STATEMENT OF ELIZABETH P. PAPEZ[1]

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

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
EXECUTIVE OVERREACH TASK FORCE

EXECUTIVE OVERREACH IN DOMESTIC AFFAIRS
PART I – HEALTH CARE AND IMMIGRATION

MARCH 15, 2016

Thank you Chairman King, Ranking Member Cohen, and Members of the Task Force. I appreciate the opportunity to appear here today to discuss executive implementation of federal legislation, notably the Affordable Care Act or ACA. Executive action is necessary to administer complex legislation. But it presents special challenges under statutes that require the executive to run unfunded programs over time. In such cases agencies can be tempted to depart from statutory mandates in order to address changing political or economic circumstances. The ACA is a prime example of such legislation, and its implementation has been the subject of significant legal and policy debate since its passage six years ago. My comments this morning concern the governance issues underlying these debates that this Task Force has resolved to study. These issues transcend particular programs and administrations, and as Chairman Goodlatte observed last month are "not partisan issues but American issues that touch[] the very

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

core of our system of government."[2] When one branch of government oversteps its bounds to address perceived failings by another branch, it upsets the system of checks and balances that protects our democratic system. These upsets have real consequences for the millions of people and trillions of dollars affected by executive implementation of federal statutes. And the issues they raise in the ACA context require special attention because they could have important consequences for future governments and programs that have nothing to do with healthcare.

The few examples I'll touch on this morning illustrate the point. The ACA provisions on employer coverage, cost-sharing subsidies, and premium tax credits present economic and practical challenges that have prompted agencies to second guess appropriations and legislative decisions the Constitution commits to Congress. The executive's employer coverage regulations revise express statutory deadlines and participation requirements. The Treasury Department's cost-sharing regulations use money appropriated for specific tax credits to pay for cost-sharing subsidies Congress expressly refused to fund. And IRS regulations say that premium tax credits expressly directed at insurance exchanges "established by a State" may be used for insurance on exchanges *not* "established by a State."

The executive branch has defended these actions as lawful efforts to implement the Act in the face of unforeseen circumstances. And a divided Supreme Court has now upheld some of these efforts. But these developments do not resolve the problems this Task Force has identified, and its commitment to avoiding agency overreach in statutory implementation is an important step toward protecting our constitutional system of checks and balances not just in the health care and immigration areas this panel will discuss today, but also in future areas that will rely on today's programs as precedent.

[2] Statement of R. Goodlatte, https://judiciary.house.gov/press-release/house-judiciary-committee-passes-resolution-creating-task-force-on-executive-overreach/

I. ACA Employer Coverage Regulations.

Section 1513 of ACA requires certain employers to offer certain insurance coverage by 2014 or face tax penalties.[3] Notwithstanding this express directive, the Treasury Department announced that the Act's 2014 requirements would not apply until 2016,[4] and granted so-called "transition relief" from statutory penalties for employers who cover at least 70 percent of relevant employees in 2015 and at least 95 percent of relevant employees in 2016.[5]

This kind of relief raises questions about when an agency crosses the constitutional line that separates implementation from legislation. Executive Branch agencies may interpret and enforce federal statutes, but may not rewrite or amend them. Since at least the 1700s a legislative act has been defined as a "standing Law" by which "every one may know what is his."[6] Our Constitution reserves such acts to Congress, and agencies that make categorical changes to express statutory provisions push this constitutional boundary. Executive Branch prosecutorial discretion and authority to enforce laws does not allow it to exempt entire classes of people or conduct from express statutory requirements. That would be tantamount to suspending portions of a statute, which is a power our Constitution denies the executive.[7]

---

[3] 43 U.S.C. §§ 4980H(a)-(b).

[4] 79 Fed. Reg. 8544 (Feb. 12, 2014); https://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20021014.pdf.

[5] https://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20021014.pdf

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

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

II. Cost-Sharing Subsidies.

Section 1402 of ACA requires insurance companies to reduce co-payments, deductibles and other costs to qualified individuals who purchase health plans in public insurance exchanges. The section and Section 1412(c)(3) then authorize federal payments to insurance companies to offset the price of Section 1402's required cost-sharing. In its FY2014 budget submission the Executive Branch requested appropriations for these payments. When Congress did not authorize them, the Department of Health & Human Services responded that for purposes of "efficiency" it would fund the payments out of the "same account from which the premium tax credit portion of the advance payments are made."[8] But the tax credits are funded through a permanent appropriation that does not reference the Act's cost-sharing provisions. The administration's expenditure of nearly $3 billion in offset funds thus raises the question whether agency implementation of the Act's cost-sharing mandate violates Article I's prohibition on expending public funds without an "Appropriation made by Law."[9]

In February 2015 the chairmen of two House committees sent letters to the Treasury and Health and Human Services Departments asking for "a full explanation for, and all documents relating to" the administration's payment of cost-sharing subsidies.[10] The agencies' response concedes that nearly $3 billion in such payments were made in 2014, but refers questions about the legal basis for these payments to the administration's filings in a pending lawsuit.[11] That suit

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

[9] U.S. CONST. art. I, § 9, cl. 7. A July 2013 letter from the Congressional Research Service observes that "unlike the refundable tax credits, these [cost-sharing] payments to the health plans do not appear to be funded through a permanent appropriation. Instead, it appears from the President's FY2014 budget that funds for these payments are intended to be made available through annual appropriations."

