STATEMENT OF ELIZABETH P. PAPEZ[1]

FORMER DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON WAYS AND MEANS SUBCOMMITTEE ON OVERSIGHT
UNITED STATES HOUSE OF REPRESENTATIVES

EXAMINING THE USE OF ADMINISTRATIVE ACTIONS IN THE IMPLEMENTATION OF THE AFFORDABLE CARE ACT

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Thank you Chairman Roskam, Ranking Member Lewis, and Members of the Subcommittee. I appreciate the opportunity to appear here today to discuss the use of administrative actions to implement the Affordable Care Act (ACA or Act). Agency implementation is an inescapable part of administering complex legislation. And it presents special challenges under the ACA because the law calls upon multiple agencies to implement an especially elaborate and costly network of related federal and state programs. Because of their price and practical burdens, many of these programs have been the subject of staggered agency implementation since the Act's passage in March 2010. Much has been said about the policy and legal issues surrounding these implementing efforts. What I would like to address briefly this morning are certain constitutional and governance issues that transcend the debate over particular programs. These issues are not academic. They have real consequences for the millions of people and trillions of dollars affected by the ACA's administrative implementation.

[1] Elizabeth P. Papez is a partner in the Washington, DC office of Winston & Strawn LLP and a member of the Adjunct Faculty at the George Washington University Law School. From 2007 to 2009, she served as Deputy Assistant Attorney General in the Office of Legal Counsel at the United States Department of Justice. Ms. Papez is a graduate of Harvard Law School, earned her Bachelor of Science degree *summa cum laude* from Cornell University, and served as a law clerk to Justice Clarence Thomas of the United States Supreme Court and Judge Danny J. Boggs of the United States Court of Appeals for the Sixth Circuit.

And their resolution in the ACA context requires careful consideration because it could have important consequences for future governments and programs that have nothing to do with healthcare.

The constitutional questions that surround recent administrative efforts to implement the ACA reflect the separation of powers among the three federal branches of government as well as the division of sovereign authority between the federal government and the States. As relevant here, Article I commits to Congress the powers to legislate, tax, appropriate funds, and regulate interstate commerce consistent with state sovereignty. Article II empowers the Executive Branch to interpret and enforce legislation with due regard for the authorities reserved to Congress, the judiciary and the States. And Article III empowers federal courts to interpret statutes and review the legality of agency action in justiciable cases.

Each branch has an independent duty to exercise its constitutional authority within the bounds of this framework, and failure to do so can have a ripple effect that threatens the rule of law across administrations and programs. Recent efforts to implement the ACA illustrate this risk. The statute's provisions on employer coverage, cost-sharing subsidies, and premium tax credits present economic and practical challenges that have prompted implementing agencies to range beyond the Act's text to an extent that has spurred constitutional challenges from coordinate branches and regulated individuals. The employer coverage regulations categorically revise express statutory compliance deadlines and participation requirements. The Treasury Department's cost-sharing regulations conclude that, despite the administration's prior requests for annual appropriations, cost-sharing subsidies may be paid from funds permanently appropriated for specific tax credits. And IRS regulations declare that the premium tax credit provision expressly directed at insurance exchanges "created by a State" must also encompasses

exchanges established by federal agencies. The Executive Branch defends these actions as lawful efforts to implement the Act, and as appropriate responses to apparently unanticipated shortfalls in funding, state participation, and private sector readiness central to the Act's affordable care mandate. But the Constitution limits the extent to which agencies may interpret legislation to encompass or address evolving circumstances. Accordingly, this Subcommittee recently questioned whether the administration's employer coverage and cost sharing regulations exceed constitutional limits and intrude upon Congress's legislative and appropriations authority. Parallel challenges to agency implementation of the Act's cost-sharing and premium tax credit provisions have also made their way into two pending lawsuits. Regardless of their outcome, these suits and the ongoing disagreement between the political branches regarding ACA's implementation highlight the constitutional obligations and risks that attend administration of complex legislation, and underscore the need for continuing legislative oversight.

I. Employer Coverage Regulations.

Section 1513 of the Act requires certain employers to offer all full-time employees statutorily-prescribed insurance coverage by 2014 or face tax penalties established in the tax code provisions the Act amends.[2] Notwithstanding the statute's express coverage requirements and compliance deadline, the Treasury Department announced both in press releases and a formal rulemaking that the Act's 2014 requirements and penalties would not apply until 2016.[3] Specifically, the regulations depart from the Act's 2014 mandates by waiving statutory penalties for employers who cover at least 70 percent of relevant employees in 2015, and by waiving such for employers who cover at least 95 percent of relevant employees in 2016.

