

THE ACA'S COST SHARING REDUCTION
PROGRAM: RAMIFICATIONS OF THE
ADMINISTRATION'S DECISION ON THE SOURCE
OF FUNDING FOR THE CSR PROGRAM

HEARING
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND
INVESTIGATIONS
OF THE
COMMITTEE ON ENERGY AND
COMMERCE
HOUSE OF REPRESENTATIVES
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CONTENTS

	Page
Hon. Tim Murphy, a Representative in Congress from the Commonwealth of Pennsylvania, opening statement	1
Prepared statement	3
Hon. Diana DeGette, a Representative in Congress from the state of Colorado, opening statement	5
Hon. Fred Upton, a Representative in Congress from the state of Michigan, opening statement	6
Hon. Gene Green, a Representative in Congress from the State of Texas, opening statement	8
WITNESSES	
Doug Badger, Senior Fellow, Galen Institute	10
Prepared statement	12
Tom Miller, Resident Fellow, American Enterprise Institute	33
Prepared statement	35
Morton Rosenberg, Legislative Consultant	52
Prepared statement	54
Simon Lazarus, Senior Counsel, The Constitutional Accountability Center	86
Prepared statement	88
SUBMITTED MATERIAL	
Subcommittee memorandum	122

THE ACA'S COST SHARING REDUCTION PROGRAM: RAMIFICATIONS OF THE ADMINISTRATION'S DECISION ON THE SOURCE OF FUNDING FOR THE CSR PROGRAM

FRIDAY, JULY 8, 2016

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:15 a.m., in room 2322 Rayburn House Office Building, Hon. Tim Murphy (chairman of the subcommittee) presiding.

Members present: Representatives Murphy, McKinley, Burgess, Blackburn, Griffith, Bucshon, Flores, Mullin, Collins, Cramer, Upton (ex officio), DeGette, Schakowsky, Castor, Tonko, Clarke, Kennedy, Green, and Welch.

Staff present: Gary Andres, Staff Director; Jennifer Barblan, Counsel, Oversight and Investigations; Jessica Donlon, Counsel, Oversight and Investigations; Jay Gulshen, Staff Assistant; Brittany Havens, Professional Staff, Oversight and Investigations; Charles Ingebretson, Chief Counsel, Oversight and Investigations; Jennifer Sherman, Press Secretary; Dylan Vorbach, Deputy Press Secretary.

OPENING STATEMENT OF HON. TIM MURPHY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. MURPHY. Good morning, everyone. Just first announce that we know there are a number of things happening over in the Capitol building and on the floor. We will move as quickly and readily as possible, so I appreciate members' patience in trying to get through onto the witnesses. Thank you. If someone could get the door in the back of the room I would appreciate that.

So this is a hearing of the Energy and Commerce Committee on the ACA's Cost Sharing Reduction Program: Ramifications on the Administration's Decision on the Source of Funding for the CSR Program. Let me say the Constitution is clear. No money shall be drawn from the Treasury but in consequence of appropriations made by law.

This means that the Executive Branch cannot spend money unless Congress says they can. Yet just yesterday, the Assistant Secretary for Tax Policy at the Department of Treasury testified before the Ways and Means Committee, "If Congress doesn't want the

monies appropriated it could pass a law saying do not appropriate the monies from that account.” That is a direct quote. It is in direct contradiction to the principles of appropriations law, it is an affront to the powers granted to Congress in the Constitution, and I don’t agree with the concept of that which is not forbidden is permitted.

We are here today to examine the ramifications of the Administration’s illegal decision to fund the Affordable Care Act’s Cost Sharing Reduction program to a permanent appropriation. We aren’t here to discuss whether or not the decision is illegal. A federal district court has already decided that it is. We are here today to talk about the consequence of the Administration’s brazen attempt to grab the power of the purse from Congress.

The ACA established the CSR program but did not fund it. The Administration knew this and requested an annual appropriation for the CSR program in the President’s fiscal year 2014 budget request. Congress, however, denied that request. But just a few months later, the Administration began making CSR payments anyway. How? Well, the Administration decided to raid the permanent appropriations for tax refunds and credits, an action which violated the most fundamental tenet of appropriations law.

In February 2015, alongside the Committee on Ways and Means, this committee launched an investigation into the Administration’s actions. The committee’s investigation sought to understand the facts surrounding the Administration’s decision to fund the CSR program through a permanent appropriation. Our questions were straightforward and included when and how this decision was made and who made it.

From the onset, the Administration has refused to cooperate with the committee investigation, but despite the Administration’s relentless efforts to obstruct our necessary investigation we were able to shed some light on the Administration’s decision. The details of the findings from the committee investigation are outlined in our joint report that was released yesterday. And I believe this is the report. You should all have that.

The Administration’s position essentially boils down to this. Don’t judge my actions, judge my intentions. The President swore an oath to preserve, protect, and defend the Constitution, as members of Congress we have each done the same.

And again this Administration seems to believe it is above the law, and let me be clear: none of us are. This decision is not about the merits of the Affordable Care Act or the ability to provide health care for anyone. I certainly believe we should be doing something to help those, particularly those who are low income who struggle for health issues, but this is about a constitutional question and will this committee and this Congress uphold the Constitution or look the other way? No matter your position on the merits of the Affordable Care Act, we should all agree that we all must follow the law.

Today’s hearing will examine the consequences of the findings from the committee’s investigation into the Administration’s decision to unconstitutionally fund the CSR program through a permanent appropriation. These consequences are widespread and they impact the ACA, they impact appropriations law, and they impact congressional oversight.

The Obama administration's actions with respect to the CSR program are part of the broader pattern. There are clear problems with the law if the Administration must violate the Constitution to keep the law afloat. And it is not just the CSR program. There are also problems with the Transitional Reinsurance Program, the Risk Corridors, the Basic Health Program and the list goes on. There are broad institutional concerns in play here.

The Constitution clearly states that the power of the purse lies not with the executive but with congressional branch. This provides Congress an important check on the executive branch and that applies to any President of any party at any time. The President's claim of appropriations by inference, however, turns the Constitution on its head and threatens this important power of Congress.

Finally, we as an institution must confront the executive branch's position that can dictate the terms of our oversight. Oversight is critical to a functioning democracy and that is why the Constitution grants Congress extensive authority to oversee and investigate executive branch activities. That is how we improve the efficiency and effectiveness of the laws and how we eliminate waste, fraud, and abuse from government.

As our report makes clear, the executive branch has gone to great lengths to keep information about the Cost Sharing Reduction Program from Congress and therefore the American people. If they think what they are doing is legal then I would invite them to come before this committee and explain it. This subcommittee cannot and will not accept any witness tactics that is delay and deny.

In fact, again today we have another instance of the Administration's obstruction. The committee invited Department of Health and Human Services' Secretary Burwell or a designee of her choosing to attend today's hearing, but the Department has failed to provide anyone. For the alleged most transparent Administration in history, this Administration is trying its utmost to avoid congressional scrutiny and that begs the question is someone trying to hide something.

I want to thank our esteemed panel of witnesses for appearing today. We look forward to listening to your expert opinions on the consequences of the Administration's actions.

[The statement of Mr. Murphy follows:]

THE PREPARED STATEMENT OF HON. TIM MURPHY

The Constitution is clear—"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." This means that the Executive branch cannot spend money unless Congress says it can. Yet, just yesterday, the Assistant Secretary for Tax Policy at the Department of the Treasury testified before the Ways and Means Committee, "If Congress doesn't want the monies appropriated, it could pass a law saying do not appropriate the monies from that account." That is a direct quote. It is in direct contradiction to principles of appropriations law and it is an affront to the powers granted to Congress in the Constitution. That which is not forbidden is permitted.

We are here today to examine the ramifications of the Administration's illegal decision to fund the Affordable Care Act's "cost sharing reduction" program through a permanent appropriation. We aren't here to discuss whether or not the decision is illegal—a federal district court has already decided that it is. We are here today to talk about the consequences of the administration's brazen attempt to grab the power of the purse from the Congress.

