Hearing on the Use of Administrative Actions in ACA Implementation

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HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT

OF THE

COMMITTEE ON WAYS AND MEANS

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Hearing on the Use of Administrative Actions in ACA Implementation

U.S. House of Representatives,
Committee on Ways and Means,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:06 a.m., in Room 1100, Longworth House Office Building, Hon. Peter Roskam [chairman of the subcommittee] presiding.

Chairman Roskam. The committee will come to order.

Welcome to the Ways and Means Oversight Subcommittee hearing on Examining the Use of Administrative Actions in the Affordable Care Act.

I will begin with an opening statement, and then we will yield to Mr. Lewis, the ranking member, when he arrives. He is on his way, but he has asked us to move ahead.

So, with that, today we are going to be taking a look at administrative actions, that is, unilateral actions by the President and the executive branch as they implement and administer the President's healthcare law. The question we examine today is: If one President could ignore parts of the healthcare law, can another President ignore the whole thing?

The issue goes to the core of our committees's mission to conduct rigorous oversight. House rule 10 empowers us, as a subcommittee, to determine whether laws and programs are being implemented and carried out in accordance with the intent of Congress. And while we consider these issues today, it is also important to remember the larger context.

The Affordable Care Act was passed by Democratic majorities in the House and Senate in 2010. It was signed into law by President Obama. If a President and Congress of one party can enact a law, but reconsider and alter it after enactment, then what can a different President in Congress do with the same law or any other? Do laws matter at all? What about the votes of the American people? Do they matter?

We are focusing specifically on executive actions relating to the Affordable Care Act, but don't lose sight of the critical importance of these issues at the core of our representative democracy. The question before us is not whether the administration is implementing the healthcare law. It is whether the administration is undermining the rule of law. And I believe the answer is yes.

The administration is too eager to take unilateral actions to solve thorny political problems. It has created a false narrative that Congress is unwilling to take on these challenges. In fact, as we will hear today, Congress has amended the Affordable Care Act over a dozen times. The administration's problem is acting out of expediency and not following the Constitution.

So the old phrase comes to mind that, "The road to hell is paved with good intentions." But the Constitution is clear. Congress writes the law. The President executes the law, period. The President cannot rewrite the law. If the President can make the law up as he pleases, there is no accountability.

Putting this incredible amount of power in the hands of one person completely erodes the delicate balance that the Founding Fathers established through checks and balances. Ultimately, too, it takes away the meaning of our votes as American citizens.

It is precisely because of this issue and the significance and the scope of the President's healthcare law that yesterday I introduced legislation to create a special inspector general to monitor the Affordable Care Act. It is modeled after the special inspectors general that Congress has created for Iraq and Afghanistan reconstruction and the Troubled Asset Relief Program, and together have produced taxpayer savings of almost $10 billion.

So an enterprise as big and complicated as national healthcare reform surely deserves the same level of oversight as the earlier endeavors. And, without objection, I will insert the findings of my SIGMA Act into the record.

[The information follows: The Honorable Peter Roskam 1]

Chairman Roskam. Our hearing today will review some of the changes the President has made to the Affordable Care Act without congressional approval and impact of those changes.

And, to do this, we have four extremely knowledgeable witnesses: Elizabeth Papez, a partner at the law firm of Winston & Strawn; Jonathan Adler, Professor of Law at Case Western Reserve University; Grace-Marie Turner of the Galen Institute; and Robert Weiner from Arnold and Porter.

And I want to thank all of you for attending and look forward to the insight and perspectives that you have. I know you are busy people. You are being very generous with us with your time today, and I am grateful.

Mr. Rangel. Mr. Chairman.

Chairman Roskam. Mr. Rangel, let me finish my statement and then I will --

Mr. Rangel. I apologize. That pause was misinterpreted by me.

Chairman Roskam. No trouble. Let me just continue, and I will recognize you.

Defenders of the law claim that the President's actions are routine uses of administration discretion. However, as we will discuss today, administration discretion is not unlimited.

In many ways, the actions are unprecedented in American history, as some of our witnesses will describe. I expect one witness will shrug this off. But I don't think the Founders would shrug. And, in fact, they were very apprehensive about just this situation.

And here is the proof: Our second President, John Adams, wrote this in part in the Massachusetts constitution. He said this: "In the government, the legislative department shall never exercise Executive and judicial powers, the executive shall never exercise legislative and judicial power, and judicial shall never exercise legislative and Executive power, so that it may be a government of laws and not of men."

I want to emphasize that this is not hypothetical. This is not esoteric. This is not distant. This is at the very core of who we are as people. The unchecked use of unilateral executive action creates a dangerous and damaging precedent. And today we are here to learn a cautionary tale: Beware of a bad process that yields the result you desire. It can just as easily be used against you.

In closing, this principle was brilliantly portrayed in the film, "A Man for All Seasons." You will recall that this is the story of Sir Thomas More. And in a dramatic scene, an associate of his made the argument that he would cut down all the laws of England in order to get at Satan himself. More retorts that he would give the devil the benefit of the law for his own safety's sake. And let's not forget that laws exist to protect us.

I know that members of both sides of this committee have strong feelings on this issue. I am sensing that Mr. Rangel is so enthusiastic that he is seeking my recognition even now. And I look forward to our discussion.

Chairman Roskam. And, with that, Mr. Rangel, I am happy to recognize you. We are waiting for Mr. Lewis, who asked us to go ahead. But, with that --

Mr. Rangel. I want to appreciate your recognition.

I have in the audience a young student that is following me around for today for the purposes of learning more about the Congress. And so I can't thank you enough for the eloquent history lesson that you have given today. And notwithstanding some people's thought, I was not really here when the Founding Fathers drafted the Constitution.

But it would help, even before Mr. Lewis gets here, as to where would you want this hearing to conclude, because I am still looking for that avenue where we can reach a bipartisan conclusion.

And having seen your party ask for repeal of this law 55 times and having the U.S. Supreme Court saying that it is constitutional and recognizing that, in counting the numbers, it doesn't look like we are going to override a veto and, since Larry Foster is here, before

Mr. Lewis can get here, what is the object of this hearing today? What would you want to conclude?

Because I am enthusiastic of trying to show Mr. Foster that I am so anxious before the President's term is over to find out that you decided to do something constructive to make the Affordable Care Act more effective.

Chairman Roskam. Well, Mr. Rangel, I appreciate that opportunity to bring to your attention these witnesses, who I think are going to give us a perspective that is incredibly valuable.

And let's turn to them and invite them to give us some insight. And I think that they are going to span a spectrum and give us a wide range of opinions on some of these areas.

And so my hope is that both you and the student who has been following you for this period of time will come away edified from this. And look forward to your comments as well.

Now, the ranking member, Mr. Lewis, has joined us.

Mr. Rangel. Well, he is not only our ranking member, but he is an icon and a breath of fresh air for the entire world. And I am so glad that Mr. Foster is able to see that we have some outstanding statesmen on our committee. And thank you so much for the courtesy, Mr. Chairman.

Chairman Roskam. I will echo your descriptions of Mr. Lewis.

And with Mr. Lewis, that is as good as it gets. We will to you for your opening statement.

Mr. Lewis. Thank you very much, Mr. Chairman and fellow members on both sides. I want to thank you for being so patient.

I want to apologize to you, Mr. Chairman. I was down at the controller's office speaking to all of the staff there and other agencies, but I am honored and delighted to be here.

I want to thank the witnesses for being here. Good morning.

Mr. Chairman, thank you for holding this hearing. I have said that it is good to be here to see each and every one of you.

Let me begin by saying what I have said at countless other hearings: The Affordable Care Act works. It was the right thing to do. It was the just thing to do. And it was long overdue.

I believe in my core that health care is a basic human right. It is not something that should be reserved for a select few, for the rich, or for the wealthy. The health reform law provides real benefits to American families. Over 16 million people who were previously uninsured now have health insurance.

Under the law, more than 100 million people with preexisting conditions can no longer be denied coverage. Millions of young people can stay on the insurance of their parents until age 26. In addition, over 9 million hardworking Americans across the United States receive tax credit to make their health insurance affordable, just as Congress intended.

Mr. Chairman, today's hearing should not be a platform for continued attacks on the health reform law. Instead, we should come together and focus on how to further improve health care for all Americans. Each and every one of us has a responsibility to make this country better for the least among us and for generation yet unborn. We have a duty to speak up and speak out on behalf of those that have no one to stand up for them.

The administration acted as Republican and Democratic administration have before them to implement a law in a manner that considers and reflects the importance of the mission. It is time for each and every one of us to face the truth. The Affordable Care Act is the law of the land, and we must do all we can to strengthen and improve it. Tearing it down is simply not an option.

Thank you, Mr. Chairman.

Chairman Roskam. Thank you, Mr. Lewis.

I think this debate is framed up very, very well. So Mr. Lewis -- I want to pick up on one of his comments in that this is not really a forum today to debate the merits of the Affordable Care Act.

That is well litigated. It is, you know, well explained. We have got very strong feelings. This committee has been at the heart of some of those debates, and it is really no secret what our different views are.

So we want to go deeper than that. We want to go now to this foundational question. That is what I would characterize as unilateral action. Others may characterize it differently. But you know what I am saying, the use of executive action and whether it is operating in the framework that is legal.

So we will hear from our panel in this order: Grace-Marie Turner, President of the Galen Institute; Jonathan Adler, Professor of Law at Case Western Reserve School of Law; Elizabeth Papez, partner at Winston & Strawn, who was formerly Deputy Assistant Attorney General of the Office of Legal Council at the Department of Justice; and Robert Weiner, a partner at Arnold and Porter.

The committee has received your written statements, and they will be made a formal part of the hearing record. You will have 5 minutes to deliver your remarks.

And, Ms. Turner, we will begin when you are ready. Thank you.

STATEMENT OF GRACE-MARIE TURNER, PRESIDENT, GALEN INSTITUTE

Ms. Turner. Thank you, Chairman Roskam. Thank you, Ranking Member Lewis and members of the committee. I really appreciate the opportunity to talk today with you about the administration's actions in implementing the Affordable Care Act.

Professor Adler and Ms. Papez will discuss in their testimony some of the more prominent regulatory changes the administration has made contrary to the language of the statute. The Galen Institute has chronicled many of the changes made to the ACA, and I will be talking about some of the other less prominent ones today.