[2] 43 U.S.C. §§ 4980H(a)-(b).

[3] 79 Fed. Reg. 8544 (Feb. 12, 2014).

These regulations raise fundamental questions about when agency action crosses the constitutional line that separates implementation from legislation. Executive Branch agencies may interpret and enforce federal statutes, but may not rewrite or amend them. The line between administration and revision is sometimes blurry, but historical definitions of inherently legislative acts are instructive. The definition of a legislative act as defining the boundaries of permissible conduct at a particular point in time dates back to Locke, who explained that the legislative authority "cannot assume to its self a power to Rule by extemporary Arbitrary Decrees," but is rather bound to promulgate "standing Laws," by which "every one may know what is his."[4] Under this definition and the U.S. Constitution, administrative actions that make categorical changes to express statutory prescriptions threaten the line that separates implementation from legislation. The Executive Branch's prosecutorial discretion to decide where to spend its limited resources, and to decline prosecution of conduct a statute makes punishable, does not empower agencies to exempt entire classes of people or conduct from express statutory prohibitions or time limits. That is because such acts are equivalent to suspending portions of a statute, which is a power Article I reserves to Congress in keeping with its historical treatment as a quintessentially legislative function.[5]

[4] JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT, para. 136, *in* TWO TREATISES OF GOVERNMENT 358-59 (Peter Laslett ed., 1988) (1689).

[5] "In the seventeenth century . . . royal suspensions and dispensations became a source of acute conflict between Parliament and the Crown." Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 691 (2014). As part of the constitutional settlement after the Glorious Revolution, "the monarch was henceforth denied suspending and dispensing powers" in "[t]he very first two articles of the English Bill of Rights of 1689," which state: "the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal," and "the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal." *Id*. (citing authorities).

II. Cost-Sharing Subsidies.

Section 1402 of the Act requires insurance companies to reduce co-payments, deductibles and other costs to qualified individuals who purchase health plans in public insurance exchanges. The section then combines with Section 1412(c)(3) to authorize federal payments to insurance companies to offset the price of the statutorily-prescribed cost-sharing reductions to insureds. In its FY2014 budget submission the Executive Branch requested appropriations for these payments. When Congress did not authorize them, the Department of Health & Human Services responded that for purposes of "efficiency" it would fund the payments out of the "same account from which the premium tax credit portion of the advance payments are made."[6] But the tax credits are funded through a permanent appropriation that does not reference the Act's cost-sharing provisions. The administration's expenditure of nearly $3 billion in offset funds thus raises the question whether agency implementation of the Act's cost-sharing provisions violates Article I's prohibition on expending public funds without an appropriation made by law.[7]

On February 3 of this year, the Chairmen of the Committees on Ways and Means and Energy and Commerce sent letters to Treasury Secretary Lew and Health and Human Services Secretary Burwell asking for "a full explanation for, and all documents relating to" the administration's payment of cost-sharing subsidies.[8] The agencies' response concedes that $2.997 billion in such payments were made in 2014, but refers questions about the legal basis for

[6] Ltr. from S. Burwell to T. Cruz, M. Lee (May 21, 2014).

[7] A July 2013 letter from the Congressional Research Service observes that "unlike the refundable tax credits, these [cost-sharing] payments to the health plans do not appear to be funded through a permanent appropriation. Instead, it appears from the President's FY2014 budget that funds for these payments are intended to be made available through annual appropriations."

[8] Ltrs. from F. Upton, P. Ryan to S. Burwell, J. Lew (Feb. 3, 2015).

these payments to the administration's filings in a pending lawsuit.[9] Regardless how that suit is resolved, it is unlikely to moot the need for continuing legislative oversight and political branch engagement on the affected provisions.

The Supreme Court has held that the utilization of appropriated funds within a statutorily-prescribed category is a proper executive function,[10] and that agency authority to administer statutory provisions is greatest where the relevant provisions are ambiguous.[11] But this administrative and interpretive authority comes into play only where there is a valid legislative appropriation in the first place, and the only appropriation the administration has identified with respect to the Act's cost-sharing provisions is a provision that is linked to tax credits that exclude insurance subsidies.[12] Absent some ambiguity in these provisions or a plausible interpretation of the Act that includes insurance subsidies in existing appropriations, the administration's cost-sharing payments are vulnerable to challenge under constitutional separation of powers principles and the Administrative Procedures Act.[13] And if such challenges succeed, the political branches will have to confront how to fund the subsidies or administer the Act without them.

