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### Government by Blog Post

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# Government by Blog Post

Josh Blackman<sup>\*</sup>

## I. INTRODUCTION

Since Democrats lost their filibuster-proof majority in the Senate in the 2010 midterm elections—due in large part to the rising unpopularity of the Affordable Care Act (ACA) and the growing strength of the Tea Party—President Obama was largely unable to advance his agenda through the legislative process. Faced with Republican opposition at every step, Obama increasingly turned to executive power to take action where Congress would not. By 2011, the mantra of his presidency became “We can’t wait.” Charlie Savage reported that the President coined this slogan at a strategy meeting to “more aggressively use executive power to govern in the face of Congressional obstructionism.”<sup>1</sup> When Congress will not legislate to the President’s satisfaction, he will act alone. In a White House blog post fittingly titled “We Can’t Wait” the administration listed all of the President’s executive actions, stressing that he “is not letting congressional gridlock slow our economic growth.”<sup>2</sup> By my count, Obama has repeated this phrase at least a dozen times to justify taking executive action where Congress would not pass him the bill he wants.<sup>3</sup>

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<sup>\*</sup> Associate Professor, South Texas College of Law, Houston. This essay is adapted from *Unraveled: Obamacare, Religious Liberty, & Executive Power* (Cambridge University Press 2016). I would like to thank the members of the *FIU Law Review* and all of the participants of the symposium.

<sup>1</sup> Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES (Apr. 22, 2012), <http://nyti.ms/1SgzZnC>.

<sup>2</sup> *We Can’t Wait*, WHITEHOUSE.GOV (Oct. 24, 2011), [www.whitehouse.gov/economy/jobs/we-cant-wait](http://www.whitehouse.gov/economy/jobs/we-cant-wait).

<sup>3</sup> Press Release, The White House, Remarks by the President on the Economy and Housing (Oct. 24, 2011, 2:15 PM) (“So I’m here to say to all of you—and to say to the people of Nevada and the people of Las Vegas—we *can’t wait* for an increasingly dysfunctional Congress to do its job. Where they won’t act, I will. In recent weeks, we decided to stop waiting for Congress to fix No Child Left Behind, and decided to give states the flexibility they need to help our children meet higher standards.”) (emphasis added), [www.whitehouse.gov/the-press-office/2011/10/24/remarks-president-economy-and-housing](http://www.whitehouse.gov/the-press-office/2011/10/24/remarks-president-economy-and-housing); Press Release, The White House, Remarks by the President at a Campaign Event (Oct. 25, 2011, 7:36 PM) (“And so we’re going to keep on putting pressure on them, but in the meantime we’re saying we can’t wait for Congress, and we’re going to go ahead and do everything we can through executive actions—whether it’s this refinancing program, or tomorrow I’m going to be talking about making college more affordable for young people—we’re *not going to wait* for Congress.”) (emphasis added), [www.whitehouse.gov/the-press-office/2011/10/25/remarks-president-campaign-event-1](http://www.whitehouse.gov/the-press-office/2011/10/25/remarks-president-campaign-event-1); Press Release, The White House, Remarks by the President at Signing of Executive Order (Oct. 31, 2011, 12:50 PM) (“Congress has been trying since February to do something about this. It has not yet been able to get it done. And it is the belief of this administration, as well as folks like Bonnie and Jay, that we *can’t wait for action on the Hill*—we’ve got to go ahead and move forward.”) (emphasis added),

If “We Can’t Wait” was President Obama’s mantra, the “Pen and Phone” was his method. In a cabinet meeting he explained, “We’re not just going to be *waiting* for legislation in order to make sure that we’re providing Americans the kind of help they need. I’ve got a pen and I’ve got

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[www.whitehouse.gov/the-press-office/2011/10/31/remarks-president-signing-executive-order](http://www.whitehouse.gov/the-press-office/2011/10/31/remarks-president-signing-executive-order); Press Release, The White House, Remarks by the President on Head Start in Yeadon, Pennsylvania (Nov. 8, 2011, 11:43 AM) (“Our children deserve action. And we *can’t wait* for Congress any longer.”) (emphasis added), [www.whitehouse.gov/the-press-office/2011/11/08/remarks-president-head-start-yeadon-pennsylvania](http://www.whitehouse.gov/the-press-office/2011/11/08/remarks-president-head-start-yeadon-pennsylvania); Press Release, The White House, Remarks by the President at the House Democrats Issues Conference (Jan. 27, 2012, 1:36 PM) (“On the other hand, where they obstruct, where they’re unwilling to act, where they’re more interested in party than they are in country, more interested in the next election than the next generation, then we’ve got to call them out on it. We’ve got to call them out on it. We’ve got to push them. *We can’t wait*. We can’t be held back.”) (emphasis added), [www.whitehouse.gov/the-press-office/2012/01/27/remarks-president-house-democrats-issues-conference](http://www.whitehouse.gov/the-press-office/2012/01/27/remarks-president-house-democrats-issues-conference); Press Release, The White House, Remarks by the President on No Child Left Behind Flexibility (Feb. 9, 2012, 1:57 PM) (“In September, after waiting far too long for Congress to act, I announced that my administration would take steps to reform No Child Left Behind on our own. This was one of the first and the biggest “*We Can’t Wait*” announcements that we’ve made, because our kids and our schools can’t be held back by inaction.”) (emphasis added), [www.whitehouse.gov/the-press-office/2012/02/09/remarks-president-no-child-left-behind-flexibility](http://www.whitehouse.gov/the-press-office/2012/02/09/remarks-president-no-child-left-behind-flexibility); Press Release, The White House, Remarks by the President on the Economy—Warrensburg, Missouri (July 25, 2013, 5:09 PM) (“And I’m going to take these plans all across the country, and I’m going to ask folks for help because, frankly, sometimes *I just can’t wait* for Congress. It just takes them a long time to decide on stuff.”) (emphasis added), [www.whitehouse.gov/the-press-office/2013/07/25/remarks-president-economy-warrensburg-missouri](http://www.whitehouse.gov/the-press-office/2013/07/25/remarks-president-economy-warrensburg-missouri); Press Release, The White House, Remarks by the President on the Economy—Jacksonville, Florida (July 25, 2013, 2:45 PM) (“Unfortunately, over the past two years, too many folks in Washington have been cutting these investments. The world *can’t wait* for Congress to get its act together.”) (emphasis added), [www.whitehouse.gov/the-press-office/2013/07/25/remarks-president-economy-jacksonville-fl](http://www.whitehouse.gov/the-press-office/2013/07/25/remarks-president-economy-jacksonville-fl); Press Release, The White House, Remarks by the President on the National Network for Manufacturing Innovation (Jan. 15, 2014, 1:14 PM) (“Long term, the challenge of making sure everybody who works hard can get ahead in today’s economy is so important that we *can’t wait* for Congress to solve it. Where I can act on my own without Congress, I’m going to do so.”) (emphasis added), [www.whitehouse.gov/the-press-office/2014/01/15/remarks-president-national-network-manufacturing-innovation](http://www.whitehouse.gov/the-press-office/2014/01/15/remarks-president-national-network-manufacturing-innovation); Press Release, The White House, Remarks by the President on Opportunity for All and Skills for America’s Workers (Jan. 30, 2014, 11:27 AM) (“Some of the ideas I presented I’m going to need Congress for. But America cannot stand still, and neither will I. So wherever I can take steps to expand opportunity, to help working families, that’s what I’m going to do with or without Congress. I want to work with them, but *I can’t wait for them*. We’ve got too much work to do out there.”) (emphasis added), [www.whitehouse.gov/the-press-office/2014/01/30/remarks-president-opportunity-all-and-skills-americas-workers](http://www.whitehouse.gov/the-press-office/2014/01/30/remarks-president-opportunity-all-and-skills-americas-workers); Press Release, The White House, Remarks by the President on Jobs in American Infrastructure (Feb. 26, 2014, 2:40 PM) (“But what I also said at the State of the Union is, in this year of action, whenever I can partner directly with states or cities or business leaders or civic leaders to act on this opportunity agenda, I’m going to go ahead and do it. *We can’t wait*. We’ve got to move. We’ve got to get things going. Too many families are counting on it.”) (emphasis added), [www.whitehouse.gov/the-press-office/2014/02/26/remarks-president-jobs-american-infrastructure](http://www.whitehouse.gov/the-press-office/2014/02/26/remarks-president-jobs-american-infrastructure); Press Release, The White House, Remarks by the President Before Cabinet Meeting (July 1, 2014, 11:04 AM) (“And part of the reason that I wanted to bring the Cabinet together today is to underscore for them my belief I think shared by most Americans that *we can’t wait* for Congress to actually get going on issues that are vital to the middle class.”) (emphasis added), [www.whitehouse.gov/the-press-office/2014/07/01/remarks-president-cabinet-meeting](http://www.whitehouse.gov/the-press-office/2014/07/01/remarks-president-cabinet-meeting); Press Release, The White House, Remarks by the President on the Economy (July 1, 2014, 2:22 PM) (“Middle-class families *can’t wait* for Republicans in Congress to do stuff. So sue me.”) (emphasis added), [www.whitehouse.gov/the-press-office/2014/07/01/remarks-president-economy](http://www.whitehouse.gov/the-press-office/2014/07/01/remarks-president-economy).

a phone.”<sup>4</sup> Specifically, he said, “I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward”<sup>5</sup> to “advance a mission that . . . unifies all Americans.”<sup>6</sup> To accomplish this mission, the President insisted that his cabinet “use all the tools available to us, not just legislation.”<sup>7</sup> The President’s Chief of Staff, John Podesta, put it bluntly: “The upshot: Congressional gridlock does not mean the federal government stands still.”<sup>8</sup>

The Obama approach to governance was crystalized in a November 2014 *Saturday Night Live* parody of the *Schoolhouse Rock!* classic, titled “How a Bill Does Not Become a Law.”<sup>9</sup> A character dressed as a Bill, standing on the steps of Capitol Hill, was explaining to a boy how he would become a law. “Well first I go to the House, and they vote on me. But then I need from the Senate a majority. And if I pass the legislative test, then I wind up on the President’s desk.”<sup>10</sup> President Obama appears, and shoves the Bill down the steps. The boy shouts, “President Obama, what’s the big idea. That bill was trying to become a law.”<sup>11</sup> The smirking President tells the boy, “There’s actually an even easier way to get things done around here. It’s called an executive order.”<sup>12</sup> Another character, dressed as an Executive Order appears. “I’m an executive order,” he sings, “and I pretty must just happen.”<sup>13</sup> The boy asks, “Don’t you have to go through Congress at some point?”<sup>14</sup> The Executive Order, with cigarette in hand, dismisses the boy. “Oh that’s adorable, you still think that’s how government works.”<sup>15</sup> The bill climbs back up the stairs and sings, “Look at the midterm elections, people clearly don’t want this”<sup>16</sup> executive order. The Bill, gasping, climbs up the steps and sings, “We’re going to take you to court, we’re going to shut down all the Congress—”<sup>17</sup> Obama shoves the Bill down the stairs one

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<sup>4</sup> *Obama on Executive Actions: “I’ve Got a Pen and I’ve Got a Phone”*, CBS DC (Jan. 14, 2014, 1:05 PM), <http://cbsloc.al/1YhuYzX> (emphasis added).

