporters about one thing: that it had, and has, a clear and simply stated goal – “to achieve near-universal health insurance coverage,” and they understood that the premium assistance necessary to achieve that goal would be available in all states. To my knowledge, not until late in 2011 did Mr. Cannon surface his claim to the contrary. He said at the time that he “was first made aware of this aspect of the ACA” in December 2010, nine months after enactment. To ACA opponents probing for any opportunity, no matter how far-fetched, to impede the law’s implementation, the discovery of this apparent “glitch” must have been invigorating.

<sup>24</sup> 77 Fed. Reg. 30,377, 30,378, 30,387 (May 23, 2012)

<sup>25</sup> See, e.g., Michael Cannon, “No Obamacare Exchanges,” *National Review Online* (April 12, 2012), <http://www.nationalreview.com/articles/295773/no-obamacare-exchanges-michael-f-cannon>; Dan Diamond, “Could Halbig et al. v. Sebelius Sink Obamacare,” *The Health Care Blog*, (June 11, 2013) (quoting Michael Greve: “This is for all the marbles.”), <http://thehealthcareblog.com/blog/2013/06/11/could-halbig-et-alv-sebelius-sink-obamacare/>.

But In fact, everyone was right at the beginning. The ACA's text does *not* sabotage its universally acknowledged purpose of ensuring access to health insurance for millions of Americans who cannot now afford it. To make their implausible case to the contrary, the opponents snatch a few isolated phrases out of context, and ignore the rest of the 2700 page statute. Numerous provisions of the law confirm that eligible residents of all states shall receive the premium assistance they need.

In a nutshell, the text of the ACA provides that if state decides not to set up an Exchange, the federal government is to step in and set one up in its place. The same rules apply to all Exchanges, whether it's the states or the federal government that operates them. Under the opponents' tortured reading, all sorts of individual provisions in the statute do not work, and, indeed, the exchange marketplaces themselves will not work. That result, of course, is precisely what these die-hard opponents intend. But it's the opposite of what the Congress that enacted the ACA intended.

In order to justify their implausible reading of the ACA's text, opponents have concocted an even more head-scratching claim – that the sponsors of the law “purposefully” designed it to achieve this self-immolation. Their theory is that, by threatening to deprive residents of states of premium tax credits, Congress sought to “coerce” states to set up Exchanges. If true, what the Act really means, and what its sponsors really intended, is a result that would not only cancel the core benefit the law sought to confer, for the core constituency it aimed to benefit. More remarkably, under the opponents' misread, the ACA's sponsors would have intentionally handed over to ACA opponents in state capitols the power to subvert the law in their states. In effect, they would have given Mr. Cannon's political allies that “stake” and invited them to drive it through the heart of the ACA. Is that plausible?

Unsurprisingly, there is not a single piece of evidence in the legislative record to support the notion that Congress was threatening states into setting up Exchanges. There is no mention of this idea anywhere in the voluminous pages of the debate over the Affordable Care Act. No one, supporter or opponent of the law, brought it up.

And certainly no one ever communicated to any state official that they risked depriving their residents of affordable health care if they refused to set up their own Exchanges. *There is no such thing as a stealth threat.* A threat must be communicated. Here, none ever was. In and of itself, this is fatal to the upside-down interpretation opponents are asking the courts to embrace.

How likely is it that a majority of the Supreme Court, or any court, will endorse the perverse premise of these ACA opponents, and bar access to affordable quality health care for millions of people whom Congress specifically intended to benefit? Such a decision, especially if rendered by an ideologically divided court, will likely appear to the public as a radical ratcheting up of the regrettable tradition of *Bush v. Gore* – though less principled and more transparently political. I doubt that the judiciary will take the bait these lawsuits tender, and venture out on that limb.

And, self-evidently, it is frivolous to suggest that the Obama Administration is violating the Constitution's mandate to take care that the laws be faithfully executed by implementing the ACA's exchange provisions in a manner that is faithful to the ACA's text, to the purpose of the Congress that enacted it, and to the needs of millions of hard-working Americans for access to affordable health insurance.

### **Conclusion**

In sum, the various critiques being vetted here, of the Affordable Care Act and other Obama Administrative initiatives, reflect political and policy-driven criticisms routine in a democratic polity, especially one as polarized as we are today. But attempts to wrap those arguments in the Constitution just thicken the political fog. They deserve no attention from people who are seriously interested in evaluating competing policy and political claims, or in facilitating, rather than obstructing, resolution of those differences.