III. Premium Tax Credits.

In an effort to make health insurance affordable to people required to purchase it, Section 1401(a) of the Act provides tax credits for insurance purchased on "an Exchange established by

[9] Ltr. from R. DeValk, J. J. Esquea to P. Ryan (Feb. 25, 2015) (citing No. 1:14-cv-01967, *House of Representatives v. Burwell* (D.D.C. 2015).)

[10] *Id.* at 726, 732, 733; *see also id.* at 760 (White, J., dissenting).

[11] *Chevron USA, Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-43 (1984).

[12] The law requires that an "issuer" of a qualified health plan to an eligible insured individual "shall reduce the cost-sharing under the plan at the level and in the manner" specified. 42 U.S.C. § 18071(a)(2). The issuer then "shall notify the Secretary of such reductions and the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions." 42 U.S.C. § 18071(c)(3)(A). But the appropriations provision for tax credits the Treasury Department

[13] 5 U.S.C. § 706(2).

the State under section 1311." 26 U.S.C. § 36B(c)(2)(A)(i). The Executive Branch recently issued regulations applying these credits to coverage purchased on federal exchanges created by the U.S. Department of Health and Human Services under Section 1321 of the Act.[14] These rules are being challenged in the Supreme Court as unconstitutional legislation via regulation. The petitioners in *King v. Burwell* assert that the administrative provision of credits for insurance purchased on exchanges established by federal agencies under Section 1321 impermissibly rewrites the Act's express provision of such credits only for insurance purchased on exchanges "established by [a] State under section 1311." The petitioners argue that this textual limitation is both unambiguous and logical because the tax credits were enacted to incent States to establish exchanges that the Tenth Amendment prohibits Congress from requiring them to adopt. That these inducements have not moved most States to create exchanges is a fact the administration cites in support of applying Section 1311 credits to purchases on federally-created exchanges. Indeed, the Executive Branch has defended that interpretation of Section 1311 as the only position consistent with federalism principles and the Act's affordable care mandate, because refusing to provide tax relief to individuals who must purchase insurance on federally-created exchanges could make insurance so costly that States would feel compelled to establish exchanges in order to avoid so-called "death spirals" in their insurance markets.

The Supreme Court engaged these and other separation of powers questions relevant to Section 1311's administration in March. Justice Ginsburg began by raising a threshold question about whether Petitioners had standing to challenge the contested regulations in federal court. Justices Kagan, Ginsburg, Breyer and Sotomayor then questioned whether Petitioners' reading of Section 1311 could be reconciled with the Act's affordable care mandate. Justice Kennedy

[14] Specifically, the IRS regulations define "Exchange" to include both federal- and state-established exchanges, 45 C.F.R. § 155.20, and extend eligibility for tax credits to taxpayers enrolled through an Exchange so defined, 26 C.F.R. § 1.36B-1; 26 C.F.R. § 1.36B-2.

expressed concern that if Petitioners "prevail in the plain words of the statue," a "serious constitutional problem" might arise because States would feel compelled to support exchanges in order to secure tax relief for their residents.[15] Justice Scalia then probed what the "consequence" of any such "unconstitutionality" would be, and prompted counsel for both parties to concede there is no case that says when a statute contains a "clear provision [that] is unconstitutional, [the Court] can rewrite it."[16] He next pressed the Solicitor General to admit that, at least "theoretically," Congress could address any "disastrous consequences" of Petitioners' position by "enact[ing] a statute that takes care of the problem."[17] And Justice Alito offered that if the Court were to invalidate the challenged regulations, it could allow time for a legislative response by "stay[ing] the [Court's] mandate until the end of this tax year."[18]

Last but not least, Justice Kennedy questioned the argument that the Court should defer to the Administration's interpretation of Section 1311 because the provision is ambiguous. He observed that Congress was unlikely to hide the "elephant" of "how billions of [dollars] of subsidies are to be disbursed" in the "mousehole" of an ambiguous provision that would "leave that call to an IRS reg," particularly when the "director of Internal Revenue" had never identified any such ambiguity or raised it with Congress.[19] And the Chief Justice noted that if the Administration's position on ambiguity were correct, "that would indicate that a subsequent administration could change th[e] interpretation" of the statute in new regulations.

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[15] No. 14-114, *King et al. v. Burwell*, Tr. at 16:20-23 (U.S. Sup. Ct., Mar. 4, 2015).