<sup>5</sup> Rebecca Kaplan, *Obama: I Will Use My Pen and Phone to Take on Congress*, CBS NEWS (Jan. 14, 2014, 12:44 PM), <http://cbsn.ws/1PWUdS3>.

<sup>6</sup> *Obama on Executive Actions: “I’ve Got a Pen and I’ve Got a Phone”*, CBS DC (Jan. 14, 2014, 1:05 PM), <http://cbsloc.al/1YhuYzX>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Saturday Night Live: How a Bill Does Not Become a Law* (NBC television broadcast Nov. 22, 2014), [www.nbc.com/saturday-night-live/video/capitol-hill-cold-open/2830152](http://www.nbc.com/saturday-night-live/video/capitol-hill-cold-open/2830152).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

last time.

During the implementation of the Affordable Care Act,<sup>18</sup> President Obama repeatedly turned to this all-too-familiar pattern of *executive action*. (Note that executive action, an umbrella term that includes memoranda and other informal guidance documents from administrative agencies, is far broader than actual executive orders signed by the President.<sup>19</sup>) First, the impact of the Affordable Care Act made certain groups worse off. Second, as a result, Congress was pressured to modify the law to alleviate these negative externalities from the law. However, Democrats feared that Republicans would seize the opportunity to unravel other portions of the law. This halted any possible bipartisan support for legislative amendments. Third, in the face of this gridlock, President Obama turned to executive action to alter the ACA's onerous mandates. Specifically, he delayed and suspended the individual and employer mandates, as well as modified provisions affecting benefits for Congressional employees and coverage in the U.S. territories.

Each of these executive actions—implemented through formal notice-and-comment rulemaking or informal social-media blogging—came as a complete surprise. Each change posed risks to the long-term sustainability of the law. Each change relied on tenuous readings of the statute, and dubious assertions of executive authority to accomplish ends entirely at odds with what Congress designed. Each action was contested in court by states and private parties. However, because the executive actions had the effect of lifting burdens, rather than imposing any injuries, the government vigorously contested that no one had standing to bring suit. As a result, the ultimate legality of these moves was decided not by the courts, but by the President, who desperately acted alone to salvage his signature law.

One of the more disconcerting aspects of the law's implementation, beyond the numerous delays and waivers, has been the cavalier approach by which the government announced these changes. More often than not, the explanation of a modification would come in a social media update on the Department of Health and Human Services (HHS) blog (often on a Friday afternoon). For example, as Ezra Klein and Sarah Kliff observed, “on the Friday following the Fourth of July, [the administration] quietly released a 606-page regulation that delayed requirements for the marketplaces to

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<sup>18</sup> Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A (2012).

<sup>19</sup> Gregory Korte, *Obama Issues “Executive Orders by Another Name”*, USA TODAY (Dec. 17, 2014, 1:16 PM), <http://goo.gl/gBS7QC> (President Obama had “already signed 33% more presidential memoranda in less than six years than Bush did in eight. He’s also issued 45% more than the last Democratic president, Bill Clinton, who assertively used memoranda to signal what kinds of regulations he wanted federal agencies to adopt. Obama is not the first president to use memoranda to accomplish policy aims. But at this point in his presidency, he’s the first to use them more often than executive orders.”).

verify workers' incomes and employment status."<sup>20</sup> One benefits lawyer lamented that this process "is how HHS often breaks controversial regulatory news."<sup>21</sup> It soon became a painful pastime of ferreting through these massive document dumps and attempting to find the actual basis for the rule previously announced in the blog post. And invariably, the policy, as stated in the blog post, doesn't quite match up what is in the rule. This was no longer a government of law, but a government by blog post.<sup>22</sup>

## II. "BUSINESSES CAME TO US"

Although the Affordable Care Act's exchanges launched on October 1, 2013, the crucial date was actually January 1, 2014. On this day, there would be three major milestones. First, the individual mandate would kick in, penalizing people who were uninsured or who had an insurance policy that did not meet the requirements of "minimum essential coverage."<sup>23</sup> Second, for the new year, the ACA's employer mandate required businesses with more than fifty employees to provide their full-time workers with a qualified health insurance plan or alternatively pay a penalty.<sup>24</sup> This mandate included the requirement for employers to provide their workers with cost-free access to contraceptives. Third, policies purchased on the ACA exchanges—subsidized by federal tax credits—would begin.

Congress directed that these three interlocking mechanisms would simultaneously go into effect on January 1, 2014, so that all Americans would benefit from health care reform at once. Or at least that was the plan. After millions of canceled plans, difficulties of signing up online, and opposition from the business community, President Obama would alter each of these mandates in ways Congress never intended.

The first crack in the ACA's armor formed in July 2013, months before HealthCare.gov launched. Since its inception, businesses lobbied the White House to delay or modify the employer mandate, in order to avoid the added cost of covering their employees.<sup>25</sup> Specifically, businesses warned that they would drop employees from full-time to part-time—less than thirty-hours per week—in order to avoid the ACA penalty. Neil

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<sup>20</sup> Ezra Klein & Sarah Kliff, *Obama's Last Campaign: Inside the White House Plan to Sell Obamacare*, WASH. POST (July 17, 2013), <http://wapo.st/1oGgo92>.

<sup>21</sup> R. Pepper Crutcher, Jr., *Union Funds May Find Treasure Buried in HHS Rule Preamble*, AFFORDABLE CARE ACT REV. (Oct. 31, 2013), <http://www.acareview.com/2013/10/union-funds-may-find-treasure-buried-in-hhs-rule-preamble>.

<sup>22</sup> Josh Blackman, *Obamacare and Government by Blog Post*, LIBERTY LAW SITE (Mar. 10, 2014), <https://perma.cc/KP28-FEJR>.

<sup>23</sup> 26 U.S.C. § 5000A (2012).

<sup>24</sup> 26 U.S.C. § 4980H(a)–(c) (2012).

<sup>25</sup> Robb Mandelbaum, *The Employer Mandate Has Been Delayed. Will It Be Rewritten?*, N.Y. TIMES BLOG (July 3, 2013, 5:51 PM), <http://goo.gl/qEOZF7>.

Trautwein, the Vice President of the National Retail Federation explained that if the mandate went into effect, employers would start cutting hours: “If you set a hard 30-hour limit for eligibility, you encourage employers to cut where they can. You’re not going to cut willy-nilly, but potentially you increase your part-time workforce.”<sup>26</sup>

Their rent-seeking worked. President Obama would later explain that “businesses came to us and said, ‘listen, we were supportive of providing health insurance to employees, in fact, we provide health insurance to our employees; we understand you want to get at the bad actors here, but are there ways to provide us some administrative relief?’”<sup>27</sup> And he did just that. On July 2, Mark Manzur, the assistant secretary for tax policy, took to social media to update the ACA’s status.

In a blog post titled *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, the Obama administration nonchalantly suspended the employer mandate.<sup>28</sup> The ACA provides that the employer mandate “shall apply to months beginning after December 31, 2013.” That is, it goes into effect on January 1, 2014. However, Manzur blogged that the government “will provide an additional year before the ACA mandatory employer and insurer reporting requirements begin.”<sup>29</sup>

To justify this “transitional” policy, the blog post cited the “complexity of the requirements and the need for more time to implement them effectively.”<sup>30</sup> Although Manzur’s announcement was framed in terms of relaxing the ACA’s onerous reporting demands—over which the HHS secretary does have significant discretion—the true impact of this delay was to prevent the government from being able to impose penalties on non-compliant employers. The post mentions, almost as a side note, that “[w]e recognize that this transition relief will make it impractical to determine which employers owe shared responsibility payments . . . . Accordingly, we are extending this transition relief to [them].”<sup>31</sup> In other words, because employers were not obligated to report to the government how many uninsured workers they had, the government had no method of assessing the employer mandate’s penalty. With the click of a mouse—without so much as a tweet of advance notice to affected parties—the government announced that the employer mandate was suspended for *all* employers in 2014.

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<sup>26</sup> Sarah Kliff, *The Politics of Delaying Obamacare*, WASH. POST (July 2, 2013), <https://perma.cc/CRU6-7HGT>.

<sup>27</sup> *Interview with President Obama*, N.Y. TIMES (July 27, 2013), <http://goo.gl/K4qZJ7>.

<sup>28</sup> Mark Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, TREAS. NOTES (July 2, 2013), <https://goo.gl/vd0GvQ>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

Shortly after the blog post went viral, the Internal Revenue Service (IRS) released a notice regarding “transition relief,” announcing that the employer mandate’s penalty will not be “assessed for 2014.”<sup>32</sup> Mark Iwry, Deputy Assistant Secretary at Treasury, defended the delay by explaining that the agency has done this a dozen times before, without any Congressional objection: “On a number of prior occasions across administrations, this authority has been used to postpone the application of new legislation when the immediate application would have subjected taxpayers to unreasonable administrative burdens or costs.”<sup>33</sup>

Observers saw different motivations for the change, beyond administrative convenience. Sarah Kliff noted that beyond the “complexity of the [reporting] requirements,” some “observers saw a political motivation as well.”<sup>34</sup> Michigan Law Professor Nicholas Bagley was skeptical about the purported reason for the delay: “Affording transitional relief for a law that was enacted four years ago raised the question of, shouldn’t you have had your ducks in a row when you knew this was coming down the pike?”<sup>35</sup> The business community, which stood to benefit from this largesse, was pleased. “I think this is less about readiness and more about the fact that they’re trying to be flexible in their implementation,” said Rhett Buttle, vice president of the Small Business Majority.<sup>36</sup> “It does seem like an olive branch” to the business community, he said.<sup>37</sup> The businesses can’t wait, but their employees would have to.