The ACA established the CSR program, but did not fund it. The Administration knew this, and requested an annual appropriation for the CSR program in the President's Fiscal Year 2014 budget request. Congress, however, denied that request.

But just a few months later, the Administration began making CSR payments anyway. How? The Administration decided to raid the permanent appropriation for tax refunds and credits—an action which violated the most fundamental tenet of appropriations law.

In February 2015, alongside the Committee on Ways and Means, this Committee launched an investigation into the Administration's actions. The Committees' investigation sought to understand the facts surrounding the Administration's decision to fund the CSR program through a permanent appropriation. Our questions were straightforward, and included when, and how this decision was made, and who made it.

From the outset, the Administration has refused to cooperate with the Committees' investigation. But despite the Administration's relentless efforts to obstruct our necessary investigation, we were able to shed some light on the Administration's decision. The details and findings from the Committees' investigation are outlined in our joint report that was released yesterday.

The Administration's position essentially boils down to this—don't judge my actions, judge my intentions. The President swore an oath to preserve, protect, and defend the Constitution. As Members of Congress, we have each done the same. Yet, again, this Administration seems to believe it is above the law. Let me be clear—it is not.

This hearing is not about the merits of the ACA or ability to provide healthcare for anyone. It is about a constitutional question and will this committee and this congress uphold the constitution or look the other way. No matter your position on the merits of the Affordable Care Act, we should all agree that the executive branch must follow the law.

Today's hearing will examine the consequences of the findings from the Committees' investigation into the Administration's decision to unconstitutionally fund the CSR program through a permanent appropriation. These consequences are widespread—they impact the ACA, they impact appropriations law, and they impact congressional oversight.

The Obama Administration's actions with respect to the CSR program are part of a broader pattern. There are clear problems with the law if the Administration must violate the Constitution to keep the law afloat. And it's not just the CSR program—there are also problems with the Transitional Reinsurance Program, the Risk Corridors, the Basic Health Program, and the list goes on.

There are also broad institutional concerns at play here. The Constitution clearly states that the power of the purse lies not with the Executive, but with the Congress. This provides Congress an important check on the Executive branch. And that applies to any president, of any party at any time. The President's claim of appropriation by inference, however, turns the Constitution on its head and threatens this important power of Congress.

Finally, we as an institution must confront the Executive branch's position that it can dictate the terms of our oversight. Oversight is critical to a functioning democracy. This is why the Constitution grants Congress extensive authority to oversee and investigate Executive branch activities. It is how we improve the efficiency and effectiveness of the laws, and how we eliminate waste, fraud, and abuse from government.

As our report makes clear, the Executive branch has gone to great lengths to keep information about the cost sharing reduction program from the Congress, and therefore from the American people. If they think what they are doing is legal, then come before this committee and explain it. But instead, they delay and deny. In fact, again today, we have another instance of the Administration's obstruction. The Committee invited Department of Health and Human Services Secretary Burwell—or a designee of her choosing—to attend today's hearing, but the Department has failed to provide anyone. For the alleged “most transparent Administration in history,” this Administration is trying its utmost to avoid Congressional scrutiny. That begs the question: What are they trying to hide?

I want to thank our esteemed panel of witnesses for appearing today. We look forward to listening to your expert opinions on the consequences of the Administration's actions. I now recognize the Ranking Member of the Subcommittee, Ms. DeGette, for 5 minutes.

Mr. MURPHY. And before I recognize the ranking member of the subcommittee, Ms. DeGette, I want to personally thank this committee for what was done for mental health reform, particularly my friend, Ms. DeGette, and everybody here steadfast in investigating a very important question of this nation. The chair, the vice chair, the full committee, the ranking members, it is powerful what came through and I personally want to thank you for that. But now I recognize the ranking member of the subcommittee, Ms. DeGette, for 5 minutes.

OPENING STATEMENT OF HON. DIANA DEGETTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Ms. DEGETTE. Thank you, Mr. Chairman, and thanks for your praise on the mental health bill. It really was a joint effort. There were a lot of bumps in the road and difficult negotiations. That is an example of what this committee can do when we really work together. And as I said in this committee and on the floor, it is a really good first step. Now we need funding and I think we all know that.

Unfortunately today's hearing is not a productive hearing like all of our mental health hearings were, and it is really not intended to improve the ACA or to improve the affordability of health care for middle income and low income people. It is yet another hearing to bash the Administration as they tried to do their best to implement—well, to enact and implement the Affordable Care Act.

Just for the record, it is the 17th hearing that this subcommittee has had since the ACA was passed into law in 2010 in Congress alone. Nearly one-fifth of the hearings that we have had in this subcommittee have focused on ACA oversight. As I have said repeatedly in my various statements in this committee, I wouldn't mind that if there actually was an attempt to do something to improve the way the ACA works.

Now obviously we try to enact constitutional legislation in this Congress. That is our job. That is the thing we were sworn to uphold. But we do have a judicial branch which is there to give checks and balances just in case people get it wrong, and in this case the House Republicans decided that they thought the CSR was unconstitutional. Well, it is not this committee's job to determine whether this program is unconstitutional or not. It is the court's job.

And guess what. The House Republicans filed a lawsuit in federal court. They asked the judge to decide between conflicting interpretations of the law. And guess what. The trial court judge actually chose to rule on the merits of the case and the judge ruled for the House Republicans and said in fact according to that judge's position that this provision of the ACA was not constitutional and now the Administration is appealing that decision.

So what are we doing here today? This matter is in the courts. Now I am not here to say whether it is my opinion, even though I am a lawyer, about whether this is constitutional or not, but I will say that everything I knew in the deliberation of this bill was everybody believed this provision to be constitutional. And so once again we are having this oversight where we are hauling in the Ad-

ministration, we are hauling in other people to talk about whether this provision, this Cost Sharing Reduction Program is constitutional or not, but in fact what we should be talking about is what are we going to do to improve the ACA so that the middle class and lower income taxpayers can afford health care?

Mr. Chairman, I was glad to hear you say that it is not about the merits of health care or provision of health care to low income people, but isn't that really what we should be worried about? Shouldn't we let the courts worry about the ins and outs of the constitutionality? And if in fact the appeals court upholds the trial court decision, shouldn't it be our job to try to figure out how to give some kind of subsidies or other offsets to middle and low income people so they can afford health care?

There is nothing I have seen since 2009 to indicate that there was any ill will on behalf of the Administration with respect to the low cost fund, or the Cost Sharing Reduction Program. There is no indication that the Administration knowingly violated the Constitution. They in fact thought that it was constitutional.

So why are we here? Once again we are here to bash the ACA, to rake the Administration through the mud, and to continue to question this policy. I think it would be much more useful for this committee to look at legislation or to look at policies that would help fix this program and help make it affordable to get health care. With that I yield back.

Mr. MURPHY. The gentlelady yields back, and I will recognize the chairman of the full committee, Mr. Upton, for 5 minutes.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Well, thanks, Mr. Chairman. Again, kudos on mental health. It was a great effort, and if I remember it passed our full committee 53 to nothing, so that is not a bad mark.

So it was nearly 18 months ago when former Ways and Means chair Paul Ryan and I sent our first letter to the Administration requesting documents and information about the source of funding for the health law Cost Sharing Reduction, CSR, Program. Chairman Brady now continued on with me in this investigation after he became chairman of Ways and Means late last year, and we believed then and still believe today that the President illegally and unconstitutionally funded this program to a permanent appropriation used primarily to pay back tax refunds.

Over the course of the investigation we have sent more than a dozen letters and interviewed just as many Administration officials. We have been forced to issue subpoenas to the Administration for documents on the issue and I sent three subpoenas myself. And we have learned a lot during this time despite the unprecedented obstruction from this Administration, but there are even basic facts that the Administration is still withholding from the Congress.