And we count, as I said, at least 50 changes. Thirty-one have been made by the administration, 17 passed by Congress and signed into law by the President, and two made by the Supreme Court. I have appended that list to my testimony.

Just a few examples. Allowing people to self-attest to their eligibility for subsidies was not part of the law. In newly discovered conflicts between the regulation and the statute, the law provides exchange subsidies for people under 100 percent of poverty as well as unlawful immigrants, contrary to the language of the statute.

And it also provides illegal bonus payments to try to postpone cuts to the Medicare Advantage plans. The nonpartisan Government Accountability Office called for the administration to cancel this $8.3 billion program when it was giving quality bonus payments to plans that were mediocre and sometimes not even that. The administration has ignored the GAO and Congress' demands to stop the illegal payments.

The administration has also been criticized for its lack of transparency in the financing and implementation of the law. For example, the administration last year issued $300 million in solvency funds to co-ops. There has been no explanation of the criteria used for making those decisions and why some received added funding and others did not.

In addition, Ways and Means Chairman Paul Ryan has asked Treasury to explain $3 billion that it has been spending in cost-sharing reduction spending never authorized by Congress. The issue is part of a lawsuit filed by House Speaker John Boehner.

The administration claims the payments were legal, but it undercut its own argument when HHS asked Congress for appropriation to finance the payments. Congress refused, but the government continued to make the payments to insurance companies anyway.

There have been numerous instances where the administration has made what many Members of Congress consider to be good changes to the law, but not within the statutory authority. And Congress has said, "Okay. We will go along with that" and, in fact, has passed on a bipartisan basis a number of provisions, for example, when the administration issued its blog post in 2013 announcing the employer mandate delay.

The House of Representatives later that month passed legislation to say, "We will give you authorization to delay the mandate." The President said he would veto that legislation if it reached his desk, which it did not because it died in the Senate.

The House later that year had bipartisan support for the Keep Your Health Plan Act of 2013. It would give legal authority for the administration to delay implementation of some health plans that did not comply with ACA requirements. The administration threatened to veto that as well. The administration has claimed it has made the changes through regulation because Congress has refused to consider legislative fixes, but that also is not true.

The repeal of the CLASS Act, the repeal of the 1099 reporting requirement, and the Medicaid fix all were passed by Congress, signed into law by the President, showing that the President is able to get Congress to act on changes to the law. The ACA has caused enormous disruption throughout the health sector. There were fixes that were needed, but the administration does not have the authority to fix the legislation. It must implement it as written.

Mr. Chairman, I believe the evidence that will be presented today shows the need for your call for a special inspector general to monitor the ACA. The administration has spent -- and I would say wasted -- billions of dollars in taxpayer money and implementing the Affordable Care Act with eight different agencies charged with overseeing implementation of this law. It is very difficult for any one inspector general to oversee the implementation and to really make sure the law is being properly implemented and that the taxpayer dollars are being well spent.

So I commend you for the SIGMA Act, Mr. Chairman, and I look forward to your questions.

Chairman Roskam. Thank you, Ms. Turner.

Professor Adler.

STATEMENT OF JONATHAN H. ADLER, JOHAN VERHEIJ MEMORIAL PROFESSOR OF LAW AND THE DIRECTOR OF THE CENTER FOR BUSINESS LAW AND REGULATION AT CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW

Mr. Adler. Thank you, Mr. Chairman, Ranking Member Lewis, and members of this subcommittee. I thank you for the invitation to testify today on how Federal agencies have been implementing the Affordable Care Act.

As you know, I have serious concerns about the way in which various agencies within the Department of Treasury and the Department of Health and Human Services have been implementing this law. In my view, they have repeatedly disregarded the plain text of the Affordable Care Act and the limits on their statutory authority.

Whatever the policy merits of the specific administrative actions they have taken, there are serious questions about their lawfulness, and these questions should certainly concern members of this committee, whatever your views of the policy merits of the ACA.

The core structure of our Constitution divides power among the three branches of our Federal Government. All legislative powers granted in the Constitution are vested in

Congress. Executive agencies only have that authority which Congress has delegated to them. They have no inherent legislative authority, and they are bound by the President's constitutional obligation to take care that the laws are faithfully executed.

While the executive branch maintains the discretion over how the laws are to be enforced, such discretion does not entitle administrative agencies to disregard statutory provisions that are deemed unwise or inconvenient, let alone the authority to waive legal obligations that are written into Federal law.

The constable's authority to decide not to arrest every lawbreaker is not the authority to waive the law's obligations, and the agency's authority to allocate resources in accord with the executive branch's policy priorities does not allow it to disregard unwanted statutory mandates.

In the context of ACA implementation, Federal agencies have repeatedly failed to uphold the law as it was enacted by Congress. There are numerous instances in which Federal agencies have sought to waive relevant ACA requirements or implement the law in a manner that does not conform to the relevant statutory text and the authority that Congress granted.

Take but one example: Employers that fail to provide adequate health insurance under the law are subject to what the administration deems is a tax. The ACA provides that this tax obligation shall apply to months beginning after December 31, 2013. There is nothing ambiguous about this language.

While the administration has discretion over how vigorously to enforce this requirement and whether, for example, to seek penalties for noncompliance, it has no authority to waive the underlying liability, let alone to create subcategories among those employers subject to the requirement and tax liability. Yet, that is what the administration has sought to do.

The administration cited no meaningful legal authority for this decision. Treasury cited a series of past administrative actions. Yet, none of these are remotely comparable. For example, declining to seek penalties for noncompliance with certain tax laws is not the same thing as waiving a tax liability altogether when that tax liability accrues by operation of law at a date certain.

Unfortunately, this is not an isolated occurrence. The administration has repeatedly disregarded statutory limits on its authority and cast aside the relevant statutory text in administering the ACA.

Other examples include an attempt to waive the minimum coverage requirement after it was made plain that the ACA would not allow individuals who liked their insurance plans to keep them; an IRS rule that purports to authorize tax credits in exchanges established by the Department of Health and Human Services, even though the ACA only authorizes tax credits in exchanges established by the States; IRS regulations extending tax credit eligibility to some low-income aliens not lawfully residing in the U.S. as well as to some individuals who fall outside the income requirements explicitly established by the text of the act; and the Department

of Treasury's decision to issue cost-sharing subsidy payments to health insurance companies when Congress has failed to make appropriations in the support of such payments.

Even legal commentators who have been generally supportive of the administration's implementation of the ACA and the underlying act have raised serious questions about agencies' legal authority to take some of these steps.

University of Michigan Law Professor Nicholas Bagley, for example, wrote in the New England Journal of Medicine that several of these actions, quote, "appear to exceed the scope of the executive's traditional enforcement discretion," end quote, and cannot be justified as an exercise of executive branch authority to prioritize limited agency resources.

At stake is more than the implementation of this particular law. Professor Bagley put it well; so, I will quote him again. He said, quote, "The Obama administration's claim of enforcement discretion, if accepted, would limit Congress' ability to specify when and under what circumstances its laws should take effect. That circumscription of legislative authority would mark a major shift of constitutional power away from Congress, which makes the laws, and towards the President, who is supposed to enforce them."

There may well be good policy justifications for many of the measures I have discussed above. I offer no opinion in this testimony as to the policy wisdom of various steps Treasury and HHS has taken. My focus is, instead, on the lack of legal authorization for these actions. Whatever steps are taken to implement the ACA, whether by this administration or its successors, they must conform to the law.

Administrative agencies have no warrant to rewrite statutes or waive statutorily imposed obligations, no matter how compelling the policy arguments in support of such changes may be. The ACA was controversial when it was enacted, and many provisions of the law remain controversial today. If they are to be amended, it is the job of this Congress, not the job of administrative agencies.

Mr. Chairman and members of this subcommittee, I recognize the importance of these issues, and I am certainly willing to answer any questions you may have. Thank you again.

Chairman Roskam. Thank you.

Ms. Papez.

STATEMENT OF ELIZABETH P. PAPEZ, PARTNER, WINSTON & STRAWN, LLP

Ms. Papez. Thank you, Mr. Chairman, Ranking Member Lewis, and members of the subcommittee for the opportunity to appear here today and discuss the administrative efforts to implement the Affordable Care Act.

Agency implementation is obviously a necessary part of administering complex legislation, but it presents special challenges under the ACA because the law calls upon multiple agencies to

implement an unusually elaborate and costly network of related Federal and State programs. The statute is 904 pages long and in over 700 instances directs Federal agencies to set the rules for an array of new government programs worth more than $1 trillion.

The testimony this morning has already addressed various policy and legal challenges surrounding some recent agency efforts to implement or, in certain cases, delay implementing some of these programs over the last 5 years. So I thought I would confine my remarks to a few constitutional and governance issues that I think transcend the debate over particular programs and underscore why agency administration of the ACA presents an especially strong case for ongoing legislative oversight by this subcommittee and others.

As the chairman noted, the governance issues date back to the founding, which recognize the hazards of concentrating power in a single person or a body. The U.S. Constitution answers this concern with a Federalist structure. It is often described as the essential basis for a free system of government. It divides authority among the three branches of the Federal Government and between the Federal Government and the States.

The so-called separation of powers issues that attend the ACA's administration reflect this constitutional division of authority and arise anytime statutes look to Federal agencies to define the scope of Federal programs. But these issues demand particular attention when its statute relies on agency implementation and discretion to the degree ACA does.

I had the privilege of working on some of these issues during my time at the Justice Department and, as a law clerk and, also, as a law firm partner, have seen how they can directly and significantly affect the private sector, in fact, in millions of people and trillions of dollars of Federal programs.

The separation of powers issues are already playing out in a number of government efforts to implement the statute today. The regulations implementing the employer coverage mandate categorically revise certain statutory compliance deadlines and employer participation requirements.

The Treasury Department's cost-sharing regulations conclude that, despite prior administration requests for annual appropriations, the subsidies actually 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, nonetheless, be read to encompass exchanges established by Federal agencies.

The administration has defended these challenged regulations as lawful efforts to implement the act and as appropriate responses to perhaps unanticipated shortfalls in funding, State participation, and private sector readiness central to the act's Affordable Care mandate.

In fact, Mr. Weiner's written testimony, I think, for this hearing points out that some of the regulatory actions now being challenged by this subcommittee and in the courts were directly responsive to constituent input.