### III. “LET’S MAKE A TECHNICAL CHANGE OF THE LAW”

The decision to delay the employer mandate came as a surprise to virtually everyone outside of the White House. The *Washington Post* reported that thirty minutes before the Treasury Department updated its status, the administration poked the Democratic leadership in the Senate and House.<sup>38</sup> They did not like it. This last-minute notice was deemed a slight, because only a week earlier on June 24, Jeanne Lambrew gave them no indication that the mandate would be delayed. The *Post*, quoting an anonymous White House official, attributed the secrecy to GOP opposition

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<sup>32</sup> I.R.S. Notice 2013-45, 2013-31 I.R.B. 116, at 3 (July 9, 2013), <http://goo.gl/71ZfJI>.

<sup>33</sup> Sarah Kliff, *The White House Keeps Changing Obamacare. Is That Legal?*, WASH. POST (Aug. 7, 2013), <https://perma.cc/9BHZ-XJWE>.

<sup>34</sup> Sarah Kliff, *The Politics of Delaying Obamacare*, WASH. POST (July 2, 2013), <https://perma.cc/CRU6-7HGT>.

<sup>35</sup> Sarah Kliff, *The White House Keeps Changing Obamacare. Is That Legal?*, WASH. POST (Aug. 7, 2013), <https://perma.cc/9BHZ-XJWE>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Amy Goldstein & Juliet Eilperin, *HealthCare.gov: How Political Fear Was Pitted Against Technical Needs*, WASH. POST (Nov. 2, 2013), <https://perma.cc/E5FT-JARS>.



to Obamacare: “It’s very hard for a staffer to talk to a member of Congress about a decision that’s not made yet.”<sup>39</sup> This delay was also the first major hint that something was awry with the ACA. Sarah Kliff wrote on *WonkBlog* that the delay of the employer mandate, along with the earlier delay of the launch of the small business insurance marketplaces, “could draw criticism that the administration will not be able to put into effect its signature legislative accomplishment on schedule.”<sup>40</sup>

Reportedly, the White House even kept the Treasury Department out of the loop until the very end. A March 2014 letter by House Oversight Committee Chairman Darrell Issa (R-CA) charged that “the White House Chief of Staff knew about the employer mandate delay prior to the head of the [Treasury] department implementing the program.”<sup>41</sup> Issa noted this approach raised “serious questions about whether the White House directed the delay of the employer mandate for political reasons.”<sup>42</sup> The Californian explained that Mark Mazur could not recall if any lawyers within the Treasury discussed if they had the legal authority to delay the mandate.

The President attempted to justify the delay by faulting the Republicans, whom he deemed unwilling to make a minor change to the law. “In a normal political environment,” Obama explained, “it would have been easier for me to simply call up the speaker and say . . . let’s make a technical change of the law.”<sup>43</sup> In a different time, the President suggested, “[t]hat would be the normal thing that I would prefer to do.” For example, in 1936, President Roosevelt’s implementation of Social Security had to be delayed because the government couldn’t figure out how to create twenty-six million unique numbers for workers.<sup>44</sup> President Lyndon B. Johnson signed Medicare into law on July 30, 1965, and it was scheduled to go into effect on July 1, 1966—a day the *New York Times* dubbed “M-Day.”<sup>45</sup> The enrollment effort successfully enrolled 93% of eligible seniors by 1966, in some cases forest rangers tracked down hermits in the woods.<sup>46</sup> But that wasn’t enough—President Johnson was able to persuade Congress to delay

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<sup>39</sup> *Id.*

<sup>40</sup> Sarah Kliff, *White House Delays Employer Mandate Requirement Until 2015*, WASH. POST (July 2, 2013), <https://perma.cc/3BVW-47QG>.

<sup>41</sup> Jonathan Easley, *Issa Questions Treasury’s Authority to Delay ObamaCare Employer Mandate*, THE HILL (Mar. 20, 2014), <https://perma.cc/2EXC-3S4B>.

<sup>42</sup> *Id.*

<sup>43</sup> George Will, *Obama’s Unconstitutional Steps Worse than Nixon’s*, WASH. POST (Aug. 14, 2013), <https://goo.gl/2CGOXi>.

<sup>44</sup> STEVEN BRILL, *AMERICA’S BITTER PILL: MONEY, POLITICS, BACKROOM DEALS, AND THE FIGHT TO FIX OUR BROKEN HEALTHCARE SYSTEM* 314 (2015).

<sup>45</sup> Sarah Kliff, *When Medicare Launched, Nobody Had Any Clue Whether It Would Work*, WASH. POST (May 17, 2013), <https://perma.cc/AW6A-6QW6>.

<sup>46</sup> *Id.*

the rollout by two months in order to get more people to enroll.<sup>47</sup> In 2013, however, President Obama said we were “not in a normal atmosphere around here when it comes to, quote-unquote, ‘Obamacare.’”<sup>48</sup> But this was not accurate—there in fact was bipartisan support to delay the employer mandate.

On July 17, two weeks after the Treasury Department shared its new posting, the House of Representatives passed the *Authority for Mandate Delay Act*.<sup>49</sup> The two-page bill would have delayed the implementation of the employer mandate until 2015.<sup>50</sup> That is *precisely* what the blog post accomplished, except it had the backing of the legislative branch. It was enacted on a 264-161 vote, with thirty-five Democrats voting yea.

In response to this bill, which would have unequivocally given him the authority to delay the mandate, the President issued a veto threat. The White House said the bill was “unnecessary.”<sup>51</sup> Underlying this veto threat was a concern that Republicans could later add amendments to the bill, which would unravel other provisions of the law. Because of the President’s executive action, the Democratic-controlled Senate—spared the need to take a tough vote—never even considered the bill.

With the employer mandate already delayed until January 2015, lobbying was enhanced to push it back even further. Harvard Professor John McDonough, who advised Senator Ted Kennedy, explained that the delay is “not a freebie.”<sup>52</sup> “Politically, it won’t get easier a year from now [to implement], it will get harder,” he said.<sup>53</sup> “You’ve given the employer community a sense of confidence that maybe they can kill this. If I were an employer, I would smell blood in the water.”<sup>54</sup>

Once again, the rent-seeking worked. Seven months after the initial blog post, the Treasury Department postponed the full implementation of the employer mandate until 2016.<sup>55</sup> But in doing so, the executive branch

<sup>47</sup> BRILL, *supra* note 44, at 315.

<sup>48</sup> Wash. Post Staff, *TRANSCRIPT: President Obama’s August 9, 2013, News Conference at the White House*, WASH. POST (Aug. 9, 2013), <https://perma.cc/9BRB-RS5E>.

<sup>49</sup> Authority for Mandate Delay Act, H.R. 2667, 113th Cong. (2013); Final Vote Results for Roll Call 361, GOVTRACK (July 17, 2013), [www.govtrack.us/congress/votes/113-2013/h361#](http://www.govtrack.us/congress/votes/113-2013/h361#) (last visited Apr. 7, 2016).

<sup>50</sup> To delay the application of the employer health insurance mandate, and for other purposes. Authority for Mandate Delay Act, H.R. 2667, 113th Cong. (2013).

<sup>51</sup> Executive Office of the President, *Statement of Administration Policy* (July 16, 2013), <https://perma.cc/7YZL-T4BA>.

<sup>52</sup> Sarah Kliff, *The Politics of Delaying Obamacare*, WASH. POST (July 2, 2013), <https://perma.cc/CRU6-7HGT>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544, 8574 (Feb. 12, 2014).

did not merely delay the requirement. Instead, it modified the mandate in a fragmented manner, with novel standards that deviated from Congress's design. First, for businesses with 50 to 100 full-time employees, the employer mandate penalty would not be assessed *at all* during 2015. For these companies, the employer mandate would be entirely delayed for two full years. According to the Small Business Administration, there are roughly eight million people (7% of all workers in America) at companies in this range.<sup>56</sup> Second, the mandate would only be partially implemented for businesses with more than 100 employees. In 2015, these businesses would not be subjected to the penalty if they offered health insurance coverage for at least 70% of their employees. Starting in 2016, an employer that offered coverage to 95% of its employees would not be subject to the penalty.

Absolutely none of this—not the bifurcation of employers, not the 70% transitional mandate, not the 95% final threshold—is in the ACA. The President suspended the employer mandate for 2014, partially waived it for 2015, and decided that in 2016 and beyond the mandate will never be fully implemented as Congress designed. The delay of the employer mandate would form the basis of a 2014 lawsuit brought by the United States House of Representatives.<sup>57</sup>

#### IV. “CONGRESS SHOULD LIVE UNDER THE SAME LAWS IT PASSES”

Influential corporations would not be the only beneficiaries of executive-action largess. In September 2009, while the ACA was being drafted, Senator Chuck Grassley (R-IA) proposed an amendment requiring members of Congress and their staff to use the newly-created exchanges. “The more that Congress experiences the laws we pass,” Grassley said, “the better the laws are likely to be.”<sup>58</sup> The veteran fiscal hawk added, “My interest in having Members of Congress participate in the exchange is consistent with my long-held view that Congress should live under the same laws it passes for the rest of the country.”<sup>59</sup> The amendment provided that the federal government could only offer members of Congress and their congressional staff health insurance plans that were “created under” the ACA or “through an Exchange established under” the new law.<sup>60</sup>

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<sup>56</sup> Sarah Kliff, *The White House Is Relaxing the Employer Mandate Again*, WASH. POST (Feb. 10, 2014), <https://perma.cc/LV2C-87FH>.

<sup>57</sup> See *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015).

<sup>58</sup> *Grassley Amendment Makes Congress Obtain Coverage from Health Care Plan Established in Reform Bill*, GRASSLEY.SENATE.GOV (Sept. 30, 2009), <https://perma.cc/P55Z-EHD5>.

<sup>59</sup> *Id.*

<sup>60</sup> Patient Protection and Affordable Care Act, 42 U.S.C. § 18032(d)(3)(D)(i) (2012).

As a result of the amendment, unlike all other federal civil servants, Hill staffers would no longer be eligible for the generous Federal Employees Health Benefits Plan (FEHBP). Under FEHBP, the government pays approximately 75% of an employee's annual premium. This annual tax-free contribution of between \$5,000 and \$12,000 was *far* more generous than the income-adjusted subsidies available on HealthCare.gov. Indeed, many well-compensated congressional employees would be ineligible for any subsidies on the exchange. These high-earning civil servants would be put in the same position as other Americans who had to pay for their own insurance.