Yesterday, the majority staff of this committee along with the majority staff of Ways and Means released this report detailing our investigation. We did it because folks at home in my state of Michigan, but frankly across the country and elsewhere, deserve to know

how the government is spending their hard-earned tax dollars, and we are taking billions, talking billions in this instance.

The federal government has an obligation to each and every taxpayer to spend the money with full transparency in accordance with the law, and when it comes to the CSR Program I am sorry to say that the federal government has failed to do so. This Administration has gone to great lengths to prop up the health law, going as far to break its signature law to keep it afloat and here the Administration won't even give Congress the documents or the testimony that we need to fully understand how they came to the decision that they made to fund the program, in my view, illegally.

Without access to the information from the executive branch we cannot conduct the effective oversight. Without effective oversight we can't protect the public's interest. Last month I proudly joined my colleagues in introducing our proposal to replace the Affordable Care Act once and for all. I believe that our plan offers a better way forward. One that makes important changes to our health care system to improve access and also to decrease costs in a way that won't require the federal government to secretly shuffle around billions of dollars and violate the law like we have seen this Administration do from our report with the Affordable Care Act.

Yesterday's hearing of Ways and Means Oversight Subcommittee focused on the extensive findings detailed in this report. Today we are here to talk about the long-term implications of those findings. Our findings go far beyond the CSR Program and are important to the future of the Affordable Care Act, appropriation laws and principles, and even our institutional powers in the legislative branch.

We did invite Secretary Burwell to attend or provide a witness for today's hearing and I am disappointed that they have declined our invitation to testify. We deserve answers and we are not going to rest. Our work continues, and I yield to Dr. Burgess the balance of my time.

Mr. BURGESS. I thank the Chairman for yielding, and I certainly want to second his comment about the Department of Health and Human Services owed us the presence of the Secretary or an appropriate designee to continue to investigate this issue.

As we have discovered, this Administration has disregarded the Constitution by taking and transferring money from the authorized and funded premium tax credit account to the Cost Sharing Reduction Program. Throughout this committee's investigation the Administration has gone to unprecedented lengths to delay providing this information, often citing nonexistent legal privileges. If the Administration's rationale for withholding information is accepted we risk exempting the entire executive branch from congressional oversight.

This trend toward an all-powerful Administration must not continue in the next Administration. I look forward to hearing from the witnesses that we do have today about the importance of transparency and oversight and what this committee might do to further prevent this type of activity in the future, and I yield to the gentlelady from Tennessee.

Mrs. BLACKBURN. I thank the gentleman for yielding. And to the answer as to why we are here today, we as Congress have oversight and that is exactly what we are doing, because we have found

that there is money that is being reprogrammed and shifted, as Dr. Burgess said, from one account to another without our agreement and appropriation. It is called Article I powers. We are talking, as Chairman Upton said, about billions of dollars. It is inappropriate. We should be doing the oversight and making the determination of what is happening with these dollars. And with that I yield back the balance of my time.

Mr. MURPHY. I thank you, and now recognize Mr. Green of Texas for 5 minutes.

**OPENING STATEMENT OF HON. GENE GREEN, A
REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS**

Mr. GREEN. Thank you, Mr. Chairman. It is my job to give our ranking member's statement today because I think he is locked down in the Capitol. But before we do that, the issue of litigation brought by the Republican majority, it is not unusual that a litigant would not show up and not come to a hearing while you are in the court process.

We know the district court made a ruling and that is on appeal, so I don't think there is any problem with somebody from the Administration not showing up simply because we can decide, we have an opinion between all of us on what is constitutional but that doesn't matter. The folks who make that decision sit in the black robes over in the Supreme Court building. So I don't think there is any problem with the Administration not showing up, because since the litigation was brought by the majority and let's let the courts work its way through that. But now I will go to my colleague's opening statement.

When we passed the Affordable Care Act into law over 6 years ago, we dramatically changed the health care landscape in the United States. The law has made access to comprehensive affordable health care a reality for the American people, and at the close of the third open enrollment earlier this year nearly 13 million people had selected health plans or had been reenrolled in quality, affordable health insurance through the federal or state exchanges.

The uninsured rate has fallen to a historic low, and an estimated 10 or 20 million previously uninsured adults have gained coverage since the passage of the bill in 2010. To help limit health care costs to consumers, the law includes several mechanisms like the Cost Share Reduction or the CSR Program assists low and middle income Americans afford their deductibles, copayments and coinsurance.

CSRs are also help that ensure that out-of-pocket health care costs do not place a crippling financial burden on American families. Many health care enrollees have taken advantage of the benefits offered by the CSR program. Of the approximately 11.1 million consumers who were enrolled at the end of March of this year, 57 percent or nearly 6.4 million individuals were benefiting from the CSRs to make their coverage more affordable.

This CSR program is proven effective in accomplishing what it was designed to do. One study estimates that Americans who are eligible for cost sharing reductions would save an average of \$479 each year. Yet if you listen to my colleagues on the other side of

the aisle, you will hear nothing about the benefits of the CSR Program or about the Affordable Care Act at all.

But despite the overwhelming success of the law, this committee has chosen to hold yet another hearing to attack and undermine the Affordable Care Act. This is nothing new. The Republican majority spent 6 years promising to repeal and replace the Affordable Care Act but we have yet to see a meaningful piece of legislation, and I might add until the last week. They recently unveiled a plan that falls laughingly short in providing quality, affordable coverage for our constituents and their constituents.

Those watching this hearing need to understand that the Republican majority is exclusively focused on taking down the Affordable Care Act. They have now voted 64 times to undermine or repeal the Affordable Care Act. They have held hearings, sent letters, document requests, conducted interviews, and issued subpoenas. They have filed an unprecedented lawsuit in federal court to challenge the Cost Share Reduction Program.

There are certain ways we could be conducting meaningful oversight of the Affordable Care Act and I am sure we could come together and improve the law and enhance the coverage and options available to our constituents. But this hearing and this investigation will do no such thing. Hearings like this only serve to hurt Americans, reverse the progress that has been made for millions who now benefit from the law, and it is time our Republicans just stop litigating the past and to work with us to continue improving the health care quality of the country.

Anybody else want the time, the minute?

Mr. MURPHY. Well, I think the gentleman—

Mr. GREEN. Being a former state senator I could continue to talk for a minute but I would be glad to yield back.

Mr. MURPHY. Well, Senator, I understand. Having been a senator myself I understand that senators are given unlimited time to speak and they always manage to exceed it. But thank you.

I ask unanimous consent that the members' opening statements be introduced into the record, and without objection, the documents will be entered into the record.

I would now like to introduce the witnesses for today's hearing. First, we have Mr. Doug Badger who will lead off our panel. Mr. Badger is a former White House Senior U.S. Senate Policy Advisor, currently a senior fellow at the Galen Institute. We thank Mr. Badger for being with us today, and we look forward to his comments. We also want to welcome Tom Miller. A resident fellow at the American Enterprise Institute, Mr. Miller studies health care policy including health insurance and market-based alternatives to the Affordable Care Act. Thanks to Mr. Miller for appearing before us today and we appreciate your testimony.

Next, we welcome legislative consultant Mr. Morton Rosenberg. For over 35 years, Mr. Rosenberg was a specialist in the American Public Law with the American Law Division of the Congressional Research Service where among other topics he focused on the scope and application of congressional oversight and investigative prerogatives. He has been in the forefront of these issues and we appreciate him being here today and offering his testimony on this important issue. And finally we would like to introduce Mr. Simon

Lazarus who is senior counsel with The Constitutional Accountability Center. We thank him for being with us today.

I want to again thank all of our witnesses. It is quite an esteemed panel with probably a century or more of experience, so we look forward to hearing from you.

Now you are all aware this committee is holding an investigative hearing and when so doing has had the practice of taking testimony under oath. Do any of you have any objections to taking testimony under oath? Seeing no objections, the chair then advises you that under the rules of the House and the rules of the committee you are entitled to be advised by counsel. Do any of you desire to be advised by counsel today? And seeing no requests for that in that case, will you please rise and raise your right hand and I will swear you in.