There are a couple of things I would say about that. The first is that political accountability is obviously important in our system of government, but the Constitution limits the extent to which agencies may interpret legislation to address such concerns or encompass new circumstances.

The second thing I would say is I am familiar with some of the examples of past executive branch action that the current administration cites as precedent for its ACA administration efforts, and I frankly don't think they are comparable in scope or in statutory authorization to some of the ACA implementation issues we will discuss this morning, nor do I think Supreme Court decisions like Heckler v. Chaney are on point.

Those cases are about the executive branch's discretion to enforce the laws, not to pass by regulation wholesale exemptions from an existing statute. That is the kind of executive branch action that is equivalent to suspending a law and has long been considered an improper intrusion on Congress' authority.

The third thing and, I guess, the last thing I would say is, to the extent that some of these past examples of executive branch action are comparable to the current administrative efforts to implement the ACA, they simply illustrate the broader point that adherence to separation of powers principles is not a partisan issue.

As I think even Mr. Weiner's examples in his written statement indicate, they are issues that cut across policies at administrations, which is why their resolution in the healthcare context is incredibly important, because it could have consequences for future governments and programs that have nothing to do with health care.

As these issues unfold in the ACA context and otherwise, I think this subcommittee's continued exercise of its oversight authority will be critical to ensuring implementation of the act and all of its provisions consistent with the separation of powers and Federalism limits the Constitution requires.

Thank you for the opportunity to testify today.

Chairman Roskam. Thank you.

Mr. Weiner.

STATEMENT OF ROBERT NEIL WEINER, PARTNER, ARNOLD & PORTER, LLP

Mr. Weiner. Thank you, Mr. Chairman, Ranking Member Lewis, members of the committee. I want to make clear that I testify today only on my own behalf. I am not representing any clients.

Administrative agencies exercise power delegated by Congress and Oversight to ensure that they are properly doing so. And legislative action, if Congress finds they are not, are integral to the system of checks and balances that underlies our constitutional structure. But I submit that the opponents of the ACA have disrupted that system of checks and balances through legal and extralegal efforts to thwart implementation of the law.

From 7 minutes after the law was signed, litigation has continued unabated to this very day. Other efforts to obstruct implementation and even to discourage individuals and organizations from helping family get insurance have abounded. The Georgia insurance commissioner admitted that the government there was doing all it could to obstruct ObamaCare. And I submit that is not the rule of law.

Nevertheless, the Affordable Care Act is working. More than 14 million people have gained access to insurance. The uninsured rate has dropped from 20 percent to 13 percent of the population. Americans can no longer be denied insurance based on pre-existing conditions, and the healthcare price inflation is at its lowest rate in 50 years.

Now, Congress can't anticipate in this act or in any major legislation the stumbling blocks to implementation, and that is why it has given administrative agencies the discretion that is necessary to deal with such obstacles, which brings us to the postponement of the employer mandate.

Now, the ACA opponents have portrayed this as inimical to the fundamental precepts of our Democratic structure. In fact, it was within the bounds of administrative discretion, as exercised by prior administrations. As of July 2013, it appeared that business wouldn't be ready to make the required reports about who was getting insurance and how much or the that Treasury would be ready to process those reports.

Treasury, therefore, announced transition relief, allowing the IRS time to simplify and phase in the reporting requirements -- not the mandate; the reporting requirement -- and it talked about enforcement of the reporting requirement. Now, the problem was, without the reporting, it was impossible to enforce the mandate; and, therefore, it was necessary for Treasury to postpone that as well.

But let's be clear. The Department didn't rescind the employer mandate nor did it waive it indefinitely. Now, this is hardly an assault on the foundations of the republic. It is an exercise of administrative discretion to facilitate compliance, and there is ample precedent.

Ms. Papez may not think those precedents are on point, but Michael Leavitt, President Bush's HHS Secretary, described the delay of the mandate as wise and consistent with the phase-in of the Medicare prescription drug benefit done in his administration.

Now, another major focus of attack is the IRS regulation confirming that subsidies are available to enable consumers to get health insurance in States with Federal exchanges. The fundamental tenet of this attack is that there is one and only one permissible interpretation of this statute.

But, apparently, at least four Supreme Court justices, the Solicitor General, leading experts of statutory interpretation, the House and Senate members and staffers involved in drafting the ACA, the principal association of health insurers, the Hospital Corporation of America, the American Heart Association, 22 States, plus D.C., and many others read it the way the IRS did.

And unless we are going to challenge either the candor or the literacy of those institutions and individuals, that is a permissible reading and it is a reading that is consistent with the purpose of the statute and that doesn't gut the statute.

In short, if the committee is looking for executive overreach, I submit that it is looking in the wrong place. But, with all due respect, I would say, Mr. Chairman, that, on the broader issues, there are two ends of Pennsylvania Avenue and that the level of administrative activity is reflective of the dysfunction of this institution.

Congress can pass legislative hammers to deal with administrative overreach. It can deal with problems in the implementation of the statute. And it is the inability to do that that has led to administrative actions here.

Because I think that is ultimately unsustainable, I think that the current snapshot of the ebb and flow of power between the executive and the congressional branch is not a basis for long-term concern. Thank you.

Chairman Roskam. Well, thank you, all. I really appreciate the discipline of your testimony. All four of you directly spoke to this legal question. And so I am going to encourage my colleagues to focus in on that same line of inquiry.

I am going to go to Mr. Kelly first.

Mr. Weiner, I just want to give you a heads-up on a question that I am going to get to you, but I will ask the question at the end. You can think about your response.

If Congress has been dysfunctional, how is it possible, based on Ms. Turner's observation, that 17 statutory changes have been signed into law by President Obama? So if you can marinate in that a little bit, we will come back.

And, with that, I will yield to Mr. Kelly.

Mr. Kelly. Thank you, Chairman.

Thank the panel for being here.

It is interesting we come to these hearings. This really has nothing to do with the healthcare law, but it does have to do with the healthcare of our Constitution. And I think this is the thing that probably bothers us more than anything else.

As I was leaving the office today, I asked our guys -- I said, "Listen, please do me a favor. Look up our oath of office." And I am just going to go through this rather quickly. "I do solemnly swear or affirm that I will faithfully execute the office of the President of the United States and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

I said, "Okay. Well, give me the definition of an oath." An oath is a solemn, usually formal, calling upon God or a God to witness to the truth of what one says or to witness that one sincerely intends to do what one says. It is a solemn attestation of the truth and viability of one's words.

Now, further, Webster's defines the law as a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority.

Now, having listened to all these different testimonies -- and I read them last night -- I really found it interesting. We have really gotten beyond the debate right now, and we have tried to go off to the side. And there is an old saying out there. It goes something like this, "If you can't convince them, confuse them."

And I have looked what has happened, and I have to tell you, from what I do every day -- I am an automobile dealer, and I have to follow laws as they are written. I don't have the ability to say, "You know what. I don't particularly care for this part of the law; so, I am just not going to follow that."

Here is another law that, you know what, I don't know what they were thinking about. Obviously, they didn't look far enough. They certainly didn't look at the private sector. But, then again, I have to run a profitable business to stay in business. They don't. And it comes down to where we are today with this discussion.

It is so difficult for those of us in the private sector to look at this and to think that this President or any future President can decide at his whim what parts of the law he is going to enforce or not enforce.

So the question then becomes: How do you prepare a business model when the rules change every day? It could be something happens that it looks like, "Well, you know what. We didn't think about that part; so, we will just set that part aside" or, "There could be something else that has an influence on what we are going to do; so, we will set that part aside."

So, Ms. Turner, Mr. Adler, Ms. Papez, you are all very good at what you said. And I really find this to be very difficult. If this is the law -- and it is the law and none of us are saying it is not a law and we have made changes to this law -- my question is: Why does this President start to establish a precedent that is so dangerous for every President to follow? Because law is based on precedent.

And if we can go back in the future, if we can go back and say, "Yeah. But let me tell you how it happened back when we had the Affordable Care Act, and this is what we decided to do," how in

the world would anybody living in this country look at any law and really look at it as a law? Because this one isn't a law if it is not going to be enforced. And if it is not enforced, it truly is just words on paper. It means absolutely nothing.

And the oaths of office that we have all taken are just words. They don't mean anything. Because if it doesn't come from your heart, if it doesn't come from who we basically are as Americans, and if we make this a political statement and not a statement to what you attest to, everything this country stands for, then we are missing the point. It is not about health care. It is about the health care of our Constitution.

So if I am off base, please inform me, because I am so confused in the private sector as to what actually is the law. And you know what. A deadline doesn't have any influence. It can come and pass and it could be changed.

So how would you advise people in the private sector to look at not only this law, but as time goes forward, how should we look at any law to prepare to somehow accommodate it or work within its confines? I just don't get it.

Ms. Turner. I think, Congressman, that is the reason this hearing is so important and it is the reason the challenges before the Supreme Court are so important. The President may think that he can change the law at his will, but businesses don't.

Tens of billions of dollars have been spent by companies inside and outside the health sector to comply with this law. Individuals have to comply because there are penalties that will be enforced if they don't. So it is not optional for the American people to not comply.

And for the administration to set a precedent I think does really get to a much larger question than this law. It really is fundamentally the rule of law. And the Supreme Court challenges I think get to that fundamental question.

Mr. Kelly. Let me just ask you one question, because maybe there is some confusion in the office of the President.

But what did the President do before he was elected President? My understanding is he came from the academic world. Right?

Ms. Turner. Constitutional law instructor at the University of Chicago.

Mr. Kelly. Okay. So there really wouldn't be much cloudiness in his idea of what the Constitution is or what it contained.

I thank you all for being here.

And I yield back. Thank you.

Chairman Roskam. Mr. Rangel.

Mr. Rangel. Thank you, Mr. Chairman.

This is very interesting. I want to welcome all of the witnesses for coming here. I am still trying to figure out why you are here and why we are having this hearing.

This is a very complex piece of legislation. I understand that some changes have been made legislatively which have been signed into law, which I guess is a good thing.

I also understand that the President has exercised executive privileges in other parts of the law that is very controversial and that these issues are before the United States Supreme Court.

So if, indeed, anything that the executive branch does violates the intrusions of legislation, I assume all of you agree that this is a proper subject not for the legislative body, but for the courts.

