PREPARED STATEMENT OF ROBERT N. WEINER

Thank you, Chairman Roskam, Ranking Member Lewis, and the Members of the Subcommittee, for inviting me to testify today regarding the use of administrative actions in the implementation of the Affordable Care Act. My name is Robert Weiner. I am a partner at the law firm of Arnold & Porter LLP in Washington, D.C. From 2010 to 2012, I was an Associate Deputy Attorney General at the U.S. Department of Justice, where I oversaw the legal defense of the Affordable Care Act ("ACA"). Since leaving the Justice Department, I have written, lectured, and debated about the ACA and its implementation. I also taught a course at the Georgetown University Law Center on "The Litigation of Politics and the Politics of Litigation," based in part on my experience with the ACA. I appear today solely to present my personal views, not as an attorney or spokesman for any individual or organization.

Administrative agencies exercise power delegated by Congress. It is appropriate for this Committee and for the Congress as a whole to conduct oversight to ensure that agencies are properly using that delegated authority. If Congress finds that they are not, it has legislative remedies at its disposal. Proper oversight and legislative action flowing from it are integral to our democratic system of checks and balances.

Opponents of the Affordable Care Act, however, have disrupted and circumvented this system of checks and balances through lawsuits and efforts to stymie implementation of the law. The President signed the Affordable Care Act on March 23, 2010. The first lawsuit came seven minutes later. Even though the Supreme Court in that lawsuit upheld the constitutionality of the Act, litigation seeking—in the words of one advocate—to "drive a stake through the heart of Obamacare" has continued unabated for every minute, except those first seven, of the five years the Act has been in force. This trench warfare against the ACA includes a case rejected by the

Court of Appeals for the Fifth Circuit last month alleging that the ACA violated the Origination Clause of the Constitution. It includes another case, dismissed last week, attacking the "transitional policy" and "hardship exemption," which permit individuals temporarily to maintain health insurance coverage through plans not compliant with the general requirements of the Act. It includes a lawsuit by a Senator rejected by the Seventh Circuit last month, and one by this House, which will likely share the same fate in DC. And it includes the pending Supreme Court case, *King v. Burwell*, asking the Court to interpret the ACA in a manner that Congress plainly did not intend and that would take subsidies away from 9.3 million people who need the money to afford health insurance. Lawsuits, moreover, are only part of the assault, as opponents of the ACA at the state, local, and federal level have sought at every turn to impede its implementation, to discourage organizations from helping people get insurance, and, along the way, to block access to affordable health insurance.

And yet, despite it all, the ACA is working. Since the beginning of open enrollment in October 2013, 14.1 million adults have gained health insurance coverage, not including the 2.3 million young adults who have been able to stay on their parents' insurance policies until the age of 26.[1] The uninsured rate has dropped from 20.3 percent of the U.S. population to 13.2 percent.[2]

But those numbers do not tell the whole story.

In the *King* case, the Hospital Corporation of America (HCA), the nation's largest non-governmental health care provider, filed an *amicus* brief identifying other ways in which the

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[1] *See* U.S. Department of Health and Human Services, *HEALTH INSURANCE COVERAGE AND THE AFFORDABLE CARE ACT* (May 5, 2015) available at http://aspe.hhs.gov/health/reports/2015/uninsured_change/ib_uninsured_change.pdf.

[2] *Id.*

Affordable Care Act is working effectively. HCA reported, for example, that the Act is encouraging personal responsibility. While 90 percent of uninsured patients pay HCA nothing at all for their health care, patients who purchased insurance on the federal exchanges pay an average of $390 out-of-pocket for their care. This gives them a direct financial stake in maintaining their health, making better health care choices, and using less expensive types of care. HCA reported further that patients on federal exchanges are three times less likely than uninsured patients to seek health care in an emergency room. Reducing the use of emergency rooms for primary care was one of the ACA's objectives, and it both reduces costs and fosters better preventive care.[3]

No one could contend that implementation of the ACA has been seamless. Few, if any, major statutes anticipate all the stumbling blocks in implementation. That is one reason why Congress has afforded administrative agencies the discretion necessary to deal with delays, obstacles, and unexpected events, so that they can achieve what Congress intended in enacting new legislation. Despite such inevitable snags, and despite the relentless opposition, the Executive Branch has succeeded in implementing the ACA by judiciously exercising that discretion the same way prior Administrations have done in implementing complex statutes.