In 2009, while the Senate was crafting its health care reform bill, the House of Representatives was working on a parallel track. In contrast with the Grassley amendment, the House bill would have allowed members and their staff to remain on FEHBP, with the full 75% government-sponsored contribution. This provision, which would have maintained the status quo, would not make it into the final law. Due to the election of Senator Scott Brown in January 2010 and the urgent need to enact the Senate bill, the House was forced to accept Grassley's amendment without any debate. Representative Diana DeGette (D-CO), who voted for the ACA, explained, "We had to take the Senate version of the health care bill. This is not anything we spent time talking about here in the House."<sup>61</sup> Another House Democrat told the *New York Times*, "This was a stupid provision that never should have gotten into the law."<sup>62</sup> But it did.

Unsurprisingly, this provision was extremely unpopular on Capitol Hill. In May 2013, Senator Reid acknowledged that there was a "conflict" over how the ACA treats congressional staff.<sup>63</sup> The Senate Majority Leader said "we're trying to work that out" with House Speaker John Boehner.<sup>64</sup> *Politico* reported that during the summer of 2013, Boehner and Reid quietly collaborated to develop a "legislative fix" that would ensure that federal employees would not be disrupted.<sup>65</sup> The duo even personally lobbied President Obama at the White House, while using a cover story so as not to arouse suspicions.<sup>66</sup>

However, as the movement to repeal and replace Obamacare grew during July and August, the House GOP leadership abandoned any efforts

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<sup>61</sup> Robert Pear, *Wrinkle in Health Law Vexes Lawmakers' Aides*, N.Y. TIMES (July 29, 2013), <http://nyti.ms/1PX5PEG>.

<sup>62</sup> *Id.*

<sup>63</sup> Alexander Bolton, *Reid: More Funding Needed to Prevent ObamaCare from Becoming Train Wreck*, THE HILL (May 1, 2013), <https://perma.cc/LW3Y-5LWY>.

<sup>64</sup> *Id.*

<sup>65</sup> John Bresnahan, *Boehner's Fight for Hill Subsidies*, POLITICO (Oct. 1, 2013, 2:08 PM), <http://politi.co/23mlaYN>.

<sup>66</sup> *Id.*

to modify the ACA, short of total repeal. By September, a spokesman for Boehner explained, “We always made it clear that the House would not pass any legislative ‘fix.’”<sup>67</sup> Republicans now viewed this as a wedge issue that could force Democrats to negotiate over the ACA, lest their staff lose their truly-affordable care. The spokesman said that the Speaker “was always clear, however, that any ‘fix’ would be a Democratic ‘fix.’ His ‘fix’ is repealing Obamacare.”<sup>68</sup>

Responding to this gridlock, *Politico* wrote that President Obama became “personally involved in [the] dispute.” Senator Dick Durbin (D-IL) relayed, “The president is aware of it. His people are working on it.”<sup>69</sup> But once again, there was distinct risk that making modifications to the statute could open the door for Republican amendments that would impact other aspects of the law. Like with the employer mandate, the President was not willing to take that chance. A more attractive option, as noted by Senator Barbara Mikulski (D-MD), was for the President to act unilaterally. She explained that Democrats were “looking at what we can do with it administratively.”<sup>70</sup> Obama would do just that, and once again turn to the executive action to resolve a legislative impasse.

September 30 was the eve of the government shutdown. As the barricades on national parks were going up and HealthCare.gov was about to go down, the White House deployed a two-fold strategy. First, the Office of Personnel Management (OPM) announced that members of Congress and their staff would be able to purchase health insurance on the District of Columbia’s *Small Business Health Options Programs*, know as the D.C. SHOP exchange.<sup>71</sup> The ACA authorized these new SHOP exchanges to offer a health insurance marketplace for workers at small businesses with fewer than 50 employees.<sup>72</sup> OPM determined that after a congressional employee enrolled on the D.C. SHOP Exchange, the government could then provide the *same* contribution that was offered under the FEHBP.<sup>73</sup> Thus, there would be no meaningful disruption in benefits for Capitol Hill staffers. However, there is a problem with this approach. The House of Representatives and the Senate employ over 21,000 people—they were not in any sense small businesses.<sup>74</sup> Further, no other employees on the SHOP

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> John Bresnahan, *Obama on Hill’s ACA Mess: I’m on It*, POLITICO (July 31, 2013), <https://perma.cc/L3U8-ZRYT>.

<sup>70</sup> *Id.*

<sup>71</sup> See 78 Fed. Reg. 60,653, 60,653–54 (Oct. 2, 2013).

<sup>72</sup> 42 U.S.C. § 18024(b)(2) (2012); 45 C.F.R. § 155.710(b) (2015).

<sup>73</sup> 5 C.F.R. § 890.501(h) (2015).

<sup>74</sup> NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS ON CONGRESS CH. 5: CONGRESSIONAL STAFF AND OPERATING EXPENSES, BROOKINGS INST. ET AL. (July 11, 2013), <https://perma.cc/ZTX2->

exchange would receive such a generous tax-free benefit.

Second, to address this deficiency, the Centers for Medicare and Medicaid Services (CMS) posted on its blog a new frequently asked question (FAQ)<sup>75</sup>: “How will Members of Congress and Congressional staff access health insurance coverage through an Exchange,” the agency rhetorically asked.<sup>76</sup> The answer: “CMS clarifies that offices of the Members of Congress, as qualified employers, are eligible to participate in a SHOP *regardless of the size.*”<sup>77</sup>

A sole FAQ by itself cannot be the source of legal authority. In a different case, a federal court ruled that the CMS could not rely on an FAQ on their blog (FAQ 33) as the basis to support its modification of the method used for calculating hospital-specific supplemental Medicaid payment limits.<sup>78</sup> The court found that because FAQ 33 was the “sole authority” for the government’s decision, it must be set aside as unlawful.<sup>79</sup>

Because of the SHOP FAQ, each congressional office was treated as a *separate* employer. Rather than viewing the entire Congressional workforce as a small business—which it was certainly not—CMS and OPM chopped up the Capitol into hundreds of distinct offices, each deemed its own small business—which they certainly were not. And even if an office had more than fifty employees, “regardless of the size,” it would still be treated as a *small business*. To paraphrase Justice Scalia’s dissent in *King v. Burwell*, “[w]ords no longer have meaning” if Congress is a bunch of small businesses.<sup>80</sup>

Further, once employees were enrolled on the D.C. SHOP exchange, under the OPM rule, they would be eligible for the full 75% government-provided contribution. Notwithstanding the Grassley Amendment, which expressly sought to put congressional employees on the same footing as Americans on the exchanges, now congressional employees would be in the *exact same* position as they were before the enactment of the ACA.

Senator Ron Johnson (R-WI) would challenge the legality of OPM regulation in 2014. The court dismissed the case because the Senator—who actually benefited from the more generous benefits—was not injured, and thus lacked standing. However, Judge William C. Griesbach was troubled

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HZTA.

<sup>75</sup> Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services, *Members of Congress and Staff Accessing Coverage Through Health Insurance Exchanges (Marketplaces)* (Sept. 30, 2013), <https://perma.cc/2RY5-JY5S>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* (emphasis added).

<sup>78</sup> *Texas Children’s Hosp. v. Burwell*, 76 F. Supp. 3d 224, 238 (D.D.C. 2014).

<sup>79</sup> *Id.*

<sup>80</sup> *King v. Burwell*, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting).

by what he saw as executive overreach.<sup>81</sup> Taking the allegations “as true,”<sup>82</sup> he wrote, the “executive branch has rewritten a key provision of the ACA so as to render it essentially meaningless in order to save members of Congress and their staffs from the consequences of a controversial law that will affect millions of citizens.”<sup>83</sup> Allowing the President to rewrite the law, and not enforce other requirements “would be a violation of Article I of the Constitution, which reposes the lawmaking power in the legislative branch.”<sup>84</sup> Although the scope of the change is minor, Griesbach concluded, “the violation alleged is not a mere technicality.”<sup>85</sup> The Seventh Circuit Court of Appeals affirmed the dismissal of the case on standing grounds, but did not address the underlying constitutional issue.<sup>86</sup>

#### V. “THE PRESIDENT SHOULD HONOR THE COMMITMENT” HE MADE

In October 2013, as Healthcare.gov sputtered along, a bipartisan consensus formed that the millions of people whose policies were canceled deserved relief. Senator Mary Landrieu (D-LA) introduced the *Keeping the Affordable Care Act Promise Act*.<sup>87</sup> The bill—whose title was a direct rebuke to the President’s broken promise<sup>88</sup>—would have grandfathered all active plans that were valid on December 31, 2013. Landrieu explained on the Senate floor, “When we passed the Affordable Care Act, we did so with the intention that if you liked your health plan, you could keep it. . . . A promise was made and this legislation will ensure that this promise is kept.”<sup>89</sup> Under her proposal, the individual mandate—which required that millions of Americans purchase new, more comprehensive plans—would be temporarily suspended. The bill was supported by moderate Democrat Joe Manchin of West Virginia and Republicans Susan Collins from Maine and Lisa Murkowski of Alaska.<sup>90</sup>

Senator Landrieu’s bill posed two risks for the Obama administration. First, delaying the mandate could undermine the stability of the health care

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<sup>81</sup> Johnson v. U.S. Off. of Pers. Mgmt., 1:14-CV-009 (E.D. Wis. 2014), <http://goo.gl/L7N518>.

<sup>82</sup> *Id.* at 18.

<sup>83</sup> *Id.* at 18–19.

<sup>84</sup> *Id.* at 19.

<sup>85</sup> *Id.*

<sup>86</sup> Johnson v. U.S. Off. of Pers. Mgmt., 783 F.3d 655, 669 (7th Cir. 2015).

<sup>87</sup> Keeping the Affordable Care Act Promise Act, S. 1642, 113th Cong. (2013).

<sup>88</sup> Louis Jacobson, *Barack Obama Says That What He’d Said Was You Could Keep Your Plan “If It Hasn’t Changed Since the Law Passed”*, POLITIFACT (Nov. 6, 2013), <https://perma.cc/8WDK-RUBE>.

<sup>89</sup> Ezra Klein, *Obamacare Is in Much More Trouble than It Was One Week Ago*, WASH. POST (Nov. 13, 2013), <http://wapo.st/1qxmeLC>.