Are there any provisions that you believe that -- any testimony that you have of any issues that are not now before the United States Supreme Court? And, if they are, what would you believe is the constitutional way that we should go?

This is not the Judiciary Committee. I have worked hard on this bill, and other members have. It has been signed into law, approved by the Supreme Court. It has been debated. It has been voted on half a hundred times.

And so where does this go? Most of the testimony that is critical of the President, it is my understanding, as a lawyer, that that controversy belongs in the United States Supreme Court. It is a contest between the actions of the executive branch and those who differ with him.

So, Ms. Turner, Mr. Adler, what solution are you expecting your eloquent testimony to have on the constitutional issue in this legislative subcommittee of Ways and Means?

Mr. Adler.

Mr. Adler. Well, I mean, first of all, I think my testimony and I think some of the other testimony identify multiple instances where the administration has taken actions that are not yet subject to litigation and may or may not be subject to litigation. Not everything the Federal Government does presents a justiciable controversy. There are limits on --

Mr. Rangel. What has the President done that this Congress can do anything about? Isn't it a question of the interpretation of his action?

Mr. Adler. Not at all. This Congress, as an institution, has a long history of conducting oversight to ensure that Federal agencies are complying with the letter of the laws that Congress enacts. Certainly when --

Mr. Rangel. Mr. Adler, this is not just for this President. This is for Presidents that have been and those that follow.

Mr. Adler. I agree.

Mr. Rangel. Okay. Is not the issue whether or not the President of the United States exceeded his Executive authority? Isn't that what this testimony is all about?

Mr. Adler. Whether or not the --

Mr. Rangel. The President of the United States exceeded his constitutional authority. Isn't that the issue?

Mr. Adler. That is certainly one of the issues.

Mr. Rangel. And isn't it controversial?

Mr. Adler. It is controversial.

Mr. Rangel. And isn't it subject to debate by people who have honest opinions about what he has done, not only him, but Presidents before him? Isn't that correct?

Mr. Adler. I agree. And that is why it is appropriate for a hearing, so that the points of view --

Mr. Rangel. Appropriate for a hearing? Isn't it appropriate for the Supreme Court to decide the issue of whether or not the President acted in a constitutional way?

If we decide that he did not act, in our legislative opinion, accordingly, what do you want us to do, Mr. Adler, except to file suit in the Supreme Court?

Mr. Adler. Well, when I first came to Washington, I remember then-Commerce Committee Chairman John Dingell, who would regularly hold hearings like this, looking at the actions of executive agencies and whether or not they complied with statutes. This has been going on for decades.

Mr. Rangel. With all due respect, you are here. I am here. Will you please deal with the issue before this committee.

Assuming you are correct in believing that the President exceeded his constitutional responsibility to the people of the United States and assuming that this Congress has voted 55 times to indicate their disapproval of the President's conduct.

Now, if you want to say that this is an extension of trying to get rid of the act, which the chairman says it is not, then we can ask: Do all of you believe the people in the United States should have access to affordable health
care? Ms. Turner? Mr. Adler? Ms. Papez? Mr. Weiner? Is that a goal that we should have?

Mr. Adler. Sure.

Mr. Rangel. Because, if you agree to it, let's get to how the President and the legislature decide it should happen. They have decided. The courts have decided.

And, Mr. Adler, I understand that you have had some input in the issue now before the court. Now, there has been a lot of publicity because of the personalities of the members of this committee, especially subcommittee chairman, and people want to know what has come out of this hearing besides listening to eloquent testimony.

I submit, Mr. Chairman, that this argument should be across the street in the United States Supreme Court. We have got things to do in this Congress. We have got trade bills. We have an economy to build up. And if we want to beat up on the President, we have done a pretty good job here. Now let the Supreme Court take a look at it.

Does anybody object to what I am saying? Am I making any sense at all? Unless you want to talk about the eloquence of the arguments in the Supreme Court or go back to the Constitution, as our distinguished chairman had -- because it is very interesting when you bring up these people.

They were not thinking about people who look like me. They were not thinking about women. They were not thinking about anyone that didn't hold any land. But in this great country, the Constitution has been flexible enough to include all of the things that these old white men forgot to include, which is good.

Having said that, don't you think this is a judiciary issue?

Mr. Adler. Oversight of the executive branch's enforcement and administration of the law has been a proper subject of legislative oversight for decades. I have been doing this for over 20 years.

Mr. Rangel. After 55 votes --

Chairman Roskam. The gentleman's time has expired.

Mr. Rangel. Would you consider 55 votes to be proper oversight?

Chairman Roskam. Go ahead, Mr. Adler. Why don't you bring us home.

Mr. Adler. I was going to say, you know, I have been doing regulatory policy for over 20 years. I have attended hearings and testified at hearings like this, looking at the actions of executive agencies for about 20 years of Presidents of both parties.

Has always been Congress' place to engage in such oversight. It is something that should be done without regard for the party of the President. And it is particularly important because not every action an agency takes that may violate the law can be subject to resolution and litigation.

And many of the examples that have been pointed to in our testimony --

Mr. Rangel. Well, there --

Chairman Roskam. Look, we have been generous with the time.

Mr. Adler. -- are not currently the subject of the litigation and may not even be within article III jurisdiction of the Federal courts.

Chairman Roskam. So we are going to turn to Mr. Holding.

But before we do, I will take an attempt to answer Mr. Rangel's question, and the answer is twofold.

Number one, silence is assent. So if Congress doesn't assert itself in the form of a hearing, in a subsequent Congress, we would see someone on the House floor to say, "There is no argument here. Congress is complicit in this."

So silence is assent. We all know that. And what we are choosing to do is say, "Look, we are not going to be silent if we are making an argument that we think the Constitution has been abused."

Secondly, we have a specific admonition from the House, and that is under House rule 10. We are to determine whether laws and programs are being implemented and carried out in accordance with the intent of Congress. So we are well within our purview. It makes perfect sense for us to be discussing that.

And to give us some more insight, we will now yield to the gentleman from North Carolina, Mr. Holding.

Mr. Holding. Thank you, Mr. Chairman.

So when the President was trying to sell this healthcare plan, he promised over and over again, "If you like your healthcare plan, you can keep it. No one will take it away, no matter what."

Now, subsequently, we have learned this was completely false, and people who lost the coverage they liked were understandably upset and certainly made it a very large issue in the subsequent election. So the administration's response to this was to unilaterally change the law.

So, Professor Adler, you know, we can agree that the policy result that individuals shouldn't be forced to give up their coverage they like and that the burden on employers should be limited, but the law doesn't give the administration that kind of flexibility without Congress. Correct?

Mr. Adler. Well, certainly the law does not give the administration the authority to do what it did. It is possible that there are other ways the administration might have been able to extend the grandfathering of plans.

It could have, for example, tried to issue a regulation, redefining what constitutes a grandfathered plan by going through the notice and comment rulemaking process.

The administration chose not to do that. I don't know if that is because they determined that it wouldn't be quick enough or might itself be subject to litigation. But certainly the way the administration tried to address this issue was not consistent with tradition legal principles.

Mr. Holding. Now, Ms. Turner, the administration's job is to implement the law Congress passed, not to compensate for its shortcomings.

So isn't it our job, as Members of Congress, to fix the law if it doesn't work?

Ms. Turner. Yes, sir. And I think that you did try to do that with the provision, the legislation, that was introduced and passed on a bipartisan basis in the House that would have allowed the legal authority to the administration to allow those plans to continue even though they were not compliant with other provisions of ACA.

Mr. Holding. So when the President says that, you know, he had to act unilaterally because the Congress was dysfunctional and incapable of acting, that is patently false?

Ms. Turner. That is right. You passed that legislation on a bipartisan basis. It died in the Senate. And the President threatened to veto it.

Mr. Holding. Now, you mentioned a little bit earlier the cost of compliance, healthcare companies, individuals, and so forth. And I thought Mr. Kelly brought up a very good point that, you know, if you are a business trying to put together a business plan and you keep changing the rules of the game, then you are going to incur costs.

So, you know, are you aware of costs incurred by insurance providers when the President unilaterally said, "All right. I am going to go back and I am going to say that, 'You can keep these plans'"? Do you think that took the insurance companies by surprise?

Ms. Turner. Absolutely. And it has caused enormous disruption, and it has caused actually premium increases for individuals that they were forced to pay because the healthy people they expected to come into the exchanges did not. They kept their old plans.

And, as a result, you found more older people with higher health costs in the exchanges, which are leading to higher costs. And I believe we are going to see even more of those in the coming year.

Mr. Holding. So when an insurance provider, you know, incurs these higher costs, you know, they can pass them on to, you know, other customers. But they can pass some of those costs back to the government as well, can't they?

Ms. Turner. Absolutely. Through the subsidies. So taxpayers are paying as well. We are paying in a number of ways. Taxpayers are paying in the form of higher subsidies as well as

individuals paying in the form of higher premium costs and out-of-payment costs and their networks and deductibles and other costs of insurance.

Mr. Holding. So, I mean, just to close the loop here, when the President decides to act unilaterally, you know, making a major change in this law, I mean, there are costs to the taxpayers in doing that. Correct?

Ms. Turner. There are costs to taxpayers. There are costs throughout the entire system. And it really makes it extraordinarily difficult for companies to be able to invest in making changes that can help to make the law work when the law keeps changing, when the regulations keep changing.

Mr. Holding. Thank you, Ms. Turner.

Mr. Chairman, I yield back.

Chairman Roskam. Mr. Crowley.

Mr. Crowley. Thank you, Mr. Chairman.

Mr. Weiner, in your written testimony, you described the Affordable Care Act as having lived through -- and I will quote -- a never-ending, quote, "trench warfare" of a tax from just about the moment of its enactment. That really creates a strong image about what it is like behind the scenes for those who work to put this law into effect.

There was and, frankly, still is a constant stream of criticism coming from the other side of the aisle, which is why I think it is important to clarify something for the record, if you can answer for me.

Exactly how long was the ACA in effect before the first lawsuit was filed against it?

Mr. Weiner. Seven minutes.

Mr. Crowley. I am sorry. Could you repeat that again.

Mr. Weiner. Seven minutes.

Mr. Crowley. Seven minutes after the law was enacted a lawsuit was filed against the law?

Mr. Weiner. Yes, sir.

