

**The President's Duty to Execute Faithfully
the Patient Protection and Affordable Care Act**

Testimony of

**Michael F. Cannon
Director of Health Policy Studies
Cato Institute**

Before the

**Committee on the Judiciary
United States House of Representatives**

December 3, 2013

Chairman Goodlatte, Ranking Member Conyers, and members of the Judiciary Committee, my name is Michael F. Cannon. I am the director of health policy studies at the Cato Institute. Founded in 1977, the Cato Institute is a non-partisan, non-profit, 501(c)(3) educational foundation located in Washington, D.C., whose mission is to promote the principles of individual liberty, limited government, free markets, and peace. To maintain its independence, the Cato Institute accepts no government funding.

Thank you for the opportunity to offer my perspective on the president's constitutional duty to "take Care that the Laws be faithfully executed"¹ as it relates to the Patient Protection and Affordable Care Act of 2010.²

Introduction

Article II, Section 3 of the U.S. Constitution, to which every president swears an oath, commands that the president "shall take Care that the Laws be faithfully executed."³ Fealty to this duty is essential for maintaining our system of government and public order.

The law is a reciprocal pact between the government and the governed. Public order requires government to remain faithful to the law as much as it requires the citizenry to do so. If the actions of government officials lead citizens to conclude that those officials are no longer meaningfully bound by the law, then citizens will rightly conclude that neither are they.

Since he signed the Patient Protection and Affordable Care Act (PPACA) into law on March 23, 2010, President Barack Obama has failed to execute that law faithfully.

¹ U.S. Const. art. II, § 3.

² I also wish to thank Jonathan H. Adler, the Johan Verheij Memorial Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law, for his assistance with this testimony.

³ U.S. Const. art. II, § 3.

The president has unilaterally taken taxpayer dollars made available by the PPACA and diverted them from their congressionally authorized purposes toward purposes for which no Congress has ever appropriated funds.

He has unilaterally and repeatedly rewritten the statute to dispense taxpayer dollars that no federal law authorizes him to spend and that the PPACA expressly forbids him to spend.

He has unilaterally issued blanket waivers to requirements that the PPACA does not authorize him to waive.

At the same time he has declined to collect taxes the PPACA orders him to collect, he has unilaterally rewritten the statute to impose billions of dollars in taxes that the PPACA expressly forbids him to impose, and to incur billions of dollars in debt that the statute expressly forbids him to incur.

He has unilaterally rewritten the PPACA to allow health insurance products that the statute expressly forbids. He has *encouraged* consumers, insurers, and state officials to violate a federal law he enacted.

And he has taken these steps *for the purpose* of forestalling democratic action by the people's elected representatives in Congress.

President Obama's unfaithfulness to the PPACA is so wanton, it is no longer accurate to say the Patient Protection and Affordable Care Act is "the law of the land." Today, with respect to health care, the law of the land is whatever one man says it is – or whatever this divided Congress will let that one man get away with saying. What this one man says may flatly contradict federal statute. It may suddenly confer benefits on favored groups, or tax disfavored groups without representation. It may undermine the careful and costly planning done by millions of individuals and businesses. It may change from day to day. This method of lawmaking has more in common with monarchy than democracy or a constitutional republic.

Diverting Prevention Funds to Federal Exchanges

A simple example of the president rewriting the PPACA is his redirection of nearly half a billion dollars that Congress appropriated for the law's Prevention and Public Health Fund toward the creation of federal health insurance "exchanges," for which Congress appropriated no funds.

Earlier this year, the *Washington Post* reported, "The Obama administration plans to use \$454 million in Prevention Fund dollars to help pay for the federal health insurance exchange. That's 45 percent of the \$1 billion in Prevention Fund spending available [in 2013]."⁴ Senator Tom Harkin (D-IA) attacked the administration's attempt "to redirect that money to educating the

⁴ Sarah Kliff, *The Incredible Shrinking Prevention Fund*, Washington Post, Apr. 19, 2013, at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/04/19/the-incredible-shrinking-prevention-fund/>.

public about the new health insurance marketplaces” as “a violation of both the letter and spirit of this landmark law.”⁵

Illegal Subsidies to Members of Congress

The president has issued illegal subsidies to members of Congress for three years, and overruled career federal officials at the Office of Personnel Management by dictating that that agency would provide further illegal subsidies to members of Congress and their staffs for the purchase of health insurance through the PPACA’s Small Business Health Options Program (SHOP) Exchanges.

