

Written Statement of Simon Lazarus
Hearing Before the Committee on Rules, U.S. House of Representatives
On H. Res. ____, Providing for authority to initiate litigation for actions by the
President inconsistent with his duties under the Constitution of the United States

July 16, 2014, 10 a.m., U.S. Capitol H-313

My thanks to Chairman Sessions, Ranking Member Slaughter, and the members of the House Committee on Rules, for inviting me to testify in this inquiry into the resolution proposed by Speaker Boehner to authorize a lawsuit on behalf of the House against President Obama or “any other officer or employee of the United States.” The lawsuit authorized by the resolution would seek relief from alleged illegal or unconstitutional conduct in “implementation of (including a failure to implement) any provision” of the Affordable Care Act. In announcing the litigation resolution, Speaker Boehner stated that the lawsuit would specifically target Administration decisions to postpone and adjust effective dates for requirements relating to the so-called “employer mandate” – that large employers provide their workers with health insurance or pay a tax.

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Presumably, the lawsuit contemplated by the resolution will assert claims frequently reiterated over the past year by members of the Speaker’s conference, that postponing the employer mandate, as well as other provisions of the ACA, constituted abuses of the President’s discretionary authority and, hence, violate Article II, Section 3 of the Constitution, which provides that the President “take care that the laws be faithfully executed.” My testimony will primarily address the merits of this claim. My co-witness, Professor Walter Dellinger, will primarily address the questions of whether the House of Representatives, through representatives established pursuant to the resolution, would have standing to pursue such a claim in court, and whether the claim would otherwise be justiciable.

Regrettably, I must observe, as I did before the House Judiciary Committee in December 2013, that these claims of wayward Executive conduct import the Constitution into what are, in reality, political and policy debates. 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 like the ACA. These claims fault the Obama Administration for making necessary adjustments in timing and matching enforcement priorities with resources and technical, 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.¹ That is precisely what the President and the members of his administration are doing to implement the ACA – whatever one may think of their actions from a policy or political perspective.

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 last year, 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.² Critics labeled this 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.”³

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.”⁴ 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.”⁵

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 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>>.

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

⁴ 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>>.

⁵ 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>>.

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.”⁶

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.
- 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”⁷

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.”⁸ Secretary Leavitt made this observation based on his own experience with the Bush Administration’s initially bumpy but ultimately successful

⁶ 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>>.

⁷ 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%202014.pdf>

⁸ 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>.

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 the phase-in period during which covered employers will not be penalized for failing to insure their employees, a relatively 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.⁹ To put the issue in realistic perspective, health law expert Professor Timothy Jost observes that 171 million Americans are 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.¹⁰ In light of these circumstances, the Congressional Budget Office estimated that fewer than half a million persons are likely to go without insurance during this phase-in period, as a result of the postponement of the employer mandate.¹¹

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.¹² 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.¹³ A study of implementation of Medicare mandates in the late 1990s following the enactment of

⁹ 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>.

¹⁰ 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/>

¹¹ 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>

¹² Mazur letter, *supra* note 5.

¹³ 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>

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.¹⁴ ***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. 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. 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.¹⁵

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

¹⁴ Timothy Jost, Governing Medicare. 51 *Administrative Law Review* 39 (1999).

¹⁵ 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>

was widely criticized for apparent “deregulation through nonenforcement.”¹⁶ 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. Good faith, prudent, reasonable phasing-in adjustments are routine and appropriate.

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.”¹⁷ 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.”¹⁸ 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 declined to intervene. As former Chief Justice William Rehnquist noted in a leading case,¹⁹ 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.”²⁰ 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 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” (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?”²¹ Defining the President’s duty in

¹⁶ 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>)

¹⁷ The Administrative Procedure Act, 5 U.S.C. § 706.

¹⁸ *Telecommunications Research and Action Center, et al. v. FCC*, 750 F.2d 70, 80 (1984).

¹⁹ *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

²⁰ 470 U.S. at 833 n.4.

²¹ 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 &

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.²² 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.”²³ 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 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.

In closing, I would note that, while my testimony has focused on the substantive claim driving the pending resolution, the transparent dubiousness of that claim reinforces the standing and political question deficiencies fatal to the contemplated lawsuit. Judges, whether appointed by Republican or Democratic presidents, will see this as the political maneuver that the media and the public recognize: A president’s political opponents seeking to inflate a routine administrative practice, a reasonable and necessary feature of all administrations’ roll-outs of complex laws, into a constitutional transgression and – literally – make a federal case of it. That perception can only be enhanced by the fact, equally apparent to all, that faithful execution of the Affordable Care Act is the last thing in the world that proponents of the suit hope for.

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.

²² 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).

²³ McConnell, “Obama Suspends the Law.”