[Witnesses sworn.]

Mr. MURPHY. Thank you. You are now all under oath and subject to the penalties set forth in Title 18 Section 1001 of the United States Code. We will ask you each for a 5-minute summary of your written statement. Because we are on a tight time schedule I hope you will pay attention to the yellow and red lights there.

Mr. Badger, you may begin.

STATEMENTS OF DOUG BADGER, SENIOR FELLOW, GALEN INSTITUTE; TOM MILLER, RESIDENT FELLOW, AMERICAN ENTERPRISE INSTITUTE; MORTON ROSENBERG, LEGISLATIVE CONSULTANT; AND SIMON LAZARUS, SENIOR COUNSEL, THE CONSTITUTIONAL ACCOUNTABILITY CENTER

STATEMENT OF DOUG BADGER

Mr. BADGER. Thank you, Mr. Chairman and Ranking Member DeGette and members of the subcommittee for this opportunity to appear before you this morning to discuss the Affordable Care Act's Cost Sharing Reduction Program. Implementation of that program has been irresponsible, unaccountable, and at its heart, unlawful. It is part of a pattern of malfeasance in ACA implementation occasioned by a serious miscalculation of demand for health insurance among young and relatively healthy people.

This miscalculation led to a series of decisions by senior officials at the Departments of Treasury and Health and Human Services during 2014 that ranged from the reckless to the illegal. My colleagues, Brian Blase of the Mercatus Center, Edmund Haislmaier at the Heritage Foundation, and Seth Chandler at the University of Houston, and I, have published two studies of insurer performance in the 2014 benefit year.

Our first study provided information on how insurers fared selling individual qualified health plans, QHPs. We found that corporate welfare payments made to these plans in the form of reinsurance payments and risk corridor claims averaged more than \$1,100 per enrollee, or 25 percent of premium. Put another way, had risk corridor payments been made in full, insurers would have received \$1.25 in revenue for every dollar they collected in premiums and still lost money.

Our second paper examined the relative performance of the 174 issuers that sold QHPs in both the individual and small group mar-

kets. We found that insurers lost nearly three times as much per enrollee selling QHPs to individuals than they did to small groups. Those losses occurred despite billions of dollars in individual and corporate subsidies that were available for individual QHPs but not for group QHPs. The main reason, individual QHP enrollees incurred medical claims that averaged 24 percent more per enrollee than for group QHPs. Those claims consumed 110 percent of premium dollars.

These losses continued after 2014. McKinsey and Company estimates that they may have more than doubled in 2015. Now why has this happened? Brian Blase of the Mercatus Center I think has laid out why the rules governing the individual QHPs have produced such disastrous results for insurers that billions in lawful and unlawful corporate subsidies cannot cure. He said, "The ACA largely replaced risk based insurance in the individual market with income redistribution based on age, income, and health status."

Whatever the merits of the redistribution of wealth, Congress cannot redistribute health. The ACA's rule structure for the individual market seeks to do this by requiring insurers to sell products that are generally unattractive to younger and healthier people, and overcharge them for those products, while discounting premiums for people who are older and less healthy. The result is a so-called market that attracts high risk enrollees and repels low risk ones. Such a market is incurably dysfunctional.

As this began to dawn on Administration officials during 2014, they made a series of sudden policy reversals to entice insurers to remain in exchanges. These included the expenditures of unappropriated money on the CSR Program, the diversion of billions of dollars from the Treasury to insurance companies through the reinsurance program, repeated restructuring of the reinsurance program to make payments 40 percent more generous to insurers than at the time they submitted their premiums, and a slow retreat from the agency's prior position on risk corridor budget neutrality, an effort to turn it into a TARP-like fund that forces taxpayers to bear the costs of bad business decisions made by big corporations.

This committee has been diligent in calling attention to these actions and Congress has acted to ensure that the risk corridor program operates as intended. Further action is required to end the unlawful diversion of funds from Treasury through the reinsurance program and to ensure that lawsuits filed by insurers do not render Congress' budget neutrality risk corridor requirement meaningless.

The health care reform law is not working in the individual market. The unlawful payment of corporate subsidies cannot fix it. I am encouraged by the remarks of Ranking Member DeGette and by the Chairman. I agree that Congress should repair the health care reform law, but it should not overlook unlawful improvisations that try to disguise its deficiencies. Thank you.

[The prepared statement of Doug Badger follows:]

**Written Statement of
Doug Badger
Senior Fellow, Galen Institute¹
Before the the Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
U.S. House of Representatives July 8, 2016**

Chairman Murphy and Ranking Member DeGette, Members of the Subcommittee on Oversight and Investigation, thank you for this opportunity to appear before you this morning to discuss the Affordable Care Act's cost-sharing reduction program.

Implementation of the cost-sharing reduction program has been irresponsible, unaccountable and, at its heart, unlawful. It is part of a pattern of malfeasance in ACA implementation occasioned by a general miscalculation about the attractiveness of individual qualified health plans (QHPs) to millions of people who lack health insurance coverage.

Those miscalculations – by Administration officials, Washington health policy analysts and, most significantly, some health insurance executives – led to a series of decisions by senior officials at the departments of Treasury and Health and Human Services (HHS) during 2014 that range from the reckless to the illegal.

While it is difficult for Congressional critics and proponents of the law to agree on much, they should agree on this: the executive branch must follow the law, even when it could potentially result in more insurers withdrawing from the program.

¹ The statement reflects the views of Mr. Badger and do not necessarily reflect those of the Galen Institute.

Congress cannot avert its eyes from unlawful behavior. It must address it head-on and seek genuine solutions to the problems that confront issuers of QHPs.

Performance of Individual QHPs

The Administration's unlawful cost-sharing reduction payments can only be properly understood in the context of insurer performance in the individual QHP market.

My colleagues Brian Blase of the Mercatus Center, Edmund Haislmaier at the Heritage Foundation, Seth Chandler of the University of Houston and I have published the first two in a series of papers examining the performance of individual QHPs during the 2014 benefit year.²

Ours is the most comprehensive analysis to date of the impact of the ACA on the individual and small group insurance markets in 2014. Using a data set compiled from medical loss ratio forms insurers were required to file with HHS, we provide information on how insurers fared in their first year selling QHPs – plans that satisfy all of the ACA's requirements and are the same or substantially the same as those certified to be sold on the exchanges.

Data in those filings is reported by state at the plan level, broken out by market segment (individual and small group) and by participation in the risk corridor program. Because only QHPs participate in the risk corridor program, we were able to identify the specific financial and

² Brian Blase, Doug Badger, and Edmund J. Haislmaier, "The Affordable Care Act in 2014: Significant Insurer Losses Despite Substantial Subsidies," Mercatus Center, George Mason University, April 22, 2016. <http://mercatus.org/publication/affordable-care-act-2014-significant-insurer-losses-despite-substantial-subsidies> and Brian Blase, Doug Badger, Edmund F. Haislmaier and Seth J. Chandler, "Affordable Care Act in Turmoil: Large Losses in the Individual Market Portend an Uncertain Future," Mercatus Center, George Mason University, June 28, 2016. <http://mercatus.org/publication/affordable-care-act-turmoil-large-losses-individual-market-portend-uncertain-future>

enrollment data for those plans. We matched this data with information released by HHS on the premium stabilization programs (risk adjustment, reinsurance and risk corridors).

Our first study examined data from 289 issuers of individual QHPs. It found that, despite receiving reinsurance payments that were 40 percent more generous on a per enrollee basis than insurers expected when they set their premiums, these issuers, in the aggregate, suffered substantial losses, as proxied by risk corridor claims. Reinsurance payments to these issuers averaged \$833 per enrollee, or nearly 19 percent of premiums. Per enrollee risk corridors claims averaged \$273. These claims, even had they been made in full, would not have covered all issuer losses. Put another way, reinsurance and risk corridor corporate subsidies averaging \$1,106 per enrollee (nearly 25 percent of premium) were insufficient to make issuers whole in the aggregate.