To ensure that members of Congress and their staffs would experience the PPACA in the same manner as the citizenry, the statute bars them from the Federal Employees Health Benefits Program (FEHBP), and effectively offers them only Exchange coverage as a substitute. The statute provides:

Notwithstanding any other provision of law, after the effective date of this subtitle, the only health plans that the Federal Government may make available to members of Congress and congressional staff with respect to their service as a member of Congress or congressional staff shall be health plans that are created under this act...or offered through an exchange established under this act...⁶

Even though the Exchanges were not to become operative until 2014, this provision as written took effect immediately upon enactment.⁷ And because it immediately barred members and staff from the FEHBP, it also stripped them of the roughly \$5,000 the federal Treasury pays toward the premiums of FEHBP participants who select self-only coverage, or the roughly \$11,000 it pays on behalf of those who choose family coverage. President Obama quite literally and perhaps unjustly signed a law throwing nearly all members of Congress and congressional staff out of their health plans, and cutting their pay by thousands of dollars per year.

Rather than faithfully execute that law, however, the president chose to keep providing that coverage to members and staff and to keep making those payments, as if nothing had happened. The president has been providing illegal coverage and illegal subsidies to members of Congress and congressional staff for more than three years.⁸

Even after the Exchanges take full effect, this provision as written continues to strip members and staff of the “contribution” the federal government makes toward the premiums of those who participate in the FEHBP. Under federal law, those payments are available only for the purchase

⁵ The Importance of the Prevention Fund to Save Lives and Money, Sen., 113th Cong. (2013), (statement of Sen. Tom Harkin, Chairman of the Senate Health Education, Labor, and Pensions Committee).

⁶ Patient Protection and Affordable Care Act, 42 U.S.C. § 18032 (2010).

⁷ Robert Pear, Baffled by Health Plan? So Are Some Lawmakers, N.Y. Times, Apr. 12, 2010, at <http://www.nytimes.com/2010/04/13/us/politics/13health.html>.

⁸ Jerry Markon, Problem Over Health Coverage for Capitol Hill is Resolved, Washington Post, Apr. 21, 2010, at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/20/AR2010042005163.html>.

of plans within the FEHBP, not through the PPACA's Exchanges. Neither the PPACA nor any other federal statute authorizes the administration to continue making those payments on behalf of members and staff. Nor does the PPACA allow employers to pay their employees' premiums through the law's (individual-market) American Health Benefits Exchanges. Nor does it permit large employers – much less the nation's largest employer – to purchase coverage for their employees through its Small Business Health Options Program (SHOP) Exchanges. As a result, *Politico* reports, "OPM initially ruled that lawmakers and staffers couldn't receive the subsidies once they went into the exchanges."⁹

After President Obama personally intervened,¹⁰ OPM reversed its ruling. The agency announced it would make those \$5,000 or \$11,000 payments on behalf of members and staff who obtained coverage through SHOP Exchanges. OPM's purported justification for this newfound authority does not withstand scrutiny.¹¹

Instead, President Obama once again unilaterally rewrote federal law to give nearly every member of Congress and congressional staffer an illegal subsidy of \$5,000 to \$11,000 per year.¹² Faithfully executing the law would have required the president to let the OPM's ruling stand, and let Congress address the matter through legislation.

Spending Billions That the PPACA Expressly Forbids the President to Spend

The president's most egregious violation of his duty to execute faithfully the PPACA is his attempt – under the rubric of that law – to tax, borrow, and spend billions of dollars that statute expressly prohibits him to spend.¹³

The relevant provisions of the Act are complex, but the law is abundantly clear. The PPACA authorizes the creation of state-specific health insurance "exchanges" that regulate health insurance within each state. It asserts that "Each State shall . . . establish" an Exchange. It directs the Secretary of Health and Human Services to establish an Exchange in states that do not. It

⁹ John Bresnahan, *Government Shutdown: John Boehner's private fight for Hill health subsidies*, *Politico*, Oct. 1, 2013, at <http://www.politico.com/story/2013/10/john-boehner-hill-obamacare-subsidies-97634.html>.