[16] *Id*. at 17:18-20.

[17] *Id*. 54:10-17; 54:19-23.

[18] *Id*. at 53:1-4.

[19] *Id*. 74:16; 75:6-9; 76:12-15.

The questions the Supreme Court explored in *King*, like the broader constitutional questions surrounding the administration of ACA's employer mandate, cost-sharing, and tax credit provisions, illustrate why the Constitution requires all three branches independently to assess and adhere to separation of powers principles in enacting, implementing and reviewing complex legislation. The Declaration of Independence recognized the hazards of concentrating power in a single person or body, and the Constitution answered this concern with a division of government authority that is often described as "the essential basis of a free system of government."[20] The scope and importance of the issues the ACA seeks to address can tempt government action beyond constitutional confines, particularly in the face of difficult or shifting economic and political circumstances. But it is precisely when government action is most consequential and policy divisions run deepest that constitutional principles and the rule of law must serve as a check on the exercise of government power. History suggests that laws and practices that push separation of powers boundaries cause problems that cut across policies and administrations. Accordingly, adherence to these boundaries should not be viewed as a partisan issue or merely a matter for the courts.

The pending lawsuits in *King* and *House v. Burwell* illustrate why. *First*, both cases are subject to settled constitutional limits on judicial authority that may prevent certain statutory infirmities or administrative transgressions from reaching federal courts. And even where judicial review is available, the pending ACA suits highlight why each branch has an independent obligation to adhere to separation of powers limits and scrutinize the implementation of complex legislation over time. *King* began with the passage of a law whose funding and structure is tied to State actions that Congress cannot mandate and the Act apparently did not incent to the degree its supporters expected. In passing a law dependent on

[20] M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 133 (2d ed. 1998).

future funding and provisions for state action that could not necessarily be enforced as written, Congress arguably invited the separation of powers questions that now surround various aspects of the Act's implementation. The statute's funding and structural limitations created implementation challenges for its tax credit and cost-sharing provisions that resulted in the regulations this Committee has questioned and the *King* and *House v. Burwell* suits seek to invalidate. And those suits in turn require the courts to confront constitutional limits on their authority to depart from unambiguous statutory provisions or defer to administrative actions out of fear that doing otherwise will have consequences Congress cannot be counted upon to address.

The resolution of these questions in *King* and *House v. Burwell* may guide future administration of the Act, but will not moot the need for the political branches to engage separation of powers questions in ACA's implementation going forward. No matter how the pending suits are decided, the Executive Branch will have to assess how it can continue administering the statute, and Congress will have to oversee these efforts and consider legislative action where circumstances appear to render the implementation of certain provisions unworkable within constitutional bounds. That is particularly true because the Act itself contains provisions that allow States to seek Executive Branch waivers of certain statutory requirements, including those at issue in *King*, in the coming years.[21] Constitutional limits on federal jurisdiction would leave the interplay between such provisions and the Supreme Court's interpretation of Section 1311 to the political branches. And the manner in which federal

[21] Other provisions that may be waived under section 1332 include (i) Part I of subtitle D to ACA Title I (requirements related to the establishment of qualified health plans), (ii) Part II of subtitle D to ACA Title I (requirements related to consumer choices and insurance competition through exchanges), (iii) section 1402 of the ACA (requirements related to reduced cost sharing for individuals enrolling in qualified health plans), (iv) section 4980H of the Internal Revenue Code (requirements related to shared responsibility for employers regarding health insurance), and (v) section 5000A of the Internal Revenue Code (requirements related to tax penalties for the failure to maintain essential health insurance). ACA § 1322; 77 Fed. Reg. 11701.

agencies implement the constraints the Act places on state waivers,[22] could raise constitutional and APA issues as or more challenging as those presented in *King*. As these issues unfold, this Subcommittee's continued exercise of its oversight authority will be critical to ensuring implementation of Section 1332 and other provisions consistent with the separation of powers and federalism limits the Constitution requires.

[22] Section 1332 waivers are not available until 2017, ACA § 1332(a)(1), and even then are available only if a State shows that its innovation plan will (i) provide benefits at least as comprehensive as those required in ACA exchanges, (ii) provide coverage and cost sharing protections against out-of-pocket spending to make coverage at least as affordable as those provided by the ACA, (iii) cover at least a comparable number of residents as would be covered under the ACA, and (iv) not increase the federal deficit. ACA § 1332(b)(1).