Performance among individual issuers, of course, varied. Some did reasonably well, with a minority paying risk corridor assessments. But losses in the individual QHP market outpaced gains by a margin of roughly 8:1.³

Our second paper examined the relative performance of the 174 issuers that sold QHPs in both the individual and small group markets. Individual QHPs and group QHPs were required to meet the same benefit standards and designs, including the essential health benefits package, cost-sharing limits, and narrow actuarial standards (i.e., bronze, silver, gold, and platinum).⁴

³ Blase, Badger, et al., “Affordable Care Act in Turmoil, Table 1, footnote (c), p. 13.

⁴ 45 C.F.R. § 156.200(b), which incorporates benefit standard requirements set forth in 45 C.F.R. § 156.20. Bronze plans have an actuarial value between 58 percent and 62 percent, silver plans have an actuarial value between 68 percent and 72 percent, gold plans have an actuarial value between 78 percent and 82 percent, and platinum plans have an actuarial value between 88 percent and 92 percent.

They also had to meet regulatory standards relating to network adequacy,⁵ rate review,⁶ reporting requirements,⁷ marketing,⁸ and accreditation.⁹ The large similarities between individual and group QHPs and the regulations governing allowed for a comparison between issuer performance in the respective markets.

We found that insurers lost nearly three times as much on a per enrollee basis (as proxied by risk corridor claims) selling QHPs to individuals than to groups. These losses occurred despite premium subsidies for millions who bought individual QHPs and tax penalties on millions who refused to enroll.

Nor were the losses staved off by the billions more in corporate subsidies that the government extended to issuers of individual QHPs. The reinsurance subsidy, for example, like individual premium and cost sharing reduction subsidies, were unavailable in the group QHP market. These additional billions in transfer dollars did not prevent issuers from suffering larger losses with their individual plans.

The main reason: individual Obamacare plans attracted people in poorer health, incurring medical claims that averaged 24 percent more per enrollee than for their group QHPs.

⁵ 45 C.F.R. § 156.230.

⁶ 45 C.F.R. § 156.210.

⁷ 45 C.F.R. § 156.220.

⁸ 45 C.F.R. § 156.225.

⁹ 45 C.F.R. § 156.275.

The differences were far more pronounced between individual QHPs and non-QHPs. The non-QHPs are policies that were exempt from most of the law's requirements; they include "grandfathered" plans that customers originally purchased before the law's 2010 enactment and were allowed to renew in 2014, as well as "grandmothered" plans that regulators allowed to be renewed under the so-called "transition policy." Insurers charged individual QHP customers premiums that averaged 45 percent more than for non-QHPs. Medical claims overwhelmed that steep markup. The average QHP enrollee incurred claims that were 93 percent higher than for enrollees in non-QHPs.

Medical claims consumed 110 percent of premiums for individual QHPs, compared with less than 83 percent for group QHPs and non-QHPs in both the individual and group markets. That unsustainably high ratio for individual QHPs produced heavy losses for insurers in 2014 that individual and reinsurance subsidies could not offset.

Other studies indicate that these losses did not subside after 2014. McKinsey and Company estimates that losses may have more than doubled in 2015, based on its analysis of preliminary data.¹⁰

The law's architects believed that corporate subsidies would offset the negative effects that massive federal regulation of the individual market would have on insurers. The data suggest that they were wrong.

¹⁰ McKinsey Center for US Health System Reform, "Exchanges Three Years In: Market Variations and Factors Affecting Performance," McKinsey&Company, May 2016. See also Deep Banerjee, Caitlin Weir, and James Sung, "The ACA Risk Corridor Will Not Stabilize the U.S. Health Insurance Marketplace in 2015," *RatingsDirect*, Standard & Poor's Financial Services, November 5, 2015, 2-3.

Corporate subsidies (particularly the reinsurance program) held premiums lower than they otherwise would have been. But premiums were neither low enough to attract uninsured people in reasonably good health nor high enough to cover medical claims incurred by people who did enroll in coverage.

This adverse experience has prompted insurers to raise premiums. Customers who receive large premium and cost-sharing reductions will be shielded from these premium increases; their cost will be borne by taxpayers. But the rate hikes will make individual QHPs even less attractive to reasonably healthy people who don't qualify for substantial subsidies.

The individual QHP "marketplace" will thus likely to continue to consist disproportionately of those who buy coverage with other people's money and those who are reasonably certain that their medical bills will exceed premiums. Such a "market" is incurably dysfunctional.

Insurers and their regulators came to recognize this dysfunctionality during the first half of 2014, leading to a series of regulatory and administrative improvisations that have ranged from the merely negligent to the outright unlawful.

Cost-Sharing Reductions (CSR)

Administration of the cost-sharing reduction subsidy illustrates this spectrum of malfeasance. The program was established by section 1402 of the ACA¹¹ (as amended by section 1001(b) of HCERA)¹² to reduce cost sharing on essential health benefits (EHB) for an individual with a household income of 400 percent of the Federal Poverty Level (FPL) or below who enrolls in a silver-level qualified health plan (QHP) in the individual market through an exchange.¹³ In addition to lower out-of-pocket limits, issuers are required to provide coverage of higher actuarial value to individual QHP enrollees with incomes between 100 and 250 percent of FPL.

CMS is Spending CSR Money Unaccountably

Under the program, CMS makes periodic and timely advance payments equal to plans equal to the estimated value of the cost-sharing reduction to individual enrollees.¹⁴ Although Congress never appropriated money for the program, the Secretary began making these payments to insurers during 2014.

The agency is then required to reconcile these advance payments with the actual cost-sharing incurred by eligible enrollees.¹⁵ Although CMS initially announced it would reconcile 2014 payments in April 2015, it subsequently delayed that reconciliation until April 2016.¹⁶

¹¹ 42 U.S.C. 18071.

¹² PL 111-152, 124 Stat 1031f.

¹³ CMS, Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Years 2014 and 2015, March 2016.

¹⁴ 42 U.S.C. 18071(c)(3)(A).

¹⁵ CMS, Guidance on Reconciliation, p. 5.

¹⁶ CMS, Timing of Reconciliation of Cost-Sharing Reductions for the 2014 Benefit Year, February 13, 2015. As of this writing, this reconciliation process for 2014 has not been completed.

That delay has meant that billions of dollars have been distributed to health plans without determining whether those amounts are too much or too little.

The HHS Office of Inspector General strongly criticized the agency's handling of these payments in June 2015.¹⁷ The OIG found that "CMS's system of internal controls could not ensure that CMS made correct financial assistance payments during the period January through April 2014."¹⁸ It identified both overpayments and underpayments associated with the CSR program. "Without effective internal controls for ensuring that financial assistance payments are calculated and applied correctly," the audit concluded, "a significant amount (approximately \$2.8 billion) of Federal funds are at risk (e.g., there is a risk that funds were authorized for payment to QHP issuers in the incorrect amounts)."¹⁹

CMS is Spending CSR Money Recklessly

Since the one undeniably positive result of ACA implementation has been an increase in the number of people with health insurance coverage, CMS has thrown caution to the wind in an effort to improve enrollment results.

Its laxity imposes substantial costs on taxpayers, according to the Government Accountability Office. CMS, the agency concluded in a February 2016 report, "foregoes information that could suggest potential program issues or potential vulnerabilities to fraud."²⁰ Nor has it established a process to resolve "inconsistencies," which GAO defines as "instances where individual

¹⁷ HHS, Office of Inspector General, CMS's Internal Controls Did Not Effectively the Accuracy of Aggregate Financial Assistance Payments Made to Qualified Health Plan Issuers Under the Affordable Care Act, June 2015.

¹⁸ HHS, OIG, p. iii.

¹⁹ HHS, OIG, p. iv.