¹⁰ John Bresnahan & Jake Sherman, *President Obama on Hill's Obamacare Mess: I'm On It*, *Politico*, Jul. 31, 2013, at <http://www.politico.com/story/2013/07/obama-hill-health-care-dispute-95017.html>. ("President Barack Obama privately told Democratic senators Wednesday he is now personally involved in resolving a heated dispute over how Obamacare treats Capitol Hill aides and lawmakers, according to senators in the meeting.")

¹¹ Doug Badger, *Congress IS Getting a Special Deal Under Obamacare*, *dougsbriefcase.com* (Oct. 1, 2013), <http://www.dougsbriefcase.com/blog/congress-getting-special-deal-obamacare/>.

¹² Ordinary Americans who are suffering similar pay cuts as a result of the PPACA will receive no such relief. Michael F. Cannon, *Congress's Obamacare Waiver*, *National Review*, Aug. 6, 2013, at <http://www.nationalreview.com/article/355176/congress-obamacare-waiver-michael-f-cannon>.

¹³ See Jonathan Adler & Michael Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 *Health Matrix* 1, 119 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2106789; see also Brief of Amicus Curiae Jonathan Adler & Michael Cannon, *King v. Sebelius*, No. 13-cv-630 (E.D.Va. Nov. 27, 2013), http://object.cato.org/sites/cato.org/files/pubs/pdf/king_adler_cannon_amicus_brief.pdf, and attached.

offers health insurance subsidies¹⁴ to certain taxpayers who enroll in a qualified health plan “through an Exchange established by the State under Section 1311.”¹⁵ Finally, the PPACA exempts employers from its “free-rider penalty,” and exempts millions of individual taxpayers from its individual-mandate penalties, if their states opt not to establish an Exchange. The language of the statute is clear, consistent, and unambiguous.¹⁶

Nevertheless, shortly after legal scholars brought this feature of the law to the public’s attention in 2011,¹⁷ the Internal Revenue Service proposed a rule that would issue those subsidies – and impose the resulting taxes – through *federal* Exchanges as well as state-established Exchanges.¹⁸ Congressional Budget Office estimates indicate that issuing subsidies in the 34 states that have refused to establish Exchanges would cost taxpayers roughly \$700 billion in the first 10 years.¹⁹ The president is literally threatening to tax, borrow, and spend hundreds of *billions* of dollars, without congressional authorization, and indeed in violation of the express language of his own health care law.

The IRS proposed this rule with no apparent regard for the clear language of the statute. Despite public criticism and objections during the notice-and-comment period, the agency finalized its proposed rule in May 2012²⁰ yet cited neither any provision of the PPACA nor any element of the legislative history in support of its “interpretation” of the law.

My friend, Mr. Simon Lazarus, who is also on this panel, has defended the president’s actions. Yet despite *two years* of searching for some provision of the statute, or some element of the legislative history, that would create ambiguity about the law’s clear meaning or about Congress’ intent, the president and his supporters have offered neither. Mr. Lazarus could make news today by unveiling such a discovery, but one suspects that if any such support for the president’s actions existed, they would have discovered and offered it by now. In fact, the legislative history of the PPACA is fully consistent with the express language of the statute.²¹

Unilateral, Blanket Waivers of the PPACA’s Requirements

The president has unilaterally and without authority altered the PPACA’s effective dates by issuing blanket exemptions from both the PPACA’s employer mandate and many of its health insurance regulations.

¹⁴ The PPACA describes some of these subsidies as “premium-assistance tax credits,” but they are tax reduction in name only. Functionally, they are government outlays.

¹⁵ I.R.C. § 36B(b)(2)(A), (b)(3)(B)(i), (b)(3)(C), & (c)(2).

¹⁶ See Adler & Cannon, Health Matrix, *supra*; see also Adler & Cannon, Amicus Brief, *supra*.

¹⁷ See, e.g., Jonathan H. Adler, Cooperation, Commandeering or Crowding Out? Federal Intervention and State Choices in Health Care Policy, 20 Kan. J. L. & Pub. Pol’y 199 (2011).

¹⁸ Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,934 (Aug. 17, 2011).