Mr. Crowley. Opponents of the law waited a mere 7 minutes before filing against it. That is just remarkable. That is about the politics. But there is another number, and that number is 19. 19. That is how many hearings this committee has had on the Affordable Care Act since its enactment.

Let me put that number into context. If for every one of those hearings 1 million people got access to health insurance, it still would fall short of the 22 million Americans who got health coverage through the ACA.

Sadly, these hearings don't have that kind of positive effect. It is not as a result of these hearings that 22 million people have healthcare coverage today.

On the other hand, the Democrats on this committee have asked the majority time and again to hold a hearing on a critical issue facing our country: Highway and infrastructure funding.

And the result, not one. Not a single hearing. Not a markup this year on the funding our States and cities desperately need to maintain and improve roads, bridges, and transit systems.

There always seems to be time for hearings to try to create falsehoods once again about the ACA and how it is somehow hurting job growth, even though 12 million American jobs have been added to the economy since the enactment of the ACA. But we have had not a single hearing this year on one of the biggest ways to create jobs in our country, providing a long-term infrastructure package.

Instead, yesterday, just yesterday, the House was forced to kick the can down the road once again for just another 2 months, leaving our States and local transportation agencies in limbo, without any foresight, without any, really, ability to plan for the future, without any vision.

And, sadly, I am not surprised. I love this committee. I love this House and this institution. But it seems to me, under my Republican colleagues' control, we do a lot more looking backward instead of looking forward.

There seems to be a sentiment that it is better to score political points, get some press, and run campaign ads than it is to work together constructively to get things accomplished.

For 5 years, opponents of the law have refused any opportunity to work constructively to make it better or to offer a substitute for what they have tried to repeal 56 times. When Federal agencies use the implementing authority they have that they have used for hundreds of laws over the years, including the part D program that President Bush signed into law, these same critics raise up a cry.

To all those critics of the law, I would say, maybe if you would stop trying to sue and repeal the law out of existence, you would be able to take a moment to work to improve the act itself. All of us are ready.

We are here with bills and ideas -- bipartisan bills -- to make the law work even better for all. Every time we go through one of these hearings, I keep wishing it is the last one and that we can now work on real policy ideas. I do hope this is the last, but I doubt that it will be.

I really seriously question whether my colleagues on the other side of the aisle care about how this law is implemented, when, really, their only legislative attempts have been to repeal it 56 times.

Mr. Crowley. That is all they have done.

So, with that, Mr. Chairman, I will yield back the balance of my time.

Chairman Roskam. Thank you, Mr. Crowley.

The good news is -- and, Mr. Weiner, this is a heads-up. We are going to be coming back to you to answer Ms. Turner's point. Mr. Crowley didn't reference that.

So this narrative that Congress has an inability to deal with anything short of repeal, the argument that is gonna come back to you, Mr. Weiner, is: There have been 17 times that Congress has taken this up. Therefore, it is a false claim to say that Congress has no capacity to do that.

So we are going to be in anticipation of your response, but right now we are going to go to Mr. Smith.

Mr. Smith. Thank you, Mr. Chairman.

The President's health law made significant cuts to the Medicare Advantage program. These cuts are scheduled to go into effect in 2012. However, rather than allow these unpopular cuts to go into effect during an election year, whether it is 2012 or 2014, the administration created a nationwide pilot program that basically undid the cuts.

Ms. Turner, can you describe the purpose of a pilot program?

Ms. Turner. Pilot programs are designed primarily to test out an idea before we invest sometimes billions of dollars in the Federal funds to make sure that that pilot program can work.

Mr. Smith. So usually they test it in, like, a local community or maybe a local city or a State?

Ms. Turner. Correct.

Mr. Smith. Not the entire Nation for a pilot program?

Ms. Turner. That is unusual.

Mr. Smith. So that is virtually what was done in this case.

Do you know of any other situation that there has been a pilot program in any agency within the Federal Government that has been a pilot program for the entire Nation?

Ms. Turner. I think that it would really stretch the definition of the term, Congressman.

Mr. Smith. It doesn't sound like a pilot program to me, by any means.

Do you think this pilot was just a pretense to delay cuts to Medicare?

Ms. Turner. There is certainly evidence that they have used this fund when they began to realize the consequences that these cuts would have to Medicare Advantage plans that now about a third of seniors have voluntarily enrolled in. And they, perhaps because of pending elections, decided that they needed to replace those funds even though those funds were a big pay-for for the new subsidies in the health law.

Mr. Smith. It is a big deal. There are over 16 million seniors that are enrolled in Medicare Advantage -- 316,000 Missourians and 40,000 people in my district. You know, in fact, 39,354 in my district. So that is a lot of people that could have faced some kind of significant cuts prior to an election in 2012 or election in 2014, whenever the Affordable Care Act clearly said that these cuts needed to take place. It sounds kind of a little fishy to me.

But Congress asked the Government Accountability Office to look at this program. GAO concluded that the design of the program probably would not produce meaningful results. GAO also raised questions about whether HHS had the legal authority to run the pilot in the first place, which causes great -- whether it is a pilot or however you want to call it. At a cost of $8 billion, GAO noted, "This is the most expensive pilot in history," which is very alarming and disturbing.

Pilots are intended to demonstrate whether certain approaches work, not to allow agencies to circumvent the statute; is that correct?

Ms. Turner. That is correct, sir.

Mr. Smith. Hardworking taxpayers in our district and across Missouri deserve a government that is accountable to them and that follows the law consistently. When this administration failed to meet the legal requirements for a demonstration program and blatantly disregarded the law, America's seniors lost a lot. We can do better because our seniors deserve better.

With that, Mr. Chairman, I yield back the rest of my time.

Chairman Roskam. Thank you.

Mr. Lewis.

Mr. Lewis. Thank you, Mr. Chairman.

Mr. Chairman, before I ask a question, I want to yield to Mr. Crowley for 2 seconds.

Mr. Crowley. Thank you, Mr. Chairman.

I just want to just welcome to today's proceedings Liz Markee-Behrends. She is participating in the Foster Youth Shadow Day, and I am her victim. She is following me for the day. So I just want to welcome her to the committee.

So thank you, Mr. Chairman.

Chairman Roskam. Welcome. Glad you are here.

Mr. Lewis?

Mr. Lewis. Mr. Weiner, does the ACA allow people to receive tax credit for insurance purchased on the Federal exchange?

Mr. Weiner. Yes, it does.

Mr. Lewis. You heard members; you heard the other witness. Do you want to take some time to say anything about what you have heard?

Mr. Weiner. Yes. And let me say, Congressman Lewis, that it is an honor to be here and you are one of my personal heroes.

I think, when we talk about the actions of the administration raising the costs of insurance, it flies in the face of the evidence that the costs of insurance have been going down. And so I think that is one of the things we need to focus on.

But focusing on the language of the statute that is at issue in King, when you read a statute, you don't read the provision by itself. And to listen to the attacks in the Court and elsewhere with regard to the tax credits, you would think that the statute said, "You shall not get a tax credit if you are in a State that has a Federal exchange." It doesn't say that. It never says that.

And the portion of the statute that talks about how you calculate the amount, after it says that everybody gets the credit and then it talks about calculating the amount, it calculates the amount by reference to insurance bought on an exchange established by the State.

And the argument is made that "established by the State" means established by the State. But the fact is that Congress defines its terms -- this body can define "cat" to mean "dog" if it wants. But it defines "exchange," and the way it defines "exchange," the only read to read the statute that makes any sense is to say that the Federal Government steps into the shoes of the State when the State doesn't establish its own exchange.

Mr. Lewis. Well, thank you.

Mr. Weiner, some of my Republican colleagues seem concerned about the implementation of the law. They focus on Treasury's legal authority to delay the employer reporting requirement. Is there a Supreme Court precedent to support the agency's discretionary enforcement requirement?

Mr. Weiner. Yes. There is a major Supreme Court precedent. The leading one is a case called Heckler v. Chaney, and that relates to the enforcement discretion.

Courts are sensitive to the administrative priorities. And, you know, Congress sets deadlines at times, and sometimes they can't be met. Sometimes Congress gives the agency more than one priority, and the agency has to make choices with the budget that it has and the personnel that it has.

The Court has said that it will defer to the agency's determination on timing and that only when the action of the agency is so extreme that it amounts to an abdication of its responsibility to enforce the statute will the Court intervene. And that is the standard, and it is a standard against which this body has legislated. It is a longstanding standard. And so Congress, when it passes a law, knows that the Supreme Court has carved out that discretion for agencies in enforcing the statute.

Mr. Lewis. Let me just ask, is it correct or true that numerous administrations have delayed implementation of certain legislative provisions?

Mr. Weiner. Yes.

Mr. Lewis. Any come to mind?

Mr. Weiner. Well, Medicare part D comes to mind, and the former HHS Secretary Leavitt said that the delay of the employer mandate was directly analogous. But there are other -- there are many tax provisions, there are EPA provisions that have been delayed based on balance of priorities or on the state of the science or on any number of other grounds.

Mr. Lewis. Are you still a partner at Arnold & Porter?

Mr. Weiner. Yes, I am.

Mr. Lewis. I know the firm, and I want to thank you for all your great work. And I want to thank your firm for being back there during another period, during the height of the movement, and for all you have done for civil rights and civil liberties. Thank you for being here.

Mr. Weiner. Thank you.

Chairman Roskam. Before going to Ms. Noem, let me just ask Ms. Papez, the -- Mr. Weiner referenced that case, Heckler v. Chaney. You mention that in your written testimony and also in your oral testimony. You have cited it today as precedent for, you know, the administration to move forward.

Is that your view? Is there a different interpretation, or what do you think?

Ms. Papez. I think the opinion actually speaks for itself. I don't think it stands for the proposition for which the agencies have cited it. The opinion says pointblank that what it is

about is the executive branch's power to make discretionary judgments concerning the allocation of enforcement resources.

And some of the examples that have been given -- we have articles abound on this -- is, you know, for example, if the Justice Department wants to ticket fewer jaywalkers so they can put more, you know, drug cases in jail, that is a fair exercise of enforcement discretion.

Some of the examples in the ACA implementation go well beyond that. I think that the best one is probably the Treasury Department's decision that the employer mandate -- only 95 percent of employers have to participate from 2016 forward under the statute in the healthcare coverage. I mean, that really effects a permanent rewrite of the statute under the guise of transition relief. That is not executive enforcement discretion. That is a suspension or a rewrite of the statute as written.

