

U.S.

Obama Got the Law Right and the Politics Wrong

Louis Fisher
December 09, 2013



President Obama signs the Affordable Care Act. Photograph: [Pete Souza](#)

On July 2, 2013, Mark Mazur, Assistant Secretary for Tax Policy of the U.S. Treasury Department, issued a [brief note](#) explaining a change in the Affordable Care Act. He announced that the Obama administration would allow an additional year before the ACA's employer and insurer reporting requirements took effect. The statutory deadline of January 2014 would be moved to January 2015. His note had a disarming title: "Continuing to Implement the ACA in a Careful, Thoughtful Manner." However, nothing in the note explained the administration's legal basis for altering a statutory deadline.

That note, and the order it contained, is now the subject of a [hearing by the House Judiciary Committee](#). On December 3, the Committee convened to investigate whether Obama had violated the president's constitutional duty to "take Care that the Laws be faithfully executed." This type of legislative inquiry could be anticipated. Obama's critics have repeatedly claimed that he acts unilaterally through executive orders and agency

regulations as a way of circumventing Congress. So it was important that he address legal and constitutional issues head-on. The administration needed to explain why the one-year delay fully complied with Obama's constitutional duty. Thoughtful, patient, and detailed explanations would have lessened the political and partisan force of broadsides soon to come. Those elementary precautions were not taken.

Avoiding the Legal Issue

The legal concern was put directly to President Obama on July 24. In an [interview](#), two *New York Times* reporters, Jackie Calmes and Michael Shear, pointed out that some questioned Obama's "legal and constitutional authority" to change the deadline unilaterally. "Did you consult with your lawyer?" they asked. It was a perfect opportunity for Obama to get in front of the story, to explain why his action was justified on constitutional grounds and by the practical need to avoid harming the program through ineffective and premature implementation. Furthermore, this type of delay is not unusual in starting a large and complex government program, such as a new health policy. Obama could have pointed to specific precedents, including the difficulty in implementing the Medicare prescription drug plan under George W. Bush.

Instead of calmly and persuasively responding to his critics, Obama ducked the legal question and instead belittled those who found fault. "Where Congress is unwilling to act," he said, "I will take whatever administrative steps that I can in order to do right by the American people." The underlying message was that he is at liberty to rewrite statutes whenever he thinks it is right for the public. He continued to dig his hole deeper, telling the reporters:

There's not an action that I take you don't have some folks in Congress who say that I'm usurping my authority. Some of those folks think I usurp my authority by having the gall to win the presidency. And I don't think that's a secret.

There was no need to go there. It was a pure, self-inflicted wound. Why personalize the issue if the delay was justified on both practical and constitutional grounds? "Ultimately," the president said, "I'm not concerned about [congressional opponents'] opinions—very few of them, by the way, are lawyers, much less constitutional lawyers."

An extraordinary statement. He essentially told lawmakers—Democrats and Republicans—they had no right to criticize the one-year delay of the employer mandate unless they qualified as constitutional lawyers. Presidents don't eliminate critics that way. They multiply their number—from both parties. Members of Congress take an oath to support and defend the Constitution "without any mental reservation or purpose of evasion." They can't avoid that oath by announcing they didn't go to law school, or that they did but never practiced law, much less constitutional law. On legal issues that arise in any administration, Congress needs, and deserves, straight answers to straight questions. Obama's personal attack gave the impression that when confronted with a legal question about extending the employer mandate he would not, or could not, deal with it.

At an August 9 [press conference](#), Obama had a chance to revisit his political error and get it right the second time. Reporter Ed Henry of Fox News spoke up:

October 1st you've got to implement your signature health care law. You recently decided on your own to delay a key part of that. And I wonder, if you pick and choose what parts of the law to implement, couldn't your successor down the road pick and choose whether they'll implement your law and keep it in place?

Businesses had legitimate concerns about how to follow the ACA's rules, Obama replied. In a normal political environment, the president added:

It would have been easier for me to simply call up the speaker [of the House] and say, you know what, this is a tweak that doesn't go to the essence of the law—it has to do with, for example, are we able to simplify the attestation of employers as to whether they're

already providing health insurance or not—it looks like there may be some better ways to do this; let's make a technical change to the law. That would be the normal thing that I would prefer to do.

He did not return to the specific legal question that Henry had raised.