¹⁹ See Adler & Cannon, Health Matrix, *supra*, at 138.

²⁰ Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,377 (May 23, 2012) (to be codified at 26 C.F.R. pt. 1).

²¹ See Adler & Cannon, Health Matrix, *supra*; see also Adler & Cannon, Amicus Brief, *supra*.

After announcing in May 2012 that he would unilaterally impose the PPACA's employer mandate in 34 states where he has no authority to do so, in July 2013, President Obama unilaterally granted a one-year plenary reprieve from that mandate.²² Again, Sen. Tom Harkin, an author and supporter of the PPACA, asked, "This was the law. How can they change the law?"²³

The Treasury Department claims its delay of the employer mandate's requirements is an example of the sort of "transition relief" it has provided when implementing past tax legislation.²⁴ There are a number of difficulties with this rationale. Congress never granted Treasury the power to delay such regulatory requirements for an entire year. This is a more sweeping use of that power than previous uses. The employer mandate is an essential component of a broader regulatory scheme.²⁵ Finally, there is no limiting principle to the Treasury's claim to power. If the president can delay the employer mandate for one year, can he delay it for 10 years?

The president has also unilaterally rewritten the PPACA's health insurance regulations and in the process failed to execute faithfully the Administrative Procedures Act.

In recent months, millions of Americans have received letters from their health-insurance carriers informing them that their health plans were being cancelled because they did not satisfy the requirements of the PPACA. Amid heavy criticism that he had violated his oft-repeated pledge that "if you like your health plan, you can keep it," President Obama offered to suspend enforcement of numerous PPACA requirements in a manner that would allow some Americans to re-enroll in health plans that remain illegal under federal law, and in some cases under state law.²⁶

The president laid out a procedure through which consumers and insurers could engage in illegal activity, and encouraged state officials to facilitate those illegal activities. That procedure conflicts not only with the statute but also with the president's own regulations implementing the statute. With this new procedure, the president imposed obligations on insurers who want to take advantage of this option, yet neither those conditions nor the authority to impose them are found anywhere in the statute or the president's regulations. In effect, the president sought to reinterpret

²² Mark Mazur, Continuing to Implement the ACA in a Careful, Thoughtful Manner, Treasury Notes (Jul. 2, 2013), <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner.aspx>.

²³ Jonathan Weisman & Robert Pear, Seeing Opening, House G.O.P Pushes Delay on Individual Mandate in Health Law, N.Y. Times, Jul. 9, 2013, at <http://www.nytimes.com/2013/07/10/us/politics/house-gop-pushes-delay-on-individual-mandate-in-health-law.html>.

²⁴ Mark Mazur, "Letter to Rep. Fred Upton, Chairman of US. House Committee on Energy and Commerce", Jul. 9, 2013, at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Upton-Treasury-ACA-2013-7-9.pdf>.

²⁵ Michael F. Cannon, Delaying the Employer Mandate Requires Delaying All of ObamaCare, Cato at Liberty (Jul. 3, 2013, 8:50AM), <http://www.cato.org/blog/delaying-employer-mandate-requires-delaying-all-obamacare>.

²⁶ Gary Cohen, "Letter to State Insurance Commissioners", Nov. 14, 2013, at <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF>.

the PPACA's provisions regarding "grandfathered" plans without going through the rulemaking process required by the Administrative Procedures Act.

Declining to Collect Taxes the PPACA Imposes

By unilaterally suspending the PPACA's employer mandate and minimum-coverage requirements, the president has effectively declined to collect the penalties the statute imposes on those who fail to comply with these provisions.

The Obama administration explained that consumers who retain their (still-illegal) health plans under the specified procedures "will not be considered to be out of compliance with the market reforms," including the minimum-coverage requirements. Importantly, the administration clarified that the Treasury Department, which enforces the individual mandate, "concur[s] with the transitional relief afforded in this document."²⁷

In other words, the president announced he will not enforce the individual mandate against those who purchase these still-illegal health plans, even though the PPACA clearly requires him to do so.

Imposing Taxes the PPACA Does Not Authorize

Even more troubling, President Obama is threatening to impose hundreds of billions of dollars in taxes Congress never authorized on millions of employers and individual taxpayers.