And that is the point about coming back to the Congress. I mean, if there is a problem with implementing that provision as written, the solution is to come back to the legislature, not to have the executive branch revisit it wholesale.

Chairman Roskam. Thank you.

Ms. Noem.

Ms. Noem. Well, Ms. Papez, I am going to stay with you because I want you to speak a little bit to that. And I also want you to talk about not only the cost to some of your clients that you have seen but also costs that you have seen them endure because of changes to the ACA over time that the administration has made.

Ms. Papez. This is an important point Representative Kelly made, as well, obviously, that predictability and knowing the rules of the road are not only constitutional requirements, they are also critical to enabling the government to administer a law in a way that is functionable for the private sector. And, you know, this is a fundamental requirement that we see in the Fifth Amendment, in the Due Process Clause, where everyone is entitled to fair notice of how a law is going to be administered.

And so I probably should have cited it in my written testimony; Richard Epstein at the University of Chicago issued an article about a year ago called "Government by Waiver" that kind of walks through more articulately I think than I will now the hazards of executive branch or agency discretion to grant waivers without fair notice or procedures so the private sector can understand how do they get relief from an administration or an agency, what are the criteria for getting it, how should they structure their business activities to comply with the law, what kind of costs do they have to account for.

And this affects real people. It affects jobs, it affects benefits, it affects how someone makes payroll every month. And so these kind of deviations that we talk about, to the chairman's point, are not theoretical.

Ms. Noem. Yeah.

Ms. Papez. You know, these limits on government acts are there for a reason, and they have very real-world consequences in the administration of a statute like this.

Ms. Noem. It burdens on everyday people. And this administration has done it not just in health care; they have done it on education and many other areas, as well.

Ms. Papez. Well, and I think that is the point, right, that this is not confined to health care, but some of the ACA administration issues illustrate how dangerous it is when, you know, for policy or other reasons -- and I don't purport to comment on those. The overarching point is, you know, an ends-justifies-the-means approach on any of these issues can create very dangerous precedents that have a ripple effect throughout the government, and they can come home to roost in other programs.

I also have to say, I thought it was interesting that Representative Rangel mentioned going across the street to the Supreme Court. The Supreme Court in the arguments in the King case last month emphasized that, because the Constitution limits the Court's authority to decide some of these issues, it can do its job to appoint in examining whether a particular provision is implemented correctly.

And then to Mr. Weiner's point, it was the President's representative in the Supreme Court who said, well, if you interpret "State" to mean "State" -- because this was not a case where this body defined "cat" means "dog" or actually defined, you know, "State" to mean "Federal Government." You know, the President's representative said, if you go with the literal interpretation of the statute, the statute will be broken, and all these subsidies can't flow to people, and we won't have affordable care, to which then some members of the Court said, well, then, the answer is bring it back to the Congress, which I understood to be the purpose of this hearing.

Ms. Noem. Yeah, and I want to touch on that before I run out of time. Because one of the things that alarms me the most is what the administration does as ways to fund portions of this bill when Congress has not appropriated funds that were laid out strictly in the statute.

So can you briefly describe -- because I want to follow it up with another question -- the cost-sharing reduction program and the funding issues that we have had?

Ms. Papez. All right. So the statute provides that the Federal Government can make payments to insurance companies to make them whole --

Ms. Noem. To make up the cost difference.

Ms. Papez. Right, make them whole for money the insurance companies have to give to insurance on premium refunds and the like. And the question is, where does the Federal Government get this money?

The statute does not actually provide a permanent appropriation for those subsidies. And the administration, actually, in the fiscal 2014 budget, asked this body to appropriate annual money for that. Congress did not do so.

The executive branch then said, as a matter of administrative efficiency, they were going to take the funds from a permanent appropriation under the statute for tax credits, but do not include these subsidies.

Ms. Noem. Did they have the authority to do that --

Ms. Papez. Well, that is exactly the question.

Ms. Noem. -- in your understanding?

Ms. Papez. Right. The statute does not appear to give them the authority. And the Constitution says, if you don't -- you don't have the authority as executive; Congress has the only power to appropriate money for public programs.

Ms. Noem. And that is the authority that the administration has, is to act under the discretion of what Congress directs them to do, correct?

I mean, I am elected by the people of South Dakota to come here to represent them, to pass laws, to decide what is taxed, what should not be taxed, how those funds should be spent.

When an administration takes action like this and randomly pulls out of other funds to fund their priorities when Congress has not specifically given them the funds to do so, is that a dangerous precedent for us to be setting in this country?

Ms. Papez. Well, certainly, because it goes to the fundamental issue of where do appropriations have to originate with the Congress. And then it goes to the fundamental point that the executive has discretion to administer funds within an appropriated box. It does not have the authority to go outside that box and pull funds in to administer appropriations.

Ms. Noem. And it undermines our authority as Members of Congress, as well, to direct where those funds should flow.

Ms. Papez. Absolutely. And it also undermines the constitutional authority the people count upon to have the Congress, as a body, decide where the money is going to go.

Ms. Noem. What is interesting to me is that in fiscal year 2015 the administration didn't even request the funds. You know, in 2014 they requested the funds; we denied those funds. But in 2015 they didn't even make the request. They just made the decision among themselves to go to this other fund and get the revenue that they needed.

Ms. Papez. That is correct. And I think, to me, that points out another reason why -- you know, that issue is -- you know, it may not be an issue that goes to the courts. If it does, they can

resolve it. If it doesn't and it isn't resolved in the courts, that is an issue that should come back to this body, in terms of perhaps legislative action or at least oversight action, to say, where is this happening? And this subcommittee has done that.

Ms. Noem. To put forward consequences.

Thank you. I appreciate your testimony.

I yield back.

Chairman Roskam. I would like to recognize our newest member of the subcommittee, Mr. Renacci.

Mr. Renacci. Thank you, Mr. Chairman.

I want to thank the witnesses. I want to welcome you all, especially my fellow Buckeye, Mr. Adler.

I was going to stay away from the Supreme Court issue until Mr. Weiner brought it up and indicated that, you know, the exchanges, if the State didn't step in, that somehow this law said that the Federal Government could come in and step in. And it is amazing; I am looking at the statute here. It reads, "Where enrolled in through an exchange established by the State" -- that seems pretty clear to me.

I was a businessman for 30 years before I came here. I was in the healthcare sector. I had to deal with a number of regulations. If I could not interpret "exchange established by the State," being that simple, I never knew, as a businessowner, I could go and just use discretion to move all around and make sure that I was able to do what I wanted to do versus what the law did.

Mr. Adler, it seems pretty clear, those words, "exchange established by the State." Do you agree?

Mr. Adler. I certainly think they are clear.

Mr. Renacci. I would think so.

Recently, Andy Grewal, a tax law professor at the University of Iowa, discovered other examples where the administration has expanded the eligibility for these tax credits beyond the language of the statute.

Mr. Adler, can you discuss some of those?

Mr. Adler. Yeah, I can discuss them briefly. And I believe Professor Grewal is going to submit a written statement summarizing his research and a forthcoming article he has.

But he identified instances in which the IRS, in issuing regulations to implement section 36B of the Internal Revenue Code expanded tax-credit eligibility both to individuals that fall outside the income requirements that are provided for in the statute as well as to provide tax-credit eligibility for some aliens that are unlawfully present in the country, contrary to the text of the statute.

And he further pointed out that, because of the way the statute is written and because tax-credit eligibility is the trigger for employer mandate penalties, the IRS' unilateral expansion of tax-credit eligibility carries with it any increase in the exposure of employers to potential penalties.

And he has written these up on the Web site of the Yale Journal of Regulation and has a forthcoming article that details how the IRS' regulations are expressly contrary to the plain text of the statute and that the IRS really offered no legal justification for those differences.

Mr. Renacci. So, again, this hearing, as I always say, is not about the healthcare law; it is about the President's discretion. And there are some issues that are not in front of the Supreme Court, and that is one of the reasons we are having this hearing.

Mr. Weiner again used the word "discretion" multiple times, which really frustrates me, as someone who had to live within the rules as a businessman. How much discretion does this statute provide to the Treasury to set eligibility standards?

Mr. Adler, do you want to answer that?

Mr. Adler. Well --

Mr. Renacci. I already know what Mr. Weiner would say. He would say we have all kind of discretion, the executive branch has discretion. Mr. Adler, you tell me what you believe.

Mr. Adler. Well, I think there are certain aspects of eligibility that are very clear. So, for example, where the statute says that you must fall between 100 percent and 400 percent of the poverty line, 100 percent and 400 percent are pretty clear, right? Those involve numerical calculations, and you are either within that range or you are not.

There certainly are areas where the administration has discretion in terms of how aggressively to enforce those provisions, whether to seek penalties, whether it wants to spend more time chasing after people that earn above those thresholds as opposed to below those thresholds. Those are the sorts of things that are typically the subject of executive discretion.

Trying to alter the thresholds, as the IRS has done, is not the sort of thing that has traditionally been recognized as permissible executive discretion.

Mr. Renacci. Thank you.

And, lastly, I want to change subjects. Professor Adler, the State of Ohio, along with several public universities, has sued the administration over being assessed a tax for the reinsurance program.

Can you explain why this is a problem and how it implicates the 10th Amendment?

Mr. Adler. Sure.

So Attorney General Mike DeWine has filed this suit, and the basic claim is that insurance plans provided by State and local government entities are not covered by the plain text of the statute as entities that are subject to these taxes or payments, as some refer to them.

And it is traditional canon of construction of Federal statutes that they should not be read to impinge upon the traditional functions of State and local governments unless Congress has made that absolutely clear. And so the first argument that the State of Ohio is making is that, because the statute wasn't expressly clear that these fees or taxes that should be imposed on State and local governments, it is impermissible for the Federal Government to seek to impose them.

And then a secondary claim is that, if the statute were to be read that way, whether or not it would raise 10th Amendment questions.

In my own work, I have primarily looked at the first issue, and I think the State of Ohio raises a very serious claim. There is, certainly, a large number of cases standing for the principle that you don't read a statute to infringe upon State prerogative or State functions unnecessarily. And it does not appear that there is clear -- at least, I have not seen clear statutory language that would seem to authorize the imposition of these assessments on State and local governments.

And I believe that that case is currently pending in district court, and I believe motions for summary judgment and motions to dismiss have been filed.