<sup>90</sup> Jackie Calmes & Jonathan Weisman, *Despite Fumbles, Obama Defends Health Care Law*, N.Y. TIMES (Nov. 6, 2013), <http://nyti.ms/1TEJtP3>.

exchanges. If healthy people—no longer subject to the mandate’s penalty—failed to purchase comprehensive health insurance, the exchanges would be skewed by older, sicker patients, driving costs up. The American Academy of Actuaries warned that “delaying the implementation of the ACA’s individual mandate or extending the enrollment period for obtaining coverage could have negative consequences for health insurance coverage and costs.”<sup>91</sup> This could result in the dreaded adverse selection death spiral that the drafters of the ACA sought to avoid.<sup>92</sup>

*The New York Times* reported that Landrieu’s “legislation and a similar bill written by a Republican House member set off alarms among [White House] policy aides, who feared that letting consumers keep old plans could further undermine the health care law.”<sup>93</sup> In July, the House of Representatives passed the *Fairness for American Families Act*, which would have delayed the individual mandate for a year.<sup>94</sup> President Obama threatened to veto it, claiming it “would raise health insurance premiums and increase the number of uninsured Americans.”<sup>95</sup> Representative Chris Van Hollen (D-MD) added that if there was a delay of the individual mandate, “premiums would jump much higher,” which “would sabotage the entire purpose of the exchange.”<sup>96</sup>

Second, amending the law to delay the individual mandate created the risk that Republicans could attach amendments that would repeal other aspects of the law. Ezra Klein observed that “[o]nce Congress reopens Obamacare, no one knows where they stop. Landrieu’s bill, for instance, will also have to pass the House—and they’re going to want to attach provisions to it that Democrats won’t much like.”<sup>97</sup> Similar fears prevented the Democratic leadership from supporting legislative fixes for the the employer mandate and for congressional employees’ health care.

As a result, pressure mounted on the President, once again, to take executive action to deal with the canceled plans. During Kathleen Sebelius’s appearance on *The Daily Show*, host Jon Stewart pointed out that businesses already received an administrative reprieve from the employer

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<sup>91</sup> Jonathan Easley, *Actuaries: ACA Delays Would Cause Chaos*, THE HILL (Nov. 6, 2013, 4:31 PM), <http://bit.ly/1qwKkMJ>.

<sup>92</sup> See *Nat’l Fed’n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2614 (2012) (Ginsburg, J., dissenting).

<sup>93</sup> Sheryl Gay Stolberg & Michael D. Shear, *Inside the Race to Rescue a Health Care Site, and Obama*, N.Y. TIMES (Nov. 30, 2013), <http://nyti.ms/1MERH2E>.

<sup>94</sup> Fairness for American Families Act, H.R. 2668, 113th Cong. (2013).

<sup>95</sup> Executive Office of the President, Statement of Administration Policy (July 16, 2013), <https://perma.cc/7YZL-T4BA>.

<sup>96</sup> Ezra Klein, *What Republicans Don’t Understand About the Politics of Obamacare*, WASH. POST (Sept. 24, 2013), <http://wapo.st/1S0lrM7>.

<sup>97</sup> Ezra Klein, *Obamacare Is in Much More Trouble than It Was One Week Ago*, WASH. POST (Nov. 13, 2013), <http://wapo.st/1qxmeLC>.



mandate, but individuals with canceled policies were out of luck. “But would you say that’s a legitimate criticism that an individual doesn’t get to delay it, but a business does? Is that not legitimate?”<sup>98</sup> Sebelius could only muster a reply that individuals are not actually required to buy insurance. But if they go uninsured, she added, “[t]hey pay a fine at the end of the year . . . .”<sup>99</sup> (A year after the Supreme Court upheld the individual mandate as a *tax*, and Sebelius still referred to it as a *fine*.)

Even the 42nd President joined the fray, urging the 44th President to take action. President Clinton said that people should be allowed to keep their policies: “I personally believe, even if it takes a change in the law, that the president should honor the commitment the federal government made to those people and let them keep what they’ve got.”<sup>100</sup> Obama had once called Clinton the “Secretary of Explaining Things,” and the former President understood the risk of canceled policies all too well.<sup>101</sup> It was Harry and Louise’s fear—from the famous advertising campaign—that they would have to change their coverage that doomed *HillaryCare* in 1994.<sup>102</sup> House Speaker John Boehner relished in Clinton’s critique: “These comments signify a growing recognition that Americans were misled when they were promised that they could keep their coverage under President Obama’s health care law. The entire health care law is a train wreck that needs to go.”<sup>103</sup>

Hillary Clinton said nothing about the canceled policies.<sup>104</sup> In contrast with her husband’s loquaciousness, the former Secretary of State’s silence was deafening. On the campaign trail six years earlier, candidate Clinton’s health care plan featured an individual mandate, which would have also resulted in the cancellation of inadequate plans. To assuage the fears that derailed her healthcare reform two decades earlier, during a 2007 event in Iowa, Clinton made an all-too-familiar promise: “You can keep the doctors you know and trust. You keep the insurance you have. If you have private

<sup>98</sup> Lucy McCalmont, *Sebelius Gets the Stewart Treatment*, POLITICO (Oct. 8, 2013), <http://politi.co/23mraRn>.

<sup>99</sup> *Id.*

<sup>100</sup> Jonathan Easley, *Clinton: Let People Keep Coverage*, THE HILL (Nov. 12, 2013 10:06 AM), <http://bit.ly/1ULC4i4>.

<sup>101</sup> Jonathan Cohn, *Bill Clinton Is Wrong. This Is How Obamacare Works*, NEW REPUBLIC (Nov. 12, 2013), <https://perma.cc/BTZ3-VT3U>.

<sup>102</sup> PAUL RUTHERFORD, ENDLESS PROPAGANDA: THE ADVERTISING OF PUBLIC GOODS 247 (2000); clintonlibrary42, “*Harry and Louise*” *Health Care Ads (Clinton Administration)*, YOUTUBE (Aug. 26, 2014), [bit.ly/1S7JCL6](http://bit.ly/1S7JCL6).

<sup>103</sup> Juliet Eilperin, *Bill Clinton Identifies 3 Big Problems with the Obamacare Rollout*, WASH. POST (Nov. 12, 2013, 2:56 PM), <https://perma.cc/JMD6-7SC4>.

<sup>104</sup> Josh Gerstein, *Obama’s Critic-in-Chief Strikes Again*, POLITICO (Nov. 12, 2013), <http://politi.co/1TEKZkf>.

insurance you like, nothing changes—you can keep that insurance.”<sup>105</sup>

Ironically, during the 2008 campaign, candidate Obama attacked the individual mandate. He likened Clinton’s plan to “solv[ing] homelessness by mandating that everyone buy a house.”<sup>106</sup> However, once Obama secured the nomination, he copied Clinton’s plan almost in its entirety—including the individual mandate. Neera Tanden, who had been Clinton’s adviser joined Obama’s policy staff. She recalled that when she asked the first term Senator what he thought of a mandate, Obama replied, “I kind of think Hillary was right.”<sup>107</sup> In the race for the White House in 2016, Clinton embraced the Affordable Care Act as her own. During a February 2016 debate in Milwaukee, Clinton boasted that “You know, before it was called Obamacare, it was called Hillarycare.”<sup>108</sup>

#### VI. “SABOTAGE THE HEALTH CARE LAW”

On November 5, President Obama and Vice President Biden met with sixteen Democratic Senators at the White House to discuss the dueling crises of HealthCare.gov and the canceled policies. At the confab, Senator Landrieu, and other vulnerable democrats who were up for re-election, dubbed the “2014ers,” criticized the President for nearly two hours in the Roosevelt Room. Reportedly, Biden was willing to serve as the scapegoat. “Just attack us,” he said.<sup>109</sup> “Blame us.”<sup>110</sup> *Politico* wrote that the vulnerable Senators were given a “green light to bash the White House and call for certain legislative fixes. But they’ve been urged by senior administration officials not to insist on delaying” the individual mandate.<sup>111</sup> According to a readout from the meeting, Obama “emphasized that he shared the Senators’ commitment to ensuring that Americans who want to enroll in health insurance through the Marketplaces are able to do so in time for insurance coverage to start as early as January 1st.”<sup>112</sup> But he stopped short of endorsing a delay.

<sup>105</sup> Rebecca Berg, *Hillary Clinton in 2007: “If You Have a Plan You Like, You Keep It”*, WASH. EXAMINER (Nov. 14, 2013, 12:00 AM), <http://washex.am/22gb4pV>.

<sup>106</sup> David Ono, *Vote 08: Barack Obama Wins Illinois*, ABC 7 (Feb. 5, 2008, 12:00 AM), <https://perma.cc/47ZU-HYZD>.

<sup>107</sup> Scott Gottlieb, *The Clintonian Roots of Obamacare*, 25 NAT’L AFF. 51, 62 (2015), <https://perma.cc/TZ5B-J7SH>.

<sup>108</sup> GOP War Room, *Clinton: Before It Was Called “Obamacare,” It Was Called “Hillarycare”*, YOUTUBE (Mar. 4, 2016), <https://www.youtube.com/watch?v=z2j5WmLAYRs>.

<sup>109</sup> Sheryl Gay Stolberg & Michael D. Shear, *Inside the Race to Rescue a Health Care Site, and Obama*, N.Y. TIMES (Nov. 30, 2013), <http://nyti.ms/1MERH2E>.

<sup>110</sup> *Id.*

<sup>111</sup> Manu Raju & Seung Min Kim, *Dems Give W.H. Tight ACA Deadline*, POLITICO (Nov. 7, 2013, 6:19 PM), <https://perma.cc/ER2D-SKB3>.

<sup>112</sup> Press Release, The White House, Readout of the President’s Meeting with Senators on the Affordable Care Act (Nov. 6, 2013), <https://perma.cc/EYZ8-4DTY>.

