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Delaying Parts of Obamacare: 'Blatantly Illegal' or Routine Adjustment?

The GOP says Obama's decision to postpone implementing the "employer mandate" stomps all over the Constitution. It doesn't, and here's why.

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When, on July 2, the Obama Administration announced a one-year postponement of the January 1, 2014 effective date for the Affordable Care Act's requirement that large employers provide their workers health insurance or pay a tax, affected businesses "cheered." But anti-"Obamacare" advocates and politicians howled. They saw a "blatantly illegal move" (*Brietbart.com* pundit Ken Klukowski), a government acting "as though it were not bound by law" (CATO Institute economist Michael Cannon), and an unconstitutional "refus[al] to enforce" a democratically enacted law (Congressional Joint Resolution #45, introduced July 10 by New Jersey House Republican Scott Garrett). In the *Wall Street Journal*, Stanford Professor Michael McConnell, formerly a George W. Bush appointee to the federal bench, huffed that the decision "raises grave concerns about [President Obama's] understanding" that, unlike medieval British monarchs, American presidents have, under Article II, Section 3 of our Constitution, a "duty, not a discretionary power" to "take Care that the Laws be faithfully executed." Following up in the *Journal* this Monday, David Rivkin and Lee Casey, who helped lawyer last year's legal challenge to the ACA individual mandate, darkly intimated that the new employer mandate delay could trigger litigation that could result in "the whole statute fall[ing] while the president's suspension is in effect."

So has President Obama, in fact, broken the law and abused his constitutional authority by delaying the Affordable Care Act's "employer mandate"? This may be the top Republican talking point right now. But what does the law actually say about this?

Mostly, the heated rhetoric of the past few weeks ignores what the Administration has actually decided and how it has delimited the scope and purpose of that decision. The Treasury Department's announcement provides for one year of "transition relief," to continue working through 2014 with "employers, insurers, and other reporting entities" to revise and engage in "real-world testing" of the reporting requirements, simplify forms, coordinate requisite public and private sector information technology arrangements, and engineer a "smoother transition to full implementation in 2015." The announcement describes the postponed requirements as "ACA mandatory" -- i.e., not discretionary or subject to indefinite waiver. On July 9, Assistant Treasury Secretary Mark Mazur added, in a letter to House Energy and Commerce Committee Chair Fred Upton, that the Department expects to publish proposed rules implementing the relevant provisions "this summer, after a dialogue with stakeholders." In effect, the Administration explains the delay as a sensible adjustment to phase-in enforcement, not a refusal to enforce

In Sunday's *Washington Post*, Bush II Health & Human Services Secretary Michael O.

Leavitt concurred that "The [Obama] Administration's decision to delay the employer mandate was wise," in light of the Bush Administration's initially bumpy but ultimately successful phase-in of the 2004 prescription drug benefit to Medicare. Though "wise," is the current postponement "illegal"? On the contrary, Treasury's Mazur wrote to Chair Upton, such temporary postponements of tax reporting and payment requirements are routine, citing numerous examples of such postponements by Republican and Democratic administrations when statutory deadlines proved unworkable.

In fact, applicable judicial precedent places such timing adjustments well within the Executive Branch's lawful discretion. To be sure, the federal Administrative Procedure Act authorizes federal courts to compel agencies to initiate statutorily required actions that have been "unreasonably delayed." But courts have found delays to be unreasonable only in rare cases where, unlike this one, inaction had lasted for several years, and the recalcitrant agency could offer neither a persuasive excuse nor a credible end to its dithering. In deciding whether a given agency delay is reasonable, current law tellscourts to consider whether expedited action could adversely affect "higher or competing" agency priorities, and whether other interests could be "prejudiced by the delay." Even in cases where an agency outright refuses to enforce a policy in specified types of cases -- not the case here -- the Supreme Court has declined to intervene. As held by former Chief Justice William Rehnquist in a leading case on this subject, *Heckler v. Chaney*, courts must respect an agency's presumptively superior grasp of "the many variables involved in the proper ordering of its priorities." Chief Justice Rehnquist suggested that courts could lose their deference to Executive Branch judgment if an "agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." The Obama Administration has not and is not about to abdicate its responsibility to implement the statute on whose success his historical legacy will most centrally depend.

Nor is the one-year delay of the employer mandate an affront to the Constitution, as Professor Michael McConnell and Congressional Republicans insist. The relevant text requires that the President "take care that the laws be faithfully executed." Scholars on both left and right concur that this broadly-worded phrasing indicates that the President is to exercise judgment, and handle his enforcement duties with fidelity to all laws, including, indeed, the Constitution. As McConnell himself notes, both Republican and Democratic Justice Departments have consistently opined that the clause authorizes a president even to decline enforcement of a statute altogether, if in good faith he determines it to be in violation of the Constitution. But, McConnell contends, a president cannot "refuse to enforce a statute he opposes for policy reasons." While surely correct, that contention is beside the point.

The Administration has not postponed the employer mandate out of policy opposition to the ACA, nor to the specific provision itself. Thus, it's misleading to characterize the action as a "refusal to enforce." Rather, the President has authorized a minor temporary course correction regarding individual ACA provisions, necessary in his Administration's judgment to faithfully execute the overall statute, other related laws, and the purposes of the ACA's framers. As a legal as well as a practical matter, that's well within his job description.