Mr. Renacci. So another possible overreach because of discretion.

Mr. Adler. Sure. Sure.

And I would just say, just as we have seen litigation for decades under statutes like the 1990 Clean Air Act -- which, you know, there was just a case in the D.C. Circuit a couple weeks ago on that, and there are more pending -- there will be litigation under this statute for decades to come filed by States, by companies, by individuals. That is the way complex litigation is, especially when you are dealing with something as complex and as important as health care.

Mr. Renacci. Thank you.

I yield back.

Chairman Roskam. Mr. Meehan.

Mr. Meehan. Thank you, Mr. Chairman.

There are so many places to jump in this on this conversation.

Ms. Turner, we had discussed before, I think you commented a little bit, one of the questions was the quality bonus payment demonstration project. And I am trying to get the boundaries of this discretion that apparently the President believes he has.

And this was a demonstration program in which some $8.3 billion was tied into a demonstration program which my colleague Mr. Holding identified as being one in which it covered the entire United States. So its scope, in and of itself, is unprecedented for a demonstration project; is that not accurate?

Ms. Turner. That is correct, Congressman.

Mr. Meehan. And we also have budget neutrality requirements. Isn't that an aspect of OMB approval for these kinds of demonstration projects, budget neutrality?

Ms. Turner. They certainly would not be allowed to spend money that is not appropriated by Congress legally.

Mr. Meehan. So what is the solution? Mr. Weiner seems to object to the idea that there is litigation associated with this. What is the solution when you see an interpretation -- I was a former prosecutor, and I knew what prosecutorial discretion is, when we had a broad spectrum of rules before us, but we were limited in the resources to be able to use those rules, so we made the best use of the existing resources to interpret the existing laws.

This is a different situation, is it not, in which what we have is a disregard for the existing law and, under the guise of discretion, reinterpreting in a way that you want to see an outcome and, in fact, reinterpreting in a way that we have established contravenes existing requirements such as budget neutrality.

Ms. Turner. That has certainly been one of the great frustrations with this law. First of all, it is so complex that it is extraordinarily difficult to track all of the spending and all of the changes that are being made to this law.

But when you look at the authority of Congress, when the President takes an oath of office to faithfully execute the laws of the United States, that is part of the trust in the administration, that they are not going to push the envelope so much, as they have with this law, that the Constitution doesn't really provide, other than through the courts, a way for you to have a recourse.

And, yes, as Mr. Rangel mentioned, the courts are a vehicle, but you cannot litigate hundreds of different challenges to this law.

Mr. Meehan. I think that point is so -- Ms. Papez, you served as counsel in an agency in which you were responsible for interpreting the boundaries of what could and could not be done and, I am sure, many times gave advise that this was not doable.

And it has been said that, you know, the Court is an opportunity to resolve these issues. How realistic is it that the Supreme Court is going to be able to play the role of resolving these kinds of questions if it is not done -- or how realistic is the Supreme Court going to be?

Ms. Papez. Well, I think some of the Justices actually spoke to that at the hearing in March. I mean, they made clear that the Constitution limits their authority to resolve the particular provision or controversy in front of them.

And what the argument seemed to show, including arguments by the administration and the Solicitor General, is that if the courts rule on the particular provision in front of them -- in the King case, it is, you know, what does it mean to say an exchange established by the State; can that include the federally created exchanges? That may just open the door to a host of other questions that will then have to go back to the political branches. And I think members of the Court recognize they can't issue an advisory opinion addressing those issues.

So the point is it has to maybe come back to the Congress. At a minimum, it should be subject to legislative oversight, like the hearing today, to say, what would we do if the Supreme Court were to conclude that one provision is invalid? And that means the law doesn't work anymore? The Court, I think, has made clear on numerous occasions that is not its job to fix. That has to go back to the Congress.

Mr. Meehan. Mr. Weiner, what is the solution? How do you address this? What is our capacity to rein in when an administration acts in direct contravention not only of the bounds of discretion but within the statute or the agency requirements itself that they meet certain budgetary requirements to be able to exercise that discretion but they act way beyond the scope of it? What is the solution?

Mr. Weiner. Well, the Congressional Research Service did a study on administrative discretion, and they talked about the hammers that the Congress has. Congress can pass legislation that says, if you miss a deadline, the following things happen. And with great specificity, Congress can, in fact, deal with situations where it does not agree with the actions taken by the executive branch.

Mr. Meehan. Such as the numerous occasions where laws have been passed in the House of Representative and then disregarded because the President says, "If you do pass that, I will veto it"? What is the solution when the President says, "I have chosen to do this because I am saying it is my discretion, and you, Congress, if you do it, I will veto it"?

Mr. Weiner. Well, I think that is a failure when -- if legislation is needed -- and I am not sure I agree that it is -- but if legislation is needed and the political process can't provide it, then I think that is a failure of the political process.

But it doesn't justify -- I don't think it means we should go to litigation because I think we should try to resolve things --

Mr. Meehan. We have seen that litigation cannot be a solution because it is incapable of accommodating the vast number of challenges.

So the question is: We just say, "No big deal" and walk away and say, "Never mind"?

Mr. Weiner. No. I think you keep pushing the political process and try to get an answer there.

Mr. Meehan. Which is why we are doing these hearings, isn't it? And I think that answers one of the questions of my friend Mr. Crowley. Thank you.

Chairman Roskam. Ms. Black.

Mrs. Black. Thank you, Mr. Chairman. I appreciate your allowing me to sit on this committee and ask questions.

I do want to take a point of personal privilege. This is the National Foster Care shadowing week, and I do have a gentleman here with me from my district, Zach Grumman. He is from Jackson County, and he attends Tennessee Tech in the district. He is an English major. It is great to have him here with me.

Chairman Roskam. Welcome.

Mrs. Black. I want to go back to the publication by Professor Andy Grewal of the University of Iowa School of Law and the blog posts. And I would like to ask unanimous consent to submit this for the record.

Chairman Roskam. Without objection.

[The information follows: The Honorable Diane Black]

Mrs. Black. And as has already been said, the post details, those final regulations from the IRS on the eligibility for premium tax credits, we see the regulations give credits to taxpayers who are automatically enrolled in employer-sponsored minimum essential coverage even though the IRS, the IRS, has acknowledged that the individual is not eligible for the tax credits. Unbelievable to me that that could be taking place.

Congress has explicitly denied these premium tax credits to individuals who are receiving health benefits from their employers. I am extremely concerned that this policy will lead to employer penalties. I have actually had employers call me and tell me they are concerned about this personally, about what this is going to mean to them.

They are trying to abide by the law. They are trying to meet all the regulations. Obviously, the regulations were late coming out. They were supposed to start with reporting mechanisms in January. They didn't get the final regulations until February. It is costly to them and so on.

Can any of you address the impact that you believe this will directly have on employers?

Ms. Turner, why don't I start with you.

Ms. Turner. Employers have just, as I mentioned before, been run through the wringer in trying to comply with this law, and this is a relatively obscure provision that Professor Grewal has found, among several others, when he has looked at the statutory language and the significant conflict.

But employers are doing the right thing here in trying to provide coverage to their employees. They are following the law often with automatic enrollment. And if that happens and this person stills goes to the exchange for coverage and if it is allowed because of this breach of the Federal rules, it puts the employer in an impossible position.

Even doing their best to comply with the law is not possible because the law is in conflict with itself and really shows the extraordinary difficulty of changing a law as you go along and the repercussions and the chain effect that that requires.

Mrs. Black. It is a huge concern. And it is apparent that this administration does not have the capability of accurately verifying eligibility for these subsidies, and they have had repeated illegal workarounds on the law that have exacerbated this situation.

For instance, in the 2015 plan, the CMS implemented a policy that I believe is outside the bounds of the law, once again, where they automatically re-enrolled individuals into the exchange coverage even if they did not proactively select a new plan.

And in that they based their subsidies on income information that was out of date. They knew it was out of date. It was based on 2014 enrollment applications. And according their own office of assistant secretary for planning and analysis, nearly 2 million people were enrolled in coverage via this method that is going to potentially set up for not only a waste in taxpayer dollars, but also the issue of what it will do for the employers.

And, Ms. Papez, would you please address what you would say is the legality of what is happening with this automatic enrollment using numbers that are not verified. Is it legal? Do you believe that this is something that would, if it were in a court of law, be seen as illegal?

Ms. Papez. Well, I think the question goes to a point you raised, which is you would start with, you know, does the statute speak to this issue. And, to your point, if the statute speaks clearly to an issue, there is very little administrative discretion to depart from that. So I think that is the first point.

I think the second point is one we have discussed a little bit, which is, to the extent that the agency has discretion on implementation, there has to be an -- and there are other statutes like the Administrative Procedures Act that speaks to this -- there has to be a rigorous process for, you know, documenting, announcing, and justifying the manner in which particular programs are implemented, the way particular decisions are made.

And, you know, there are a number of APA cases, for example, in the Federal courts in D.C. here that take the position that, you know, if an agency action that affects real rights and real issues is based upon, you know, numbers or statistics or findings that are not actually verified and do not have an appropriate factual basis in the administrative record, then they are void as a matter of law and the agency has to go back to the drawing board.

Mrs. Black. Thank you.

And, Mr. Chairman, I want to thank you for having this hearing today because it is our responsibility to oversee the administrative policies and the lack of following the law. And I applaud you for allowing us to bring this forward.

Chairman Roskam. Thank you.

Ms. Turner, I am sensitive to your time. So I know you have got a flight to catch. If you need to catch that flight and walk off quietly, we will avoid eye contact and let you go. And we are gratified in advance for your time and attention today. So we are all supersensitive to that dynamic.

Ms. Turner. Thank you, sir.

Chairman Roskam. So, Mr. Weiner, the phone lines have lit up. Everybody's interested in your response.

So earlier Ms. Turner made this assertion, and she said, "Look, you know, Congress has dealt with this 17 times." And if you look at her list that was prepared by the Galen Institute, you know, they are all enumerated. They have to do with military benefits, VA benefits, drug price clarification, doc fix tax, extending the adoption credit, TRICARE for adult children. It goes on and on and on.

And what is interesting is, you know, she lists them chronologically. So, at first glance, you can say, "Well, look. It was with the old majority, and the old majority came in and did a lot of cleanup."