As the pressure mounted, in the House of Representatives both Speaker Boehner and Minority Leader Pelosi agreed that Congress should take legislative action to deal with the canceled plans.<sup>113</sup> “I’m highly skeptical they can do this administratively,”<sup>114</sup> Boehner said, doubting that executive action could fix the situation.<sup>115</sup> Pelosi said “I want to do both”—a statute and administrative fix, for a “belt and suspenders” approach.<sup>116</sup> On November 15, the House of Representatives passed the *Keep Your Health Plan Act of 2013* on a bipartisan vote, 261–157.<sup>117</sup> The one-page bill—similar to Senator Landrieu’s proposal—would have allowed any plan that was valid in 2013 to be grandfathered into 2014.<sup>118</sup>

Thirty-nine Democrats crossed the aisle to vote aye. A senior adviser to Representative Pelosi said the defectors were trying to “insulate” themselves from the unpopular cancellations.<sup>119</sup> *The Washington Post* observed that the “vote was a striking show of Democratic disunity and the largest Democratic defection on a major piece of legislation this year.”<sup>120</sup> Fearing that the bill could pass the Senate—with the vulnerable 2014ers already backing a similar proposal from Senator Landrieu—the President issued a veto threat to the House bill.<sup>121</sup> President Obama claimed that it would “allow[] insurers to continue to sell” inadequate plans, and would “sabotage the health care law.”<sup>122</sup> But it was not the veto threat that prevented the Senate from taking action on the bill—it was the President’s newly announced executive action.

#### VII. OBAMACARE IS “NOT THE REASON WHY INSURERS HAVE TO CANCEL YOUR PLAN”

On November 14—one hour before the House of Representatives voted on the *Keep Your Health Plan Act*—the President announced what would become known as the *administrative fix*.<sup>123</sup> In a speech in the press

<sup>113</sup> Aaron Blake & Paul Kane, *Boehner, Pelosi Say Legislative Fix Needed for Obamacare*, WASH. POST (Nov. 14, 2013), <https://perma.cc/9VZA-UHZP>.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Keep Your Health Plan Act of 2013*, H.R. 3350, 113th Cong. (2013); Final Vote Results for Roll Call 587, GOVTRACK (Nov. 15, 2013), <https://www.govtrack.us/congress/votes/113-2013/h587>.

<sup>118</sup> H.R. 3350, 113th Cong. (2013).

<sup>119</sup> Sean Sullivan, *Pelosi Downplays Obamacare Defections; Clyburn Says Dems “Insulating” Themselves*, WASH. POST (Nov. 17, 2013), <https://perma.cc/CM4P-XMTW>.

<sup>120</sup> *Id.*

<sup>121</sup> Justin Sink, *White House Threatens Veto of Upton Bill*, THE HILL (Nov. 14, 2013, 9:21 PM), <http://goo.gl/wbxTmb>.

<sup>122</sup> Executive Office of the President, *Statement of Administration Policy* (Nov. 14, 2013), <http://goo.gl/NA0dz7>.

<sup>123</sup> Press Release, The White House, Statement by the President on the Affordable Care Act

room, Obama recognized the difficulties posed by the canceled policies. “I completely get how upsetting this can be for a lot of Americans,” he said, “particularly after assurances they heard from me that if they had a plan that they liked, they could keep it.”<sup>124</sup> In response, the President “offer[ed] an idea that will help.”<sup>125</sup> HHS would “extend” the ACA’s “grandfather clause” to “people whose plans have changed since the law took effect.”<sup>126</sup> The decree permitted “insurers [to] extend current plans that would otherwise be canceled into 2014, and [allowed] Americans whose plans have been canceled [to] choose to re-enroll in the same kind of plan.”<sup>127</sup> It would be up to state insurance commissioners and the individual insurance companies to decide whether to continue to sell policies that did not comply with the ACA’s mandate. However, neither would be required to embrace the fix.

Ironically, this executive action mirrored the *Keep Your Health Plan Act*—the same bill that Obama threatened to veto earlier that day because it would “sabotage” the ACA. Now, Obama was unilaterally implementing virtually the same reform, without the benefit of congressional support. Even more ironically, *The Wall Street Journal* observed, “Mr. Obama is doing through executive fiat what Republicans shut down the government to get him to do.”<sup>128</sup> One of the eleventh-hour attempts to avert a shutdown was a one-year delay of the individual mandate. President Obama refused to negotiate on this point—or any other for that matter—warning that such a delay would undermine the law. Yet, not even a month later, he did exactly that.

Shortly after the announcement, HHS memorialized the new policy in a letter, stating that non-compliant health plans “will not be considered to be out of compliance” in certain circumstances.<sup>129</sup> In other words, the very plans that the law rendered invalid because they did not provide “minimum essential coverage” would now be re-grandfathered. The administrative fix waived the “minimum essential coverage” rule for millions; people who renewed old, thrifty plans were exempted from the mandate and penalty.

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(Nov. 14, 2013, 12:01 PM), <https://perma.cc/2YYC-LP2U>.

<sup>124</sup> *Id.*; Politifact selected this assurance as 2013’s “Lie of the Year.” Angie D. Holan, *Lie of the Year: “If You Like Your Health Care Plan, You Can Keep It”*, POLITIFACT (Dec. 12, 2013, 4:44 PM), <http://goo.gl/wVIOP4>.

<sup>125</sup> Press Release, The White House, Statement by the President on the Affordable Care Act (Nov. 14, 2013, 12:01 PM), <https://perma.cc/2YYC-LP2U>.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Obama Repeals ObamaCare*, WALL ST. J. (Dec. 22, 2013, 5:26 PM), <http://on.wsj.com/1RHiX6h>.

<sup>129</sup> Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Ctrs. for Medicare & Medicaid Servs., Dep’t of Health & Hum. Servs., to State Ins. Comm’rs, at 1 (Nov. 14, 2013), <https://goo.gl/Ws05A4> [hereinafter Cohen Letter].

After the President finished answering questions from the press, his Chief of Staff Denis McDonough met with the fifty-five members of the Democratic caucus.<sup>130</sup> *The Washington Post* reported that White House officials “tried to calm the group and pleaded for time to try to repair the damage without any legislative interference, pledging to fix the federal Web site.”<sup>131</sup> Afterwards, McDonough and his staff crossed the Hill to meet with 200 House democrats. In total, the urgent meetings ran nearly four hours. Ezra Klein recognized that the executive action “makes it easier for the White House to stop congressional Democrats from signing onto something like Landrieu’s” bill.<sup>132</sup>

The announcement of the administrative fix took the insurance industry by total surprise, once again. They were not prepared for the sudden “about-face” in light of the President’s previous opposition to a delay.<sup>133</sup> Even worse, President Obama could now blame the insurance companies, and not the law he implemented, for the cancellations. “[W]hat we want to do is to be able to say to these folks,” Obama said, “the Affordable Care Act is not going to be the reason why insurers have to cancel your plan.”<sup>134</sup> As Sarah Kliff observed, the President “described this policy decision as one allowing the White House to shift the blame for cancellations from the White House to the health plans.”<sup>135</sup> In other words, it will be the insurers’ fault if they don’t re-grandfather the plan canceled because of Obamacare.

The insurance companies were “furious” at the fix.<sup>136</sup> Karen Ignagni, president of America’s Health Insurance Plans, charged that the cancellations were a direct result of the ACA. “The only reason consumers are getting notices about their current coverage changing,” she said, “is because the ACA requires all policies to cover a broad range of benefits that go beyond what many people choose to purchase today.”<sup>137</sup> The law was working exactly as his senior adviser Jeanne Lambrew and others in the Obama administration had designed. But now that people were being harmed by these decisions, the White House was improvising.

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<sup>130</sup> Paul Kane & Jackie Kucinich, *Health-Care Law’s Problems Test Loyalty of Democrats in Congress*, WASH. POST (Nov. 14, 2013), <https://perma.cc/7MXT-2DEM>.

<sup>131</sup> *Id.*

<sup>132</sup> Ezra Klein, *Everything You Need to Know About the Plans to “Fix” Obamacare*, WASH. POST (Nov. 14, 2013), <http://wapo.st/1S6a1JJ>.

<sup>133</sup> Sheryl Gay Stolberg & Michael D. Shear, *Inside the Race to Rescue a Health Care Site, and Obama*, N.Y. TIMES (Nov. 30, 2013), <http://nyti.ms/1MERH2E>.

<sup>134</sup> Press Release, The White House, Statement by the President on the Affordable Care Act (Nov. 14, 2013, 12:01 PM), <http://1.usa.gov/25O3YNZ>.

<sup>135</sup> Sarah Kliff, *Insurers Are Furious About the White House’s New Obamacare Plan*, WASH. POST (Nov. 14, 2013), <http://wapo.st/1op24Bq>.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

Ignagni feared that “changing the rules after health plans have already met the requirements of the law could destabilize the market and result in higher premiums for consumers.”<sup>138</sup> She warned the administration that “additional steps must be taken to stabilize the marketplace and mitigate the adverse impact on consumers.”<sup>139</sup> After the announcement, an emergency meeting was convened between the President and health care executives to address what *The Washington Post* referred to as the “level of anxiety within the insurance industry about the administration’s policy fix.”<sup>140</sup> Robert Laszewski, an insurance industry consultant, wrote to his clients that day, “This puts the insurance companies who have successfully complied with the law, in a hell of a mess.”<sup>141</sup>

Also taken by surprise were the state insurance commissioners, who were now responsible for deciding whether to allow the noncompliant plans to be sold in their states.<sup>142</sup> Washington state insurance commissioner Mike Kreidler—who was an ACA supporter—immediately came out in opposition to the fix: “We will not be allowing insurance companies to extend their policies,” he said.<sup>143</sup> “I believe this is in the best interest of the health insurance market in Washington.”<sup>144</sup> Kreidler explained that he found out about the fix while he was at the gym that morning. He was surprised that the President pursued executive action, rather than a legislative amendment. “What I didn’t expect or anticipate,” he said, “was the fact the president would make this announcement” without any advance warning.<sup>145</sup>

After the President’s announcement, Kreidler recalled, an email was sent out with “big exclamation points” scheduling an “emergency meeting of insurance commissioners.”<sup>146</sup> National Association of Insurance Commissioners (NAIC) president Jim Donelon told *The Washington Post*, “It only dropped in our laps yesterday morning.”<sup>147</sup> A statement from NAIC said the fix “threatens to undermine the new market, and may lead to higher

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Sarah Kliff, *How States Are Deciding Whether to Accept Obama’s Cancellation “Fix”*, WASH. POST (Nov. 15, 2013), <http://wapo.st/1S6aFHc>.

<sup>141</sup> Sarah Kliff, *The White House’s Obamacare Fix Is About to Create a Big Mess*, WASH. POST (Nov. 14, 2013), <http://wapo.st/1qxxqYR>.