One of the administrative actions that opponents of the ACA have attacked is the IRS's one-year postponement of the January 1, 2014 deadline for large employers to provide their workers with health insurance or pay a tax.[4] Opponents of the ACA and the Administration have decried this transition relief as if it were some czarist decree. Whatever the political salience of

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[3] Brief of HCA Inc. as *Amicus Curiae* in Support of Responds and Affirmance, *King v. Burwell,* No. 14-114 (Jan. 2015), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-114_amicus_resp_hca.authcheckdam.pdf.

[4] 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>.

this narrative, it has little connection with the legal reality. The postponement in fact was well within the historical bounds of administrative discretion as a transitional phase-in of a new requirement.

The employer mandate depends on complex reporting requirements that inform the government as to what insurance employers are offering and to whom. Without this information, the IRS cannot enforce the mandate effectively. In July 2013, the Treasury Department announced that it was providing "transition relief," to allow the IRS "to simplify the new reporting requirements consistent with the law," and to "provide time to adapt health coverage and reporting systems while employers are moving toward making health coverage affordable and accessible for their employees."[5] The Treasury Department found that it would be "impractical" without the reports to determine which employers owed a tax penalty for failing to provide insurance to employees—the kind of determination an administrative agency is uniquely well-situated to make. Based on that finding, the Treasury Department granted transitional relief as to that obligation as well. The Department, however, did not suggest that it could or would rescind the employer mandate, or waive it indefinitely. The Department spoke of "transitional" relief, limited in scope and time, while the IRS engaged in a "dialogue with stakeholders" to develop effective reporting requirements that did not impose undue burdens.[6]

The Treasury Department issued the proposed reporting rules on September 5, 2013. In doing so, it confirmed that the proposal reflected "an ongoing dialogue with representatives of

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

[6] 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, <http://democrats.energycommerce.house.gov/sites/default/files/documents/Upton-Treasury-ACA-2013-7-9.pdf>.

employers, insurers, and individual taxpayers," which would continue through the notice and comment rulemaking process.[7] With further fine-tuning based on that dialogue, the Administration issued the final rules on February 10, 2014. In them, the Administration included additional "provisions to assist smaller businesses," and sought "to ensure a gradual phase-in and assist the employers to whom the policy does apply. . . ." Thus, the final rules apply the employer mandate starting in 2015 to larger firms with 100 or more full-time employees, and wait until 2016 to apply it to employers with between 50 and 100 full-time employees. And rather than demanding immediate, across-the-board compliance, the rule requires employers to provide insurance to 70 percent of their full-time employees in 2015 and 95 percent in 2016 and beyond.[8]

This is hardly the stuff of czarist tyranny. It is, rather, the prudent exercise of administrative discretion, based on a productive dialogue with the business community, to avoid disruption and achieve better long term compliance by phasing in new requirements instead of imposing them abruptly. It reflects the practical reality of implementing any significant legislative change affecting organizations across the country. Moreover, there is ample precedent for such a measured approach. In fact, shortly after the Treasury Department announced the postponement, Michael O. Leavitt, the former Utah Governor and President George W. Bush's HHS Secretary, described the decision to delay the employer mandate as "wise," and consistent with the Bush Administration's similar phase-in of the prescription drug benefit to Medicare adopted in 2003 and implemented in 2006. The Bush Administration, in

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[7] 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), <http://www.treasury.gov/press-center/press-releases/Pages/jl2157.aspx>.

[8] 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.

implementing Medicare Part D, delayed, modified, and transitioned-in various portions of the new law. For example, the Administration waived the penalty for late enrollment, delayed enforcement of a requirement that participating drug plans establish programs for managing the medication therapy for patients with multiple chronic health problems, and postponed elements of the method for calculating the beneficiaries' share of drug premiums, in order to keep premiums low in the first years of the program.[9]

In a letter to Chairman Upton of the House Energy and Commerce Committee in 2013, Assistant Treasury Secretary Mazur cited other "prior occasions across Administrations" where the IRS had used its statutory discretion to "postpone the application of new legislation." For example, he said:

> [T]he Small Business and Work Opportunity Act of 2007 made changes to the standards return preparers must follow to avoid penalties. The amendments were effective May 25, 2007. On June 11, 2007, the Treasury Department released Notice 2007-54 providing that the IRS would follow the standards in prior law in determining whether to assert penalties for returns due on or before December 31, 2007. Similarly, the Airport and Airway Extension Act, Part IV (signed August 5, 2011) reinstated the air transportation and aviation fuels excise taxes retroactively to July 23, 2011, when they had expired. On September 9, 2011, the Treasury Department released Notice 2011-69 providing that the excise taxes would not imposed on purchases of air transportation services made after July 22, 2011 and before August 8, 2011.[10]

Similarly, the EPA, under both Republican and Democratic Administrations, has often phased-in requirements past statutory deadlines, to avoid actions lacking scientific support or at odds with other mandates. In 2012, for example, the EPA delayed the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen and Sulfur, because the EPA found the

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[9] 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.