²⁰ GAO, CMS Should Act to Strengthen Enrollment Controls and Manage Fraud Risk, GAO-16-29, February 2016, p. 1.

applicant information does not match information from marketplace [i.e., exchange] data sources.”²¹

This has resulted, according to GAO, in billions of dollars in government payments to insurance companies on behalf of enrollees with unresolved inconsistencies in 2014. Such problems, which remained unresolved well into 2015, included 431,000 applications involving \$1.4 billion in advance premium tax credits and \$313 million in cost-sharing reduction subsidies for 2014.²²

GAO concluded that “CMS is at risk of granting eligibility to, and making subsidy payments on behalf of, individuals who are ineligible to enroll in QHPs.”²³

CMS’s incuriosity as to the eligibility of individuals to receive subsidies is so extreme that it has approved subsidies to people who don’t exist.

In the same report, GAO disclosed the disturbing results of its undercover testing of the federal health care exchange. The exchange approved subsidized coverage for 11 of 12 fictitious GAO phone or online applicants for 2014.²⁴ The government paid insurers \$30,000 in advanced premium tax credits for these phony beneficiaries and additional money in cost-sharing reduction subsidies.²⁵

“The fictitious enrollees,” GAO found, “maintained subsidized coverage throughout 2014, even though GAO sent fictitious documents, or no documents, to resolve inconsistencies.”²⁶

²¹ GAO, CMS Should Act, p. 1.

²² GAO, CMS Should Act, Figure 1, p. 18.

²³ GAO, CMS Should Act, p. 1.

²⁴ GAO, CMS Should Act, p. 1.

²⁵ GAO, CMS Should Act, p. 1.

²⁶ GAO, CMS Should Act, p. 1.

When the agency's leading measure of success is the number of enrollees, fictitious enrollees (whose insurers were paid real money) count every bit as much as real ones.

CMS is Spending CSR Money Unlawfully

The fundamental problem with the agency's CSR spending is neither recklessness nor laxity, but unlawfulness: CMS is spending billions on the CSR program; Congress has not appropriated a dime.

The law could not be more clear. Section 1402 of the Act requires insurers to offer reduced cost-sharing to people with incomes between 100 and 400 percent of the federal poverty level.²⁷ And although it directs the Secretary to "make periodic and timely payments to the issuer equal to the value of the reductions,"²⁸ it does not appropriate money for these payments.

Section 1402, unlike the advance premium tax credits authorized under section 36B of the Internal Revenue Code, is not included in the list of permanently "Refunds of internal revenue collections."²⁹ Nor could it be, since it is not an individual tax credit and, as such, is codified in title 42 of the United States Code, rather than in the Internal Revenue Code.

The Administration understood this. In April 2013, OMB requested "such sums as necessary" for CMS to fund the cost sharing reduction program for fiscal year 2014 and an advance appropriation of an additional \$1.4 billion for the first quarter of FY 2015.³⁰ HHS made a

²⁷ 42 USC 18071(b).

²⁸ 42 USC 18071(c)(3)(A).

²⁹ 31 USC 1324.

³⁰ FY 2014 Budget of The United States Government, Appendix.

similar request in its FY 2014 Justification of Estimates for Appropriations Committees, referring to the program as “one of five annually-appropriated accounts.”³¹

The following month, OMB’s Sequestration Preview Report listed the program as subject to a \$286 million cut.³² The 7.2 percent reduction applied only to domestic discretionary program and excluded mandatory spending, such as the advance premium tax credits.

President Obama signed the FY 2014 omnibus appropriations bill in January 2014.³³ In a hearing before Federal District Court Judge Rosemary M. Collyer, the Administration conceded that “there was no 2014 statute appropriating new money” for the cost-sharing reduction program.³⁴

It has continued making CSR payments to insurers anyway. The House of Representatives filed suit to enjoin the payments.

Judge Collyer’s ruling in *House v. Burwell* was clear.

“The Affordable Care Act unambiguously appropriates money for Section 1401 premium tax credits but not for Section 1402 reimbursements to insurers. Such an appropriation cannot be inferred. None of Secretaries’ extra-textual arguments—whether based on economics, “unintended” results, or legislative history—is persuasive. The Court will enter judgment in favor of the House of Representatives.”³⁵

³¹ CMS, FY 2014 Justifications of Estimates for Appropriations Committees, p. 2.

³² OMB, Sequestration Preview Report to the President and Congress for FY 2014, p. 23.

³³ PL 113-76.

³⁴ *House v. Burwell*, U.S. District Court for the District of Columbia, p. 11.

³⁵ *House v. Burwell*, p. 2.

Judge Collyer stayed her order, pending appeal.

Pattern and Practice

The Administration's unlawful CSR payments are part of a broader pattern and practice of unlawful behavior undertaken to keep insurers from dropping out of the exchanges. This pattern and practice is especially pronounced in its administration of the reinsurance and risk corridor programs.

Reinsurance

Section 1341 of the ACA establishes a transitional reinsurance program with two purposes: 1) to reimburse Treasury for the \$5 billion it spent on a temporary program that provided reinsurance payments to corporations and labor unions that provided health benefits to early retirees program [section 1102]; and 2) to compensate issuers of individual QHPs for a portion of medical claims incurred by "high-risk individuals."³⁶

CMS has acknowledged this dual purpose and that the Congressional Budget Office considered the \$5 billion in collections to be an offset for the early retiree program.³⁷

Although the statute requires the program to be state-based and administered, CMS chose to run it as a national program.³⁸ And although the statute contemplates the identification of 50 to 100 medical conditions to identify "high-risk individuals,"³⁹ CMS chose instead to reimburse insurers for 100 percent of medical bills between \$45,000 and \$250,000 incurred by any enrollee in an

³⁶ 42 USC 18061.

³⁷ 76 FR 41935.

³⁸ 42 USC 18061(a).

³⁹ 42 USC 18061(b)(2).

individual QHP.⁴⁰ That decision alone made reinsurance payments to insurers 40 percent more generous on a per enrollee basis than insurers had anticipated when they set their 2014 premiums.⁴¹

They also chose to institute the equivalent of a tax on virtually every enrollee in a private health plan. The purpose of this collection was to meet the statutory requirement of collecting a total of \$25 billion over three years (\$12 billion in 2014, \$8 billion in 2015 and \$5 billion in 2016). Of those amounts, the statute requires that \$5 billion be remitted to Treasury (\$2 billion in 2014 and 2015, \$1 billion in 2016).⁴² Insurers would receive the remaining \$20 billion (\$10 billion for 2014, \$6 billion for 2015 and \$4 billion for 2016).⁴³

CMS soon realized that the collections, like so much else in the ACA, might not go according to plan. On March 11, 2013, they issued a final rule providing that if 2014 collections were to fall short of the \$12 billion requirement, payments to Treasury and the plans would be proportionately reduced.⁴⁴ They finalized that rule for the 2015 benefit year on March 11, 2014.⁴⁵

By that point, many insurers had begun to recognize their dire condition. Fewer people than expected were buying their product and the customers they were attracting were the ones they least wanted. Nearly half the enrollees were 45 or older. Few young and healthy people were signing up. They turned to CMS for help.

⁴⁰ CMS, "CMS continues to implement premium stabilization programs," June 30, 2015.

⁴¹ Seth Chandler, "How the Obama Administration Raided the Treasury to Pay Off Insurers," *Forbes*, January 18, 2016.

⁴² 42 USC 18061(b)(3)(B)(iv).

⁴³ 42 USC 18061(b)(3)(B)(iii).

⁴⁴ 78 FR 15410.

⁴⁵ 79 FR 13744.

The agency obliged them ten days later. On March 21, 2014, CMS published a notice of proposed rulemaking that reversed its earlier regulations.⁴⁶ If collections fell short, insurers were to get 100 percent of the proceeds until they were made whole. Treasury would get the leftovers.