If and when the president begins issuing Exchange subsidies in the 34 states with federally established Exchanges, those subsidies will immediately trigger taxes against employers and individuals in those states. A back-of-the-envelope estimate is that those illegal subsidies will trigger illegal taxes against 8 million individual taxpayers and millions of employers in those 34 states.²⁸ Since those levies will only cover a fraction of the cost of the subsidies, however, the lion's share of the tax burden the president is unilaterally creating will be imposed on future generations in the form of hundreds of billions of dollars of additional federal debt.

As noted above, the total cost of these illegal taxes will reach \$700 billion over the first 10 years. But since the president claims he can issue these subsidies in *any* state that does not establish the Exchange, he is actually claiming the authority to tax, borrow, and spend more than \$1 trillion (in the event that all states refused to establish Exchanges) that the PPACA expressly says he cannot.

Forestalling Democratic Action

Underlying each of these instances in which President Obama has unilaterally rewritten federal law is an unmistakable desire to forestall democratic action by the people's elected representatives in Congress.

²⁷ Id.

²⁸ See Adler & Cannon, *Health Matrix*, *supra* at 192-193.

If the president had not raided the Prevention and Public Health Fund, then federal Exchanges might be even less prepared to offer coverage in 2014 than they are now, which almost certainly would have prompted Congress to reopen the PPACA.

If the president had not allowed members of Congress to remain in their health plans through 2014, or had not offered to provide them illegal subsidies thereafter, all observers agree Congress would have reopened the PPACA to maintain its members' compensation packages, and perhaps would have made other changes to the law.

If the president had not unilaterally waived the PPACA's unworkable employer mandate or various health insurance regulations, a revolt by employers and consumers likely would have spurred Congress to do so. Ezra Klein, another supporter of the PPACA, wrote, "This is a regulatory end-run of the legislative process. The law says the mandate goes into effect in 2014, but the administration has decided to give it until 2015 by simply refusing to enforce the penalties."²⁹ In each case, Congress stood poised to enact into law the very changes that the president announced. Yet the president threatened to *veto* the codification of his own policies. A reasonable supposition is that he would not want the codification of his policies to complicate his ability to rescind them unilaterally at a later date.

If the president were to enforce the PPACA faithfully, by admitting he has no authority to issue Exchange subsidies or to impose the related taxes in states that refuse to establish Exchanges themselves, all observers again agree that Congress would have to reopen the statute for major revisions and possibly repeal.

At this point, it manifestly clear that President Obama is exercising legislative powers he does not possess in order to prevent Congress from exercising the legislative powers that only Congress possesses.

Conclusion

The concerns I share with you today are not borne of partisanship. Though I have worked for Republicans, I am not a Republican, for reasons that Democrats on this committee can readily appreciate. I am acutely aware of the last Republican president's failures to execute the laws faithfully. In 2008, though I did not support him, I preferred the Democratic presidential candidate to the Republican candidate in part because he promised to curb such abuses by the executive. I have praised President Obama for doing more than even many libertarians to celebrate the gains in equality and freedom our nation has secured for women, for African-Americans, for gays, and for lesbians.³⁰

²⁹ Ezra Klein, *Obamacare's Employer Mandate Shouldn't be Delayed. IT should be Repealed*, Washington Post, Jul. 2, 2013, at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/02/obamacares-employer-mandate-shouldnt-be-delayed-it-should-be-repealed/>.

³⁰ Michael F. Cannon, *Seneca Falls, and Selma, and Stonewall*, Cato at Liberty (Jan. 24, 2013, 2:29PM), <http://www.cato.org/blog/seneca-falls-selma-stonewall>.

This president's failure – or *any* president's failure – to honor his constitutional duty to execute the laws faithfully is not a partisan issue. The fact that presidents from both parties violate this duty is cause not for solace. It is cause for even greater alarm, because it guarantees that presidents from both parties will replicate and even surpass the abuses of their predecessors as payback for past injustices. The result is that democracy and freedom will suffer no matter who occupies the Oval Office.

Thank you.

Attachment: Brief of Amicus Curiae Jonathan Adler & Michael Cannon, King v. Sebelius, No. 13-cv-630 (E.D.Va. Nov. 27, 2013).