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The Whatever President

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We were told that President Obama would wield his executive power this year to defy Congress. Instead, he is defying his own health-care law.

The Obama administration announced this week it is delaying and changing the law's employer mandate, the latest in a series of seat-of-the-pants revisions to Obamacare.

The president was eager to highlight steps he was taking to bypass Congress in his State of the Union last month, but left this one out. If he had demanded congressional action to delay the employer mandate, he surely would have gotten a bipartisan bill on his desk forthwith. Maybe we should revise his call for executive unilateralism in his speech: "If Congress will act ... I still prefer to act on my own."

Congress long ago ceded too much authority to the regulatory apparatus of the administrative state, but this is different. This isn't the executive branch writing rules to fill in the details of vague legislation—say, the 1,000-page Volcker Rule arrived at years after the passage of the Dodd-Frank banking "reforms." This is the executive branch affirmatively re-writing law.

Obama is legislating without the legislative branch. This is corrosive of self-government, counter to our constitutional system and contemptuous of the rule of law.

Obamacare is quite clear that the employer mandate "shall apply" after Dec. 31, 2013. Nonetheless, the Obama administration delayed it for a year last July. If there were an obnoxious, Keith Olbermann-style daily accounting of Obamacare, this would be "Day 44 Since the Employer Mandate Was Supposed to Go into Effect According to the Patient Protection and Affordable Care Act."

The first delay was bad enough, but the latest move is more brazen. It creates a distinction between employers with fewer and more than 100 employees that doesn't exist in the law, and delays the mandate for another year for businesses with 50-99 employees. At the same time, it changes the obligation on employers with more than 100 employees.

These aren't waivers or delays, but detailed revisions at variance with the law as passed by a duly elected Congress of the United States. Last year, the Treasury Department justified the delay as "transition relief," a euphemism right up there with "shared responsibility payments," the administration's favored term for fines on employers.

The examples that the department cites of prior transition relief are so tiny that they are beneath notice, and intuitively make sense as genuine transition relief. One provision of the Small Business and Work Opportunity Act of 2007 changed the standards that tax preparers had to follow to avoid penalties. The new rules went into effect in May 2007, but in June of that year Treasury said it would follow the old standards for returns filed before Dec. 31, 2007.

What the administration is doing now is unilaterally changing a law four years after its passage to try to delay its economic and political pain past a congressional election. Michael Cannon of the Cato Institute points out that the law authorizes waivers of the employer mandate only for states and, more specifically, “only if the state enacts a law that would provide equally comprehensive health insurance to as many residents, and only if that law would impose no additional cost to the federal government, and only if there is a ‘meaningful level of public input’ over the waiver and its approval, and even then not until 2017.”

Why did anyone sit down and bother to write this stuff in the bill? Just think of all the lawyering and negotiating that went into the provisions of the employer mandate—the careful definition of terms, the precisely calculated fines—only to be cast aside with a dismissive wave of the hand from on high.

It was the same with Obamacare’s prohibition on insurers offering “substandard” health plans. The president’s administrative “fix” a few months ago—granting a reprieve for these plans—amounted to an invitation to insurers to join the administration in ignoring a law that remained on the books.

President Obama seems to share something of the attitude of King James I of England, who once confided to the Spanish ambassador of Parliament, “I am surprised that my ancestors should ever have permitted such an institution to come into existence.” But, he sighed, “I am obliged to put up with what I cannot get rid of.”

What makes the president’s cavalier treatment of the legislature’s handiwork in this instance so remarkable is that Congress did his bidding. It passed the law he desperately wanted. Yet he still treats it as a series of suggestions and little more.

President Obama’s hero Abraham Lincoln had a famously worshipful view of the rule of law. “Let reverence for the laws,” he said in his Lyceum Address, “be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges; let it be written in Primers, spelling books, and in Almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice.”

President Obama’s implicit rejoinder: “Whatever.”