The agency later that year announced that there would be no 2014 leftovers. Treasury would get nothing, leaving the entire \$9.7 billion to be distributed to insurers.⁴⁷ For the 2015 benefit year, Treasury would be a bit luckier, collection \$500 million of the required \$2 billion.⁴⁸

That leaves Treasury \$3.5 billion short of the amount the statute requires them to be paid. The likelihood is that the 2016 collections will also fall short, meaning that Treasury will get little or nothing of the \$1 billion it is owed. Over the three years, the amount unlawfully diverted from Treasury to the insurance industry will almost certainly fall in the \$4.0 - \$4.5 billion range.

In a February 2016 letter to this committee, the Congressional Research Service concluded that CMS's actions

“appear to be in conflict with the plain reading of section 1341(b)(4). Because the statute unambiguously states that ‘each issuer’s contribution’ contain an amount that reflects ‘its proportionate share’ of the U.S. Treasury contribution, and that these amounts should be deposited in the General Fund of the U.S. Treasury, a contrary agency interpretation would not be entitled to deference under *Chevron*.”⁴⁹

⁴⁶ 78 FR 15808. Neither the Secretary nor the Acting CMS Administrator has been able to explain this abrupt shift to the committee and has so far refused to turn over subpoenaed documents.

⁴⁷ CMS, Summary Report On Transitional Reinsurance Payments And Permanent Risk Adjustment Transfers For The 2014 Benefit Year, June 30, 2015.

⁴⁸ CMS, The Transitional Reinsurance Program's Contribution Collections for the 2015 Benefit Year, February 12, 2016.

⁴⁹ CRS, February 23, 2016 letter to Committees on Energy and Commerce and Ways and Means, p. 8.

A lengthier legal opinion prepared by Boyden Gray and Associates for the Galen Institute concluded that the “HHS allocation scheme prioritizing payments to reinsurance-eligible issuers over payments to Treasury is unlawful.”⁵⁰

Nevertheless, this unlawful behavior persists and Congress has not addressed it.

Risk Corridors

But while the \$4.5 billion diversion of funds was a boost to the insurance industry, it soon became clear that it would not be nearly enough to cover their losses from individual QHPs. So they sought another form of assistance: an entitlement to risk corridor payments.

Section 1342 creates a temporary risk corridor program.⁵¹ The statute requires HHS to “establish and administer a program of risk corridors” under which insurers offering individual and small group QHPs “shall participate in a payment adjustment system based on the ratio of allowable costs of the plan to the plan’s aggregate premiums.”⁵² It stipulates that QHP issuers whose allowable costs exceed 103 percent of their targeted amount would be eligible to receive risk corridor payments while those whose costs fell below 97 percent of the target would be required to make risk corridor contributions.⁵³

Congress neither authorized nor appropriated funds for the risk corridors program, an indication that it intended the program to be budget neutral. CMS acknowledged in a July 2011 rulemaking that the Congressional Budget Office assumed “collections would equal payment to plans in the

⁵⁰ Letter to Galen Institute from Boyden Gray and Associates.

⁵¹ 42 USC 18062.

⁵² 42 USC 18062(a).

⁵³ 42 USC 18062(b).

aggregate.”⁵⁴ CMS reiterated that budget neutrality assumption in a regulatory impact analysis published in March 2012.⁵⁵ Its March 11, 2014 final rule reiterated the agency’s intention to “implement the program in a budget neutral manner.”⁵⁶

It stated in April 2014 that if risk corridor claims exceeded collections, “all risk corridor payments for that year will be reduced pro rata to the extent of any shortfall.”⁵⁷ The agency further stipulated that the shortfall would be made up in subsequent years, adding, “We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments over the life of the three-year program.”⁵⁸

As losses piled up during 2014, the agency modified the program to make shortfalls more likely. Specifically, the agency increased the ceiling on administrative costs and the profit floor. Although the adjustments were made to compensate for costs to insurers resulting from the decisions of some states to allow for the renewal of non-ACA-compliant, non-grandfathered individual and group policies, these changes to the risk corridor calculation were made for plans in all states. CMS acknowledged the effect of this in its preamble:

“These increases to the profit floor and administrative cost ceiling in the risk corridors formula would increase a QHP issuer’s risk corridors ratio if claims costs are unexpectedly high, thereby increasing risk corridor payments or decreasing risk corridors charges.”⁵⁹

Moreover, insurers and their regulators began to contemplate the possibility that aggregate losses among individual QHP issuers could vastly exceed gains. The Act did not provide for such an

⁵⁴ 79 FR 41930 at 41948.

⁵⁵ *Health Republic Insurance Company v. U.S.*, government motion to dismiss.

⁵⁶ 79 FR 13744 at 13787.

⁵⁷ CMS, Risk Corridors And Budget Neutrality, April 2014.

⁵⁸ CMS, Risk Corridors And Budget Neutrality, April 2014.

⁵⁹ 79 FR 30259-60.

eventuality. It neither automatically appropriated spending nor created an authorization that could serve as the basis for an appropriation.

By May 2014, the agency had begun to hedge on budget neutrality. While it would strive to achieve budget neutrality, the agency argued in a final rule, it was required to make full payments to issuers. It noted that if a shortfall in contributions were to occur, it might have to find other sources of payments, “subject to the availability of appropriations.”⁶⁰

In a September 2014 opinion letter to Senator Jeff Sessions (R-AL), the Comptroller General issued an opinion confirming that risk corridor payments required appropriation and identifying the CMS Program Management account as a possible source of risk corridor payments.⁶¹

In December 2014, Congress appended a provision to the omnibus spending act that prohibited the use of CMS Program Management funds to make payments to insurers under the risk corridor program.⁶² Congress renewed that prohibition in the FY 2016 spending bill.⁶³

That should have ended the debate. It has not. Several insurers have filed lawsuits against the federal government, seeking to obtain risk corridor payments.⁶⁴ In related actions, some states

⁶⁰ Timothy Jost, Implementing Health Reform: Final 2015 Exchange And Insurance Market Standards Rule, Health Affairs Blog, May 17, 2014.

⁶¹ Motion to dismiss, p. 9.

⁶² PL 113-235.

⁶³ PL 114-113.

⁶⁴ Bob Herman, Another insurer, BCBS of North Carolina, files risk-corridor lawsuit, *Modern Healthcare*, June 2, 2016.

have sued for these funds, seeking additional federal resources to help clean up the mess created by the failure of health insurance co-operatives.⁶⁵

The theory of these lawsuits, in effect, is that the ACA created an entitlement among insurers to risk corridor payments that appropriations restrictions did not eliminate. Moreover, that restriction applies only to CMS and, more particularly, to the agency's program management fund, but not to the Judgment Fund, a permanently appropriated entity administered by the Treasury Department.

That legal argument, as the discussion above suggests, is flawed. The law creates no entitlement to risk corridor payments. Unlike with the CSR program, it does not even authorize an appropriation. Congress has expressly forbidden money to be appropriated. Unless that appropriations restriction is limited, no funds can be expended.

Congress never intended for the risk corridors program to be a new version of TARP – granting the federal government power to shift the costs of bad business decisions by corporations to taxpayers.

The lawsuits will nevertheless move forward. If successful, plaintiffs would seek payments from the Judgment Fund. Such a payment would undermine Congress's constitutional power to appropriate in contravention of long-standing precedent.

In a January 2016 opinion letter to Senator Marco Rubio (R-FL), CRS stated that the Judgment Fund could not be used to circumvent a limitation on appropriations.⁶⁶ “Any payment to satisfy

⁶⁵ Timothy Jost, Congressional Risk Corridor Payments Spawning Legal Difficulties, Health Affairs Blog, May 24, 2016.

⁶⁶ Lawsuits to Recover Payments under the Risk Corridors Program of the Affordable Care Act, CRS letter to Senator Marco Rubio, January 5, 2016.

a judgment secured by plaintiffs seeking recovery of amounts owed under the risk-corridors program,” the agency wrote, “would need to wait until such funds were made available by Congress.”