[10] Mazur, *supra* note 5.

science too uncertain to allow formulation of the new standards. Nor was this delay unusual. Back in April 2005, EPA had completed only 404 of the 452 actions required by the Clean Air Act Amendments of 1990. And, of the 338 requirements with statutory deadlines before April 2005, EPA completed 256 late.[11]

Of course, at some point, delay becomes tantamount to abandonment or non-enforcement of a statute. That was effectively what the Supreme Court found when it ordered EPA in the Bush Administration to initiate formal rulemaking to determine whether greenhouse gases were subject to regulation under the Clean Air Act. *Massachusetts v. EPA,* 549 U.S. 497 (2007). Even after this decision, charges persisted that the Administration was pursuing a policy of "deregulation through non-enforcement."[12] But plainly, that is not what is happening with regard to the Affordable Care Act. The Obama Administration supports the ACA and has taken steps—temporary and successful steps—to enable the law to function effectively.

The federal Administrative Procedure Act ("APA") demarcates the boundaries of administrative discretion regarding timing in the implementation of statutory mandates. The APA authorizes federal courts to compel statutorily mandated actions that agencies have "unreasonably delayed."[13] But the circumstances constituting unreasonable delay are nothing like those presented here. Courts have found such unreasonable delay only after years of regulatory inertia, where the foot-dragging agency could neither provide a good explanation nor commit to an imminent deadline. Before overriding an administrative delay, moreover, courts

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

[12] 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 Env. L. Rev. (September 1996), http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1365&context=pelr

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

must assess whether compelling agency action could adversely affect "higher or competing" administrative priorities, and whether other interests could be "prejudiced by the delay."[14] The Supreme Court has presumed that an administrative agency understands better than the courts do "the many variables involved in the proper ordering of its priorities."[15] The Court has thus required deference to Executive Branch decisions on timing 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."[16] Despite the fervent hopes of some, the Obama Administration has not abdicated its responsibility to implement the Affordable Care Act, and there is no risk that it will.

Another administrative action attacked as unlawful is a letter from HHS to state insurance commissioners announcing a "transitional policy" permitting health insurers to "choose to continue coverage" for an additional year under policies commencing between January 1 and October 1, 2014, which would otherwise be terminated or cancelled" for non-compliance with insurance reforms under the ACA.[17] 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." Here, too, the Administration did not change the law, or waive the statutory requirement. Rather, in the exercise of prosecutorial discretion, HHS announced a "transitional" *enforcement* policy for the federal government, which states were free to follow or not. Many did not. This policy, too, is the type of reasonable interim adjustment that courts have found to be within the zone of administrative discretion.

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

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

[16] 470 U.S. at 833 n.4.

[17] http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF.

A third ACA regulation subject to attack is the one at issue in *King v. Burwell*, in which the IRS confirmed that subsidies were available to enable consumers to afford health insurance in states with federal exchanges. Some have described this interpretation of the statute as an assault on liberty. Let's come back to reality. To the opponents of the ACA, the language of the statute clearly commands one and only one interpretation. But, apparently, at least four Supreme Court Justices, the Solicitor General, leading experts in statutory interpretation, Senate and House leaders involved in drafting the ACA, key staffers leading the drafting process, the principal association of health insurers, the Hospital Corporation of America, the American Hospital Association, the American Cancer Society, the American Heart Association, 22 states and the District of Columbia, and countless others read it the same way the IRS does. It is a fair inference that their reading is, at the very least, a permissible interpretation of the statute. It is also the reading that advances the statutory purpose of making affordable insurance available to all Americans, avoids gutting numerous provisions of the law, and prevents the collapse of the statutory structure. It is the reading consistent with the contemporaneous legislative record, not one discovered only months after enactment of the law in an unabashed search for statutory glitches. And it is the interpretation that fulfills the Executive's duty to "take Care that the Laws be faithfully executed."

Congress should indeed hold the Executive Branch to that duty. But wrapping political or policy disagreements with the ACA or its practical implementation in baseless constitutional rhetoric, and predicting the death of freedom because of transitional relief from regulatory deadlines, serves no legitimate end. If the Committee is prospecting for Executive overreach or constitutional dereliction, the ACA is a dry hole.