

# Obama's ACA Delays — Breaking the Law or Making It Work?

Timothy Stoltzfus Jost, J.D., and Simon Lazarus, J.D.

As the Obama administration has over the past several months postponed implementation of various parts of the Affordable Care Act (ACA), the President's political opponents have charged that his decisions are "blatantly illegal," that his administration is acting "as though it were not bound by law," and that his decisions "raise grave concerns about [his] understanding" that, unlike medieval British monarchs, American presidents have under our Constitution a "duty, not a discretionary power" to "take care that the laws be faithfully executed."<sup>1</sup> Indeed, the House of Representatives has enacted, on a party-line vote, H.R. 4138, the "Enforce the Law Act," purporting to create jurisdiction in the federal courts to allow a house of Congress to sue to force the President to enforce requirements of a federal law.

The administration and its defenders have countered that its postponements are not refusals to enforce the ACA but temporary course corrections in the interest of effective implementation. But ACA opponents have kept the "illegality" meme before the public. Indeed, even ACA supporters may wonder whether there might be something to it, given the number of missed deadlines and the fact that implementation of some provisions has been delayed more than once. How should the administration's actions be understood?

The ACA is a massive law, imposing hundreds of requirements on federal agencies and private entities. Many provisions of the

law have "effective dates" by which they were to have been put into effect. Although the vast majority of these provisions have been implemented on time, it has not been possible to meet all deadlines because of a variety of factors. These include limited resources for implementing the law (Congress has failed to appropriate any funds for this purpose since the ACA was passed in 2010), the consequent need to prioritize the use of available resources, technological limitations (including the consequences of the problematic website launch), the need to phase in the implementation of various provisions in an integrated and rational sequence, and the need to avoid unnecessary disruption of employment and insurance markets.

For example, on July 2, 2013, the administration announced that it would allow large employers an extra year to comply with a requirement that they offer their employees "minimum essential coverage" or pay a tax if one or more employees received premium tax credits. This enforcement postponement was subsequently extended for another year for smaller employers. The administration had concluded that the employer mandate could not be enforced until an ACA requirement that employers report the coverage they offered to their employees was implemented, and that further work was needed before a practical, not unduly burdensome, reporting process could be implemented. Tellingly, two lawsuits brought by ACA opponents challenging this delay have now been

dismissed by the federal courts because the opponents could not point to any real injury it had caused them.

On November 14, 2013, the administration notified state insurance commissioners that it would allow states the option of delaying enforcement of various ACA requirements that would have prohibited, as of January 1, 2014, the renewal of noncompliant policies in the individual and small-group markets. States have subsequently been allowed to permit renewals of these policies through 2016. The ACA recognized a principle of "grandfathering" of existing coverage, and the administration concluded that extending grandfathering to 2013 coverage would avert temporary hardship and disruption for those who would otherwise have lost their current coverage and would ease their transition to coverage that complied fully with the 2014 insurance requirements. For similar reasons, the administration has delayed the effective dates of several other requirements of the statute.

Contrary to the claims made by the administration's opponents, delays in the implementation of complex regulatory schemes like the ACA beyond statutory deadlines are not uncommon. When the Department of the Treasury announced its revised schedule for phasing in the employer mandate, it explained that such temporary delays of tax reporting and payment requirements are routine, citing numerous examples of such postponements by both Republican and Democratic administrations when statutory

deadlines proved unworkable.<sup>2</sup> Indeed, as the George W. Bush administration implemented the 2003 Medicare Modernization Act, which created the Medicare prescription-drug program, it waived enforcement of the unpopular late-enrollment penalty for 1 year for some beneficiaries, delayed a key element of the law's method for calculating the share of premiums paid by some beneficiaries in order to reduce their current premiums, and limited enforcement of the law's requirement that insurers provide medication therapy management programs in order to ease the burden on insurers.<sup>3</sup> A study of implementation of Medicare mandates in the late 1990s, after the enactment of the massive 1997 Balanced Budget Act, showed that almost half the rules on the regulatory agenda of the Health Care Financing Administration for spring 1998 that had statutory deadlines had not been implemented on time.<sup>4</sup>

Critics of the Bush administration's persistent inaction on environmental and other regulatory matters frequently alleged that the administration failed to enforce such laws as a matter of politics or policy. Earlier administrations have similarly been accused of de facto nonenforcement of laws with which they disagreed. The Obama administration is not refusing to enforce the law. Rather, it is making simple timing adjustments that are well within the executive branch's lawful discretion.

The federal Administrative Procedure Act (5 U.S.C. § 706) authorizes federal courts to rectify statutorily required actions that have been "unreasonably delayed." The leading case interpreting the unreasonable-delay prohibition

imposes a test that considers a number of factors, of which statutory deadlines are only one, not necessarily determinative, consideration.<sup>5</sup> The late Chief Justice William Rehnquist ruled in a leading Supreme Court case, *Heckler v. Chaney* (1985), that even an agency's complete refusal to enforce a law cannot be challenged unless the refusal reflects "general polic[ies] so extreme as to amount to an abdication of its statutory responsibilities." These legal boundaries readily accommodate the delays in ACA implementation the Obama administration has instituted to date.

The administration's delays are also not constitutionally questionable. The framers of the Constitution directed the President not merely to "execute the laws" but also to "take care that the laws be faithfully executed." From the earliest days of the Republic, that broad phrasing has been understood to mean that the President is to exercise judgment, and handle his enforcement duties, not with robotic obeisance to individual statutory terms or provisions but with fidelity to the overall statute and the purposes of Congress in enacting the underlying laws.

This is not to say that either the "Take Care" clause of the Constitution or the Administrative Procedure Act is a blank check. Mitt Romney's pledge to grant "Obamacare waivers" by executive order — suspending a law that he disapproved of on policy grounds — would have been the kind of diktat that King George III had imposed on the pre-Revolution colonies and that the framers of the Constitution were intent on denying to the new American presidency. Repeated delays that

begin to appear indefinite, or otherwise unjustifiable as legitimate phase-in adjustments, could become similarly questionable.

So far, however, the administration's actions fit patterns established by past administrations (both Democratic and Republican) and countenanced by applicable statutory and constitutional provisions as applied by the courts. There is also little evidence that the administration's delays have had or will have any significant effect on health care coverage or on health care. The Congressional Budget Office concluded that the delay in the employer mandate would have a "negligible" effect on coverage. The administration's actions are not "blatantly illegal" but rather an attempt to make a complex law work.

Disclosure forms provided by the authors are available with the full text of this article at NEJM.org.

From Washington and Lee University School of Law, Lexington, VA (T.S.J.); and the Constitutional Accountability Center, Washington, DC (S.L.).

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