But the story gets more interesting when you say, "Oh. This is after there was a new majority." In fact, a majority of these took place after there was a Republican majority.

So, in light of that, would you want to revisit and reconsider your characterization of this institution being dysfunction and incapable of dealing with the Affordable Care Act?

And, if you choose not to re-characterize it, how would you characterize those legislative changes that went through House, Senate, and were signed into law by President Obama?

Mr. Weiner. Well, thank you for the opportunity to discuss this further.

I don't retreat from the statement. I think that, when you look at the Affordable Care Act and -- not just the Affordable Care Act, but that is what we are focusing on -- the question is whether Congress has been able and expected to be able to address the important issues.

Many of the issues on this list are important, but they are not core to the issues that are at stake, the principal issues that are dividing the parties, the legislature --

Chairman Roskam. Okay. So just in the interest of time, you are dismissive of the past accomplishments. Your argument is that they are de minimis. My argument is that they are more significant than that. Is that fair enough?

Mr. Weiner. Well, I think it goes beyond that. The question is what is it that hasn't been done. The King case, that is the kind of issue that in past years would have been resolved with a technical amendment. It should never have gotten to this stage.

The employer mandate that Ms. Turner cited, yes, there was a bill passed. It had a poison pill in it, in my view, and it didn't get past the Senate. That doesn't prove that we are able to deal at this stage.

I think we will reach a point where we are able to deal with it. My only argument is that I am not worried about the precedence because I think we are going to be able to come together at some point and do a better job than --

Chairman Roskam. So go back to my opening statement. And I appreciate what you are saying. But go back to my opening statement.

And that is I put a provocative statement out there, and the provocation was: Do the votes of the American public matter? Do they matter at all?

So the ACA was enacted. The majority changed. Political scientists can make their decisions about what the reasons were for the change in the majority, but I think most folks say that the Affordable Care Act was largely the discussion point in the 2010 election.

The majority changes. And so you have got a new, new, Congress that is reflecting who? The American public, who that is what this is all about.

And so you see this conundrum then and this sort of -- I would argue that you are making a false choice and you are saying, well, if Congress chooses not to deal with the things that we say -- that we deem are important, that is the architects of the statute, then somehow Congress is dysfunctional.

So your point is -- I understand your point. You understand my point. Let's move on.

So on page 4 of your testimony -- it is interesting. You have got a number of footnotes throughout. You have got 17 footnotes in your testimony. On page 4 of your testimony you make an assertion, and I will let you catch up. I will read it to you while you are catching up.

You say, "The postponement, in fact, was well within the historical bounds of administrative discretion as a transitional phase in a new requirement."

Now, there is no footnote there. There is an assertion there. What is the proof of that statement?

Mr. Weiner. Well, I think the proof of the statement is it goes on and talks about, for example, the statement of the former HHS Secretary in the Bush administration who wrote an article after the employer mandate was postponed and said that he thought it was wise and that he thought it was consistent with the kinds of things that were done with Medicare part D.

Chairman Roskam. Okay. But that is a different argument, isn't it, than the one that Professor Adler was making?

And, Professor Adler, your argument is this is different in terms of breadth and scope, and you made this point about taxes. So give us a little more color commentary, if you would, on this tax question and these postponement questions.

And answer this: If there is a future administration that says, for example, "We don't think that the international tax regime is working for our country. We think that it creates a disadvantage for American companies to be taxed on their worldwide operations, and we are choosing not to assert or collect or" -- pick your verb -- "but we are not going to go after and collect that tax," is that possible under this line of thinking? I would think that it is.

Mr. Adler. Well, I think it is certainly concerning. In my testimony, I quote my friend Nicholas Bagley at University of Michigan, who I disagree with quite strongly on a wide number of issues, including King v. Burwell, but --

Chairman Roskam. So just for the point, this professor that you are citing is a proponent of the ACA. Is that right?

Mr. Adler. Proponent of the ACA. He and I have practically gone around the country debating King v. Burwell. But he has written an article identifying, I think, five instances, including the employer mandate delays, where he does not believe -- and I certainly don't believe -- the delays can be justified under traditional administrative discretion.

And just to put this in a context to make that clear, if you think about the ways in which Congress can force action or force a change in the law, one of the traditional things Congress does is to write a law that says that private parties are subject to certain legal obligations as of a date certain.

In environmental law, this happens all the time. An emitter must control emissions by X date. That is separate and apart from what the agency or the executive branch might do to enforce that obligation.

So here, with the employer mandate, the statute says that this obligation and what administration claims is a tax liability is imposed upon private entities as of a date certain. The administration certainly has transition authority to say, "It might be hard to comply with this at first; so, we will give you a little extra time before you send us the check" or, "We are not going to seek penalties because the reporting requirements are going to take a while to get them in place." And certainly there are lots of examples of that sort of transition relief.

What the administration did here that is different is they didn't merely say, "We are going to give you more time. We are not going to seek penalties." They said, "The tax liability that is written into the law that is directly imposed on private parties" -- so this isn't a delegation to the agency, saying, "Agency go enforce it." This is directly imposed by Congress on private parties -- the IRS said, "We are going to waive that entirely for a calendar year." It then said, "We are going to make up new categories and waive it selectively for some as opposed to others."

And that is the sort of thing that none of the precedents that the Treasury Department identified --

Chairman Roskam. That is new ground. That is ground upon which a future administration could do the very thing that I just described.

Mr. Adler. It is certainly something that concerns me. And I should just note for the record, you know, we have seen things I don't think are quite as egregious, but are of this character in the past. And I have certainly been critical of them.

In the last presidential election, as a candidate, Governor Romney made some claims about plans to waive certain aspects of this law, and I, among others, said, "Hey, look. That might be a good idea, but the President can't do that. And it will be important, whomever the next President is, that they not be allowed to build upon this precedent to waive statutory obligations that are imposed directly upon private parties because that is simply not the sort of authority that the executive branch has unless Congress confers it upon the executive branch."

Chairman Roskam. So, Ms. Papez, you were talking a bit about the nature of the litigation and the lack of capacity of the court to bring certain remedies.

So, for a layman, that is sort of a red light-green light game, right, where the court can say, "No, you can't do this" and, "Yes, you can do that"?

So can you describe some of those natural limitations from a litigation point of view and how important it is that those sorts of decisions are made here in Congress as opposed to somewhere else.

Ms. Papez. Sure. You know, the limit comes from the constitution itself. Article III says the courts can only resolve what are called justiciable cases in controversy. So there has to be a specific legal question presented that has a real effect on the parties in front of the court.

Chairman Roskam. Right. It is not a hypothetical and so forth.

Ms. Papez. No.

Chairman Roskam. There has got to be a matter in controversy.

Ms. Papez. Right. A matter in controversy between the parties who are in front of the court. And Article III says the court can resolve that controversy.

Now, what we heard in the King case, including from the administration's representative, the Solicitor General, is that, if the court resolves the controversy presented in that lawsuit, which is, "How do you interpret 'established by a State'?" -- that is the phrase at issue -- that, if the court interprets that the way it appears to be written, which means "State" is a state, not a Federally created exchange, that there are going to be all these consequences to the law.

And, to your point, that is exactly where the Constitution contemplates that the courts stop and Congress step in. And several justices made this point at the argument. They said, "Look. Our ability to indulge that sort of argument, whether you are right or whether it is good policy or whether there are practical reasons not to interpret it this way because it will break some other portion of the statute, those are policy arguments. We are not speaking to whether they are right or wrong. We are saying the court can't do that. The court can't go that far."

And so that is where the issue would have to come back to the Congress. And the reason it has to come back to the Congress is because, where you are dealing with the appropriation of funds for federal programs and when you are dealing with the architecture of a statute that originated in this body, there is a limit in the Constitution to how much the executive branch can do to fix or change or adjust that in response to new circumstances. It has to come back to this body.

Chairman Roskam. So I couldn't have done it better myself. But Mr. Rangel at the beginning of the hearing said, "Look, what is this all about? And why are we here?" And he asked a question that I think is a fair question. And that is, "With so many things going on in our country and so many things going on in the Congress, is this worthy of our time today?"

And I would argue that this discussion and the level and the breadth and the depth of this discussion is worthy of our time.

And for each of the witnesses, you have been forthright and you have focused in not on the things that we disagree about, that is, the merits of the Affordable Care Act, which are obviously a wide range of opinions on this committee, but even as we get in and around sort of this core issue.

So, Mr. Weiner, you have demonstrated, you know, a higher tolerance for executive discretion than I would, obviously, or than the other witnesses have, but you can see how this question really does bring us together. Because it is the ACA today. It can be international tax tomorrow. It can be an environmental question the next day. So when Mr. Rangel said this is about Presidents past and future, it absolutely is.

And so, you know, in closing, the point I want to make is that we have an obligation as a committee, based on the House rules, to do the oversight work that I described in my opening statement. We also have an obligation, at least I feel one, to fill in the void of silence. Because I would argue that silence is assent. Silence creates precedent. Silence creates license over a period of time.

And so what we are doing today is we are putting not just this administration, but future administrations, on notice that Congress has a high expectation, that Congress will do the law writing, and we have an expectation that the executive branch will execute those laws.

And I want to thank all of my members today on both sides of the aisle. You have been very generous, you experts, with your time and your attention.

And, with that, the committee --

Mr. Rangel. Mr. Chairman.

Chairman Roskam. Yes, sir.

Mr. Rangel. I just want to thank you for your generous explanation as to why we are here and to join with you in any expansion of legislative oversight and abuse by any executive branch of government, regardless of who the President is.

And, also, I want to thank you for not going into the merits as to whether or not every American is entitled to access to health care or preconditions or whether or not the extensions.

And it is really pleasant to know that the things that I have a passion about were not objected to, but the conduct of the executive branch should always be a thing that the Congress should protect its constitutional authority.

And so, as an American, I feel good walking away from this hearing knowing that, if this is a test as to what is constitutional, let me join in it, no matter which side I am on.

ecause if the President was overzealous in providing health care to millions of Americans, he should learn by doing that as long as we succeed in doing it.

Chairman Roskam. We will leave it there. Thank you all.

Committee is adjourned.

[Whereupon, at 11:58 a.m., the subcommittee was adjourned.]

Member Submissions For The Record

The Honorable Peter Roskam 2
The Honorable Jim Renacci

Public Submission For The Record

Andy Grenwal