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

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

will not eliminate the need for continuing legislative oversight of the affected provisions, particularly those involving the employer mandate. In September 2015 the court ruled that the House did not have legal standing to challenge the executive's delay of the employer mandate in federal court.[12] And if the court ultimately sides with the House on its remaining appropriations claims,[13] the political branches will have to confront whether, and if so how, to fund the challenged subsidies without the invalid cross funding.

III. Premium Tax Credits.

In an effort to make health insurance affordable to people required to purchase it, Section 1401(a) of the Act provides tax credits for insurance purchased on "an Exchange established by the State under section 1311." 26 U.S.C. § 36B(c)(2)(A)(i). The Executive Branch recently issued regulations applying these credits to coverage purchased on exchanges created by federal agencies.[14] In 2015 certain individuals challenged the legality of these regulations in the U.S. Supreme Court. The challengers argued that providing credits for insurance purchased on federal exchanges rewrote the Act's language authorizing such credits only for insurance purchased on exchanges "established by [a] State." The Executive Branch responded that these changes were consistent with the statute and necessary to avoid so-called "death spirals" in State insurance markets. In June 2015, the Supreme Court voted 6-3 to uphold the executive's

---

[12] *See* No. 1:14-cv-01967, *U.S. House of Representatives v. Burwell et al*., at 1-2 (Sept. 9, 2015).

[13] *See* 5 U.S.C. § 706(2). ACA requires that an "issuer" of a qualified health plan to an eligible insured individual "shall reduce the cost-sharing under the plan at the level and in the manner" specified. 42 U.S.C. § 18071(a)(2). The issuer then "shall notify the Secretary of such reductions and the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions." 42 U.S.C. § 18071(c)(3)(A). But the only appropriation the administration has identified with respect to the Act's cost-sharing provisions is a provision that is linked to tax credits that expressly *exclude* insurance subsidies.

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

extension of tax credits to individuals who purchase insurance on federal (rather than state) created exchanges.[15] The majority opinion acknowledges courts' duty to adhere to statutory text,[16] but finds the Act's reference to exchanges "established by a State" ambiguous in context and thus open to executive interpretation that warrants judicial deference.[17]

* * * * *

These and other disagreements over executive implementation of ACA's insurance and funding provisions illustrate the importance of the issues this Task Force has resolved to address. The Declaration of Independence recognized the danger of concentrating power in a single person or body, and the Constitution answered this concern with a division of government authority that is often described as "the essential basis of a free system of government."[18] The scope and importance of ACA's healthcare initiative can tempt government action beyond constitutional limits, particularly in the face changing economic and political circumstances. But it is precisely when the stakes are high and stakeholders may believe the end justifies the means that our Constitution and laws serve as a check on the exercise of government power. These checks cannot be enforced by federal courts alone. And where the political branches cannot work together to enforce them, Congress can exercise its legislative, spending, and oversight powers to avoid the issues that have arisen in ACA's implementation. New statutes or amendments can minimize the extent to which federal programs are unfunded or depend on State actions beyond federal control. Congress can expressly limit appropriations in ways that *Burwell*

[15] No. 14–114, *King v. Burwell*, 576 U. S. ____ (June 25, 2015).

[16] *See id*. at 8-9 (citing *Hardt v. Reliance Standard Life Ins. Co*., 560 U. S. 242, 251 (2010)).

[17] *See id*. at 5 (quoting 26 U. S. C. §§36B(b)–(c)); *id*. at 8-15 (citing, *inter alia*, *Chevron USA, Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-43 (1984); *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 159 (2000); *Utility Air Regulatory Group v. EPA*, 573 U. S. ___ (2014)).

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

and other recent decisions suggest courts will uphold. And Congress can use its oversight authority to monitor agency implementation of statutes and consider whether further legislative or appropriations action is necessary, particularly under statutory provisions that give the executive some discretion to depart from statutory mandates.[19] Thank you again for the opportunity to address these important issues.

[19] ACA requirements that may be waived under section 1332 include (i) Part I of subtitle D to ACA Title I (requirements related to the establishment of qualified health plans), (ii) Part II of subtitle D to ACA Title I (requirements related to consumer choices and insurance competition through exchanges), (iii) section 1402 of the ACA (requirements related to reduced cost sharing for individuals enrolling in qualified health plans), (iv) section 4980H of the Internal Revenue Code (requirements related to shared responsibility for employers regarding health insurance), and (v) section 5000A of the Internal Revenue Code (requirements related to tax penalties for the failure to maintain essential health insurance). ACA § 1322; 77 Fed. Reg. 11701. But Section 1332 waivers are not available until 2017, ACA § 1332(a)(1), and even then are available only if a State shows that its innovation plan will (i) provide benefits at least as comprehensive as those required in ACA exchanges, (ii) provide coverage and cost sharing protections against out-of-pocket spending to make coverage at least as affordable as those provided by the ACA, (iii) cover at least a comparable number of residents as would be covered under the ACA, and (iv) not increase the federal deficit. ACA § 1332(b)(1).