<sup>142</sup> Cohen Letter, *supra* note 130, at 1.

<sup>143</sup> Sarah Kliff, *The Backlash to the Obamacare Fix Has Already Started*, WASH. POST (Nov. 14, 2013), <http://wapo.st/1ShboPJ>.

<sup>144</sup> *Id.*

<sup>145</sup> Sarah Kliff, *Wash. Insurance Regulator Supports Obamacare—and Rejected Obama’s “Fix.” Here’s Why.*, WASH. POST (Nov. 16, 2013), <http://wapo.st/1qxyFqY>.

<sup>146</sup> *Id.*

<sup>147</sup> Sarah Kliff, *Obama’s Meeting with Insurance Regulators Is Going to Be a Bit Awkward*, WASH. POST (Nov. 20, 2013), <http://wapo.st/1V0oqli>.

premiums and market disruptions in 2014 and beyond.”<sup>148</sup> Kansas Insurance Commissioner Sandy Praeger, a rare ACA supporter in a red state, lamented, “It’s just a big mess right now.”<sup>149</sup> She added, “I don’t know what to tell people.”

William P. White, the District of Columbia’s insurance commissioner rejected the administrative fix.<sup>150</sup> “The action today undercuts the purpose of the exchanges,” White said, “by creating exceptions that make it more difficult for them to operate.”<sup>151</sup> The next day, D.C. Mayor Vincent Gray fired White, stating that he was not authorized to criticize the President’s announcement. Council member Vincent Orange, who oversaw the District’s insurance department, explained, “[Y]ou can’t have the commissioner out there taking on the president, and the mayor being on a different page.”<sup>152</sup>

The delay of the individual mandate did not go through what is known as notice-and-comment rulemaking. This process affords the public with a thirty-day opportunity to comment on a regulation before it is published—and the agency is supposed to reply to objections. HHS explained that it had “good cause” to forego rulemaking, explaining that “[t]here have been unforeseen barriers to enrollment on the exchanges.”<sup>153</sup> Michael Greve—who helped launch the legal challenge in *King v. Burwell*<sup>154</sup>—quipped, “You don’t say. . . . [T]he ‘unforeseen barriers’ are principally a result of HHS’s own fantastic screw-up.”<sup>155</sup>

### VIII. “OBAMACARE ITSELF IS THE HARDSHIP”

Even with the November administrative fix in place, many canceled plans would remain canceled. Half of the states rejected the administrative fix, and even in those states that embraced it, many insurers refused to reissue certain canceled plans. Those affected customers would now be forced to purchase new policies on the exchanges. There was a growing

<sup>148</sup> Aaron C. Davis, *D.C. Insurance Commissioner Fired a Day After Questioning Obamacare Fix*, WASH. POST (Nov. 16, 2013), <http://wapo.st/1qwR0nH>.

<sup>149</sup> Juliet Eilperin & Amy Goldstein, *White House Relying More on Insurance Carriers to Help Fix HealthCare.gov*, WASH. POST (Nov. 9, 2013), <http://wapo.st/1RTIV1M>.

<sup>150</sup> Mike DeBonis, *D.C. Insurance Chief Is Undecided on Obamacare Exemptions*, WASH. POST (Nov. 14, 2013), <http://wapo.st/1V0p1K7>.

<sup>151</sup> Aaron C. Davis, *D.C. Insurance Commissioner Fired a Day After Questioning Obamacare Fix*, WASH. POST (Nov. 16, 2013), <http://wapo.st/1qwR0nH>.

<sup>152</sup> Aaron C. Davis, *Fired D.C. Insurance Commissioner Tried to Apologize for Criticizing Obamacare Fix*, WASH. POST (Nov. 18, 2013), <https://goo.gl/Ar7Nzb>.

<sup>153</sup> Michael S. Greve, *Obamacare’s Unforeseen Barriers*, LIBRARY OF LAW AND LIBERTY (Dec. 16, 2013), <https://perma.cc/R8Q6-5XE9>.

<sup>154</sup> *King v. Burwell*, 135 S. Ct. 2480 (2015).

<sup>155</sup> Michael S. Greve, *Obamacare’s Unforeseen Barriers*, LIBRARY OF LAW AND LIBERTY (Dec. 16, 2013), <https://perma.cc/R8Q6-5XE9>.

concern that it would be unfair to penalize people whose policies were canceled by the ACA and who were required to buy more expensive insurance or could not sign up on HealthCare.gov.

On December 19—with less than two weeks before the individual mandate would go into effect—a group of six vulnerable Senate Democrats wrote to Secretary Sebelius.<sup>156</sup> They requested “explicit clarity” on whether those who had canceled plans but could not buy new policies would be exempted from the mandate and penalty.<sup>157</sup> Senator Joe Manchin of West Virginia, one of the signatories of the letter, worried, “If it’s so much more expensive than what we anticipated, and if the coverage is not as good as what we’ve had, you’ve got a complete meltdown at that time.”<sup>158</sup> The law, he said, “falls of its own weight, if basically the cost becomes more than we can absorb.”<sup>159</sup>

The very next day, Secretary Sebelius wrote back to the sextet, acknowledging that “too many [consumers] have found [that] their policies bec[a]me unaffordable.”<sup>160</sup> In “half the states” that accepted the administrative fix, Sebelius wrote, the number of people with “canceled plans who do not have quality, affordable coverage for 2014 is clearly shrinking.”<sup>161</sup> Nonetheless, she noted, “despite all these efforts, there still may be a small number of consumers who are not able to renew their existing plans and are having difficulty finding an acceptable replacement in the Marketplace.”<sup>162</sup> Sebelius offered a “clarification” of the law.<sup>163</sup> “Those with canceled plans who might be having difficulty paying” for a compliant plan should “qualify for [a] temporary hardship exemption,” thereby excusing them “from the individual responsibility requirement.”<sup>164</sup> Yuval Levin, a conservative commentator, referred to the letter from the Senators as “bizarre kabuki theater.”<sup>165</sup> He quipped, “If you think a regulatory change announced Thursday was made in response to a letter

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<sup>156</sup> *Obama Repeals ObamaCare*, WALL ST. J. (Dec. 22, 2013, 5:26 PM), <http://on.wsj.com/1RHix6h>.

<sup>157</sup> Letter from Mark R. Warner, U.S. Sen., et al., to Kathleen Sebelius, Sec’y, Dep’t of Health & Hum. Servs. (Dec. 18, 2013), <http://goo.gl/JZdbNE>.

<sup>158</sup> Aaron Blake, *Manchin: Obamacare Could Suffer “Complete Meltdown”*, WASH. POST (Dec. 22, 2013), <http://wapo.st/1ULJtOy>.

<sup>159</sup> Susan Cornwell, *Democratic Senator Says Obamacare Could Have “Meltdown,” Hurt Party*, REUTERS (Dec. 22, 2013), <http://goo.gl/7USvNs>.

<sup>160</sup> Letter from Kathleen Sebelius, Sec’y, Dep’t of Health & Hum. Servs., to Mark R. Warner, U.S. Sen., at 1 (Dec. 19, 2013), <https://perma.cc/QY67-BW3H>.

<sup>161</sup> *Id.* at 2.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Yuval Levin, *Pounding on the Panic Button*, NAT’L REV. (Dec. 20, 2013), <https://perma.cc/57K7-EHTU>.



sent Wednesday, I've got a bridge over the East River to sell you."<sup>166</sup>

In a memorandum issued the same day, HHS explained that anyone whose policy “will not be renewed,” or whose new plan is “more expensive than” the canceled plan, “will be eligible for a hardship exemption.”<sup>167</sup> These consumers were, in effect, excused from the individual mandate on a showing that their old policy was canceled or that a new policy was more expensive. This would be true in virtually every single case—this was especially true because there was no verification process in place to double-check these claims.

In her brief letter, Sebelius disrupted the intricate compromises the Obama administration reached years earlier to ensure that people would be required to purchase comprehensive plans. Stephen Brill observed that “the hard line on grandfathering that Lambrew and the other Obama people had taken had now completely backfired.”<sup>168</sup> Further, the hardship exemption was in no way based on financial need—a person only needed to show that their plan was canceled. Ezra Klein admitted that “this puts the administration on some very difficult-to-defend ground.”<sup>169</sup> Those who had their policies canceled—regardless of their income—are exempted; but other uninsured people are still subject to the penalty.

The legal basis for the hardship fix was sketched out by Professors Nicholas Bagley and Austin Frakt two months earlier, in an article aptly titled *Saving Obamacare Without Congress*.<sup>170</sup> First, the Professors explained that the law allows for a “hardship exemption” for anyone who has “suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.”<sup>171</sup> Second, Secretary Sebelius can “grant a certification” for particular individuals attesting that “there is no affordable qualified health plan available through the Exchange.”<sup>172</sup> As a result, if these two provisions are put together, the scholars explained, “it could be a “hardship” if there is “no affordable qualified health plan available through the Exchange.”<sup>173</sup>

<sup>166</sup> *Id.*

<sup>167</sup> *Options Available for Consumers with Cancelled Policies*, CTR. FOR CONSUMER INFO. & INS. OVERSIGHT, CTRS. FOR MEDICARE & MEDICAID SERVS., DEP'T OF HEALTH & HUM. SERVS. (Dec. 19, 2013), <https://perma.cc/ZCQ3-YG9H>.

<sup>168</sup> BRILL, *supra* note 44.

<sup>169</sup> Ezra Klein, *The Individual Mandate No Longer Applies to People Whose Plans Were Canceled*, WASH. POST (Dec. 19, 2013), <http://wapo.st/1MWSi5k>.

<sup>170</sup> Nicholas Bagley & Austin Frakt, *Saving Obamacare Without Congress*, BLOOMBERGVIEW (Oct. 21, 2013), <https://perma.cc/GYB8-N55G>.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

But there is an ironic quality to this reasoning. Congress created several categories of people who would be exempted from the ACA's mandate: "individuals who cannot afford coverage," "taxpayers with incomes below filing threshold," "member[s] of Indian tribes," and anyone who "suffered a hardship with respect to the capability to obtain coverage under a qualified plan."<sup>174</sup> Congress set a strict threshold for exemptions from the penalty due to inability to pay: those for whom the annual cost of coverage exceeds eight percent of their household income.<sup>175</sup> These are individuals with extremely low incomes.