Obama also had the data he needed to defuse political attacks from Republicans, but he didn't take advantage of it. On July 3, the day after the Treasury Department issued Masur's "note," Ezekiel Emanuel—a professor at the University of Pennsylvania, an oncologist, and one of the administration's health care advisers—made clear in a *New York Times* [op-ed](#) that few employers were affected by the one-year extension. Of the six million employers in the United States, he explained, 96 percent are small businesses, employing fewer than 50 workers, and are therefore exempt from the ACA requirement to provide health insurance or pay a penalty. And 94 percent of the 200,000 employers that do employ more than 50 workers already offer health insurance. The 6 percent who don't provide insurance only account for 1 to 1.5 million workers. Many of them would be able to buy insurance on the exchanges and receive an income-based subsidy to help defray the costs. Obama could have marshaled these numbers to put the issue in perspective, but he left that job to Emanuel.

The House Investigates

At the House Judiciary Committee hearing on December 3, Chair Bob Goodlatte opened proceedings by reviewing examples of Obama's unilateral actions, such as ordering officials to stop enforcing laws against certain unlawful immigrants, waiving testing provisions of No Child Left Behind, and waiving or suspending several provisions of the health care law, including the delay of the employer mandate.

A separate statement by Ranking Member John Conyers, Jr. noted that allowing flexibility in the implementation of a new program, "even where the statute mandates a specific deadline, is neither unusual nor a constitutional violation. It is, rather, the reality of administering sometimes complex programs." He pointed out, as Obama had not when confronted with reporters' questions, that President George W. Bush was unable to meet some of the deadlines in the law creating Medicare Part D, the prescription drug plan.

Several legal experts testified at the hearing. Nicholas Professor Quinn Rosenkranz of the Georgetown University Law Center, argued that Article II of the Constitution cannot mean that the president may decline "to execute a law at all." No doubt that is a correct reading of the Constitution, but the Obama administration never declined to execute the Affordable Care Act. It agreed to carry out the law, and a delay in the employer mandate was part of that commitment.

Simon Lazarus, senior counsel at the Constitutional Accountability Center, made this very point. The delay was an adjustment in implementing the health care law, he said, "not a refusal to enforce." He called attention to earlier examples of executive agencies failing to meet statutory deadlines for issuing regulations or taking other required regulatory actions. There was no systematic effort in those cases to thwart the law. Missing deadlines, Lazarus observed, has become "a routine feature of implementing complex regulatory laws like the ACA." The Environmental Protection Agency, under Republican and Democratic administrations, has "often found it necessary to phase-in implementation of requirements beyond statutory deadlines, to avoid premature actions that were poorly grounded or conflicted with other mandates applicable to EPA or other agencies." When delays provoked litigation, [as with the employer mandate](#), federal courts "have found delays to be unreasonable only in rare cases" where inaction lasted several years and the agency could not offer persuasive reasons for postponement.

Jonathan Turley, professor of law at George Washington University, told the committee "there is no question that the President as Chief Executive is allowed to set priorities of the administration and to determine the best way to enforce the law." Yet he claimed that Obama "has crossed the constitutional line between

discretionary enforcement and defiance of federal law.” The president, he asserted, “must apply the laws equally and without favoritism,” an argument that contradicts his earlier claim that the president is allowed to set priorities and determine the best way to enforce the law. Moreover, there is no evidence that Obama practiced favoritism in the case of the employer mandate delay. Pointing to precedents that further weaken his case, Turley said, “No area of the law has one-hundred percent enforcement.” President Reagan, Turley reminds us, was accused of undermining a host of environmental laws” by appointing such officials as James Watt and Anne Gorsuch. Indeed, every president “has faced accusations of slow-walking or under-enforcing laws that he opposed.”

• • •

More than anything, the hearing reveals that there is no basis for a legal challenge to the man date delay, which is not likely what the Republican members had hoped for. But it also underscores why presidents need to wield power humbly and transparently. Though Obama appears to be within his legal rights with respect to the mandate delay, his political conduct was self-destructive. He could have directed Attorney General Eric Holder to articulate the president’s obligation under the Take Care Clause rather than merely announce his intention via the Treasury Web site. He could have put issues to rest by responding fully and clearly to questions directed at him about the legal basis for the one-year extension. But he chose not to do that.

Read more:

[politics](#)

,

[health care](#)