HHS's blanket policy of exempting *anyone* whose insurance was "more expensive" than before, irrespective of annual income, is impossible to reconcile with the congressional scheme.<sup>176</sup> This hardship "exemption" swallows the rule. Ezra Klein aptly summarized the change: "in other words, Obamacare itself is the hardship."<sup>177</sup> Law Professor Seth Chandler joked, "Surely, however, the existence of the ACA itself can not be the human-caused event creating the hardship."<sup>178</sup> Through this administrative-law shell game, the executive swept away Congress's exemption design. *The Wall Street Journal* editorialized, "A tornado destroys the neighborhood or ObamaCare blows up the individual insurance market, what's the difference?"<sup>179</sup>

Once again the insurance industry was caught off guard by this distortion to the health care markets. Karen Ignani said, "This latest rule change could cause significant instability in the marketplace and lead to further confusion and disruption for consumers."<sup>180</sup> Analyst Avik Roy explained that the "Insurers are at their wits' end, trying to make sense of what to do next."<sup>181</sup> Jonathan Gruber explained that this delay is "by itself not a huge problem," however he added, "[m]ore widespread cracks in the mandate could start to cause enormous problems for insurers."<sup>182</sup> In March

<sup>174</sup> 26 U.S.C. § 5000A(e)(1)–(5) (2012).

<sup>175</sup> *Id.* § 5000A(e)(1)(A) (2012).

<sup>176</sup> *Options Available for Consumers with Cancelled Policies*, CTR. FOR CONSUMER INFO. & INS. OVERSIGHT, CTRS. FOR MEDICARE & MEDICAID SERVS., DEP'T OF HEALTH & HUM. SERVS. (Dec. 19, 2013), <https://perma.cc/ZCQ3-YG9H>.

<sup>177</sup> Ezra Klein, *The Individual Mandate No Longer Applies to People Whose Plans Were Canceled*, WASH. POST (Dec. 19, 2013), <http://wapo.st/1MWSi5k>.

<sup>178</sup> Seth Chandler, *Obama Administration Shocking Decision to Drop Individual Mandate—But Only for Some*, ACADEATHSPIRAL.ORG (Dec. 19, 2013), <https://perma.cc/A56Q-3F58>.

<sup>179</sup> *Obama Repeals ObamaCare*, WALL ST. J. (Dec. 22, 2013, 5:26 PM), <http://on.wsj.com/1RHIX6h>.

<sup>180</sup> Jennifer Haberkorn & Carrie Budoff Brown, *White House Broadens Obamacare Exemptions*, POLITICO (Dec. 20, 2013), <http://politi.co/1oGUh2f>.

<sup>181</sup> Avik Roy, *Utter Chaos: White House Exempts Millions from Obamacare's Insurance Mandate, "Unaffordable" Exchanges*, FORBES (Dec. 20, 2013), <http://onforb.es/1VC1QnS>.

<sup>182</sup> Dylan Scott, *Does New Obamacare Mandate Exemption Open a Pandora's Box?*, TALKING

2014, the Obama administration extended the hardship exemption until 2016—right in time for the presidential election.<sup>183</sup> The individual mandate—the purported cornerstone of the law, without which it could not function—was modified, delayed, and suspended in 2014 and 2015.

#### IX. “CLARIFY AN ISSUE”

One of the more obscure, but glaring, executive actions concerning the Affordable Care Act altered the health insurance markets in the U.S. territories. Insurers in Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands were required to guarantee policies to all customers—regardless of any preexisting conditions—and could not charge them higher premiums.<sup>184</sup> These provisions are known as guaranteed issue and community rating. However, residents in the territories were not subject to the individual mandate, and consumers could wait until they got sick to purchase policies.<sup>185</sup> As the D.C. Circuit observed in its *Halbig* decision, the mandates for guaranteed issue and community rating, when decoupled from an individual mandate, would throw the “insurance markets in the territories into turmoil.”<sup>186</sup> This is the proverbial death spiral that the authors of the Affordable Care Act purportedly sought to avoid—but with respect to the territories, mandated. Ezra Klein referred to the situation in the territories as the “oddest health reform disaster you’ve never heard of.”<sup>187</sup>

Recognizing this severe risk, the territories requested to “be excluded” from the guaranteed-issue and community-rating provisions to avoid this disarray.<sup>188</sup> On three separate occasions, however, HHS explained to the territories that Congress crafted the provisions to “apply . . . in the territories,” and they could not be waived administratively.<sup>189</sup> In unequivocal terms, the letter concluded that “HHS has *no legal authority* to exclude the territories from the guaranteed availability provision of the Affordable Care Act.”<sup>190</sup> The agency told the territories, “However

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POINTS MEMO (Dec. 20, 2013), <http://bit.ly/1oGV82P>.

<sup>183</sup> Jason Millman, *Will States Go Along with the Latest Obamacare Fix?*, WASH. POST (Mar. 7, 2014), <http://wapo.st/1qxIq8v>.

<sup>184</sup> *Halbig v. Burwell*, 758 F.3d 390, 410 (D.C. Cir. 2014).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Ezra Klein & Evan Soltas, *Wonkbook: The First Crack in the Individual Mandate*, WASH. POST (Dec. 20, 2013), <http://wapo.st/1qxIOE5>.

<sup>188</sup> Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Ctrs. for Medicare & Medicaid Servs., Dep’t of Health & Hum. Servs., to Sixto K. Igisomar, Sec’y of Com. of N. Mar. I., at 2 (July 12, 2013), <http://goo.gl/27VpRH>.

<sup>189</sup> *Id.* at 1.

<sup>190</sup> *Id.* at 3 (emphasis added).

meritorious your request might be, HHS is *not authorized* to choose which provisions . . . might apply.”<sup>191</sup> The administration explained that their only remedy was to “seek legislative relief from Congress, which could enact legislation to create an exemption from the guaranteed availability provision or other changes as Congress deems appropriate.”<sup>192</sup>

What a difference a year makes. On July 16, 2014, CMS Administrator Marilyn Tavenner wrote to the Lieutenant Governor of the U.S. Virgin Islands to “clarify an issue” of the “application of certain Affordable Care Act provisions to health insurance issuers in the territories.”<sup>193</sup> Note, once again, the use of the term *clarify*. In the intervening year, however, HHS learned that “this interpretation is undermining the stability of the territories’ health insurance markets.”<sup>194</sup> As a result, once again, executive action was warranted. After a “careful review of this situation and the relevant statutory language,” Tavenner continued, HHS determined that the guaranteed-issue and minimum-essential-coverage provisions “*do not apply* to the territories.”<sup>195</sup> Insurers could now discriminate against patients with pre-existing conditions and deny them coverage.

It is impossible to reconcile the government’s turnabout. After the territories asked for clarification three times, and Congress did nothing to change the statute, the answer should have remained the same: *no*. However, because the law yielded unpopular consequences, the President took his own steps to disregard the plain text of the statute, and in the process destabilize the market. This is the exact problem a year earlier the government said it had “no legal authority” to resolve.<sup>196</sup>

## X. CONCLUSION

The President’s opposition to legislative changes to the ACA is not unreasonable. As Nicholas Bagley noted,

To some extent, the President’s willingness to press against legal boundaries is an understandable and even predictable response to the difficulties of implementing a complex statute in a *toxic and highly polarized political environment*. Congress’s unwillingness to work constructively with the White House to tweak the ACA has increased the pressure on the administration to move assertively to manage the

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<sup>191</sup> *Id.* (emphasis added).

<sup>192</sup> *Id.*

<sup>193</sup> Letter from Marilyn Tavenner, Adm’r, Ctr. for Medicare & Medicaid Servs., Dept. of Health & Hum. Servs., to Gregory R. Francis, Comm’r, Off. of the Lieutenant Gov., Div. of Banking & Ins., at 1 (July 16, 2014), <http://goo.gl/MYljpg>.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (emphasis added).

<sup>196</sup> Cohen Letter, *supra* note 130, at 3 (emphasis added).

challenges that inevitably arise in rolling out a massive—and critically important—federal program.<sup>197</sup>

There is no doubt that such a vote would be loaded with amendments to change other provisions of the law. After all House Republicans have voted fifty-plus times to repeal the law—a quixotic effort because the President would veto any repeal. (Though, many House Republicans were sent to Congress in 2010 and 2012 on a wave of popular opposition to the ACA, with an electoral mandate, however unrealistic, to try to repeal the law.)

But that's part of the ballgame. When Congress passes an unpopular law, on a straight party line vote,<sup>198</sup> that isn't working well, it can and should be changed. If Congress votes to take actions that the administration thinks will “sabotage” the law, the veto pen remains. The view that the ACA, as enacted in 2010 must remain unchanged—subject only to the unilateral changes made on a whim—strains credulity. The ad hoc, random manner in which the ACA has been amended, many of the revisions made for clear political advantages, should not be afforded the same presumption of constitutionality as other laws, duly enacted by Congress, and faithfully executed by the Chief Executive.

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<sup>197</sup> Nicholas Bagley, *The Legality of Delaying Key Elements of the ACA*, NEW ENG. J. MED. (May 22, 2014), [www.nejm.org/doi/full/10.1056/NEJMp1402641](http://www.nejm.org/doi/full/10.1056/NEJMp1402641) (emphasis added).

<sup>198</sup> Josh Blackman & Randy E. Barnett, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 3–84 (“The ACA’s party-line vote was unprecedented for such a major law. Not a single Republican in the House or Senate supported this law. Forty-nine percent of the House of Representatives opposed it, hardly a mandate (no pun intended) for transformational change. . . . All of the landmark social welfare and civil rights laws enacted in the twentieth century were passed with bipartisan support, often through messy political compromises and bargaining. The Social Security Act of 1935 was supported by 77 Republicans in the House, who joined 288 Democrats. In the Senate, 15 Republicans joined 60 Democrats. The Civil Rights Act of 1964 passed the Senate by a vote of 73 in favor and 27 opposed. A bold coalition of 27 Republicans and 44 Democrats united to break a segregationist-led filibuster. The Social Security Amendments of 1965, which created Medicaid and Medicare, passed the House by a vote of 307–116, with 70 Republicans voting in favor. This monumental health care legislation cleared the Senate by a vote of 70–24; 13 Republicans crossed the aisle. The Civil Rights Act of 1968 was passed with broad bipartisan support as was the Voting Rights Act of 1965. In 1990, the Americans with Disabilities Act passed with 90 percent agreement in the House and Senate. The absence of any consensus for the ACA in 2009 was remarkable and proved an inauspicious start.”).