Thus, even if a judge were to order HHS to pay insurers, the agency couldn’t do so unless Congress appropriated the money.

Congress should not trust the Administration to act in accordance with the law. CMS’s willingness to spend unappropriated funds on the CSR program and to divert money from Treasury to insurers through the reinsurance program are evidence enough that it will not respect legal boundaries when it comes to the ACA.

Congress should make a clear statement that money cannot be drawn from the Judgment Fund to satisfy a judgment against the government in any of the risk corridor cases.

Conclusion

The ACA has transformed the regulation of the individual and small group markets. While the small group market appears to be surviving the law’s Byzantine regulatory regime, its effect on the individual market has been toxic.

Brian Blase of the Mercatus Institute succinctly summarized the effect of these rules.

“The ACA largely replaced risk-based insurance in the individual market with income redistribution based on age, income, and health status.”⁶⁷

⁶⁷ Brian Blase, “The Obamacare Risk Adjustment Trap,” Forbes Apothecary blog, July 6, 2016, <http://www.forbes.com/sites/theapothecary/2016/07/06/the-obamacare-risk-adjustment-trap/#6ab3a5ed3284>

Whatever the merits of redistribution of wealth, it is not possible for government to redistribute health. The rules in their totality instead separate the price of insurance from risk. Since the essence of insurance is the pricing of risk, this decoupling has had adverse effects.

The rules sought to prevent insurers from seeking out people at low risk of incurring medical claims and avoiding high risk consumers. They essentially accomplished this by requiring insurers to overcharge younger and healthier people and to discount premiums for older and less healthy ones. They overachieved. The result is a “market” that attracts high-risk enrollees and repels low-risk ones. Such a “market” is unsustainable.

It was hoped that the payment of billions of dollars in corporate subsidies to insurance companies would nullify the law’s effects on insurer balance sheets. They have not. The evidence suggests that insurers continue to suffer outside losses selling individual QHPs, in contrast to their group QHPs and non-QHPs in the individual and small group markets. Neither reinsurance, risk corridor payments, nor cost-sharing subsidies have offset these losses. The scheduled expiration of the risk corridor and reinsurance programs at the end of this year will further unmask the law’s underlying dysfunction.

As the Administration began to realize during 2014 how badly markets were unravelling, it made a series of policy decisions – some of which involved the unlawful payment of corporate subsidies -- to entice insurers to remain in the exchanges. These decisions included:

1. The expenditure of unappropriated money on the CSR program, payments that were made to insurers without proper controls and still remain unreconciled.
2. The diversion of billions of dollars from the Treasury to insurance companies through the reinsurance program.

3. Repeated restructuring of reinsurance attachment points and coinsurance rates, resulting in the government assuming 100 percent of the costs of claims between \$45,000 and \$250,000.
4. A slow retreat from the agency's prior position on risk corridor budget neutrality, in effort to turn it into a TARP-like fund that used taxpayer funds to mitigate poor corporate business decisions.

This committee has been diligent in calling attention to these actions and Congress has acted to assure that the risk corridor operates as intended. Further action is required to end the unlawful diversion of funds from Treasury through the reinsurance program and to assure that the Judgment Fund is not improperly used to circumvent an appropriations restriction.

Members of both parties have reason to ignore this unlawful allocation of billions of dollars. Some are invested in keeping up appearances of the law's success, while some who seek its repeal are protective of insurers in their districts.

The Administration's behavior raises concerns that transcend the fractious politics of Obamacare. They are institutional and constitutional in nature. Institutional because Congress's core lawmaking function is being effaced. Constitutional because its power of the purse is under legal assault.

In such circumstances, Congress cannot be passive. It must insist that the Administration follow the law.

Mr. MURPHY. Thank you.

Mr. Miller, you are recognized for 5 minutes.

STATEMENT OF TOM MILLER

Mr. MILLER. Thank you, Chairman Murphy, subcommittee Ranking Member DeGette, and members of the subcommittee for the opportunity to testify today on the Obama administration's funding decisions regarding the Cost Sharing Reduction Program under the Affordable Care Act.

The federal district court ruling in *House v. Burwell* reaffirmed the longstanding rules of appropriations law. Advanced payments to insurers to reimburse their expenses in providing cost sharing reductions mandated by the ACA were never appropriated by Congress. Hence, they could not be spent by the Obama administration. All appropriations must be expressly stated. They cannot be inferred or implied. The ACA does not designate a source of funds to make the cost sharing reimbursements.

The Administration has offered a number of legal rationales to try to find authority for its decision to continue funding of the CSR payments, but as Judge Collyer in *House v. Burwell* concluded, the plain text of the ACA outweighed those arguments in most cases when other important textual distinctions did not already.

The Administration's overly broad approach to inferring permanent appropriations by Congress in this case would provide no limiting principle to prevent future Administrations from paying for virtually any ACA program on the theory that it is linked somehow to premium tax credits under Section 1401 of the law. It is this Congress and future ones that is the constitutionally designated branch of the federal government that must decide whether or how to appropriate funds for CSR payments to insurers.

This particular legal controversy needs to be placed within a larger and disturbing context. For the last 6 years, the Obama administration has been frustrated by its inability to get Congress to support more funding for a number of its less popular objectives under the ACA. It keeps trying to stretch appropriations law and administrative guidance to spend the money without necessary consent or authority.

The Administration has a lengthy rap sheet in bypassing the Constitution, statutory law and norms of administrative law. Its transgressions and evasions have essentially challenged opponents to just go ahead and sue in court if they want to uphold the law. But this pattern of conduct seriously undermines the minimum level of respect we need for and from our government agencies and officials. Laws passed by Congress are not just mere suggestions to be selectively revised or discarded by the executive branch. Elections do matter and so do the decisions by the elected representatives of Congress they empower. Trust in the basic integrity of our government institutions and their adherence to the rule of law is a key foundation of democratic accountability, civil discourse, and economic progress.

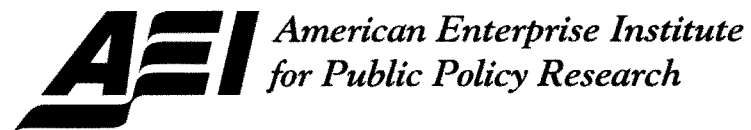
And if we are ever going to reduce the partisan rancor and operational gridlock in remedying the long list of dysfunctional components of the ACA, taking illegal shortcuts and making expedient administrative revisions in the law must be replaced by offering a

more persuasive case for whatever legislative changes in the underlying statute are necessary and then facilitating actual votes in Congress to do so. But until then, this subcommittee's continuing investigation and oversight of the executive branch's policies and practices in this area remain essential to maintaining political accountability and the rule of law.

I submitted my written testimony earlier this week before the extraordinary joint congressional investigational report into the source of funding for the ACA's Cost Sharing Reduction Program was available for review and comment. It carefully and meticulously details how the Administration first abused and raided another permanent appropriation in order to pay for the Cost Sharing Reduction Program and then obstructed the work of several congressional committees to investigate its actions. We have learned over the years that not every serious abuse of executive branch power in implementing the ACA differently than the law passed by Congress can or will be remedied in court.

But at a minimum, the American people need to know more about how officials execute the laws that control taxpayer funds and shape so many vital aspects of their lives in order to hold them politically accountable in our representative form of government. I hope and expect that today's Oversight and Investigation hearing will further that objective. Thank you.

[The prepared statement of Tom Miller follows:]



Statement before the House Committee on Energy and Commerce

Subcommittee on Oversight and Investigations

Hearing

The ACA's Cost Sharing Reduction Program:
Ramifications of the Administration's Decision on the Source of Funding
for the CSR Program

Thomas P. Miller, J.D.

Resident Fellow in Health Policy Studies

American Enterprise Institute

July 8, 2016

Summary Points

- The federal district court ruling in *House v. Burwell* reaffirmed the longstanding rules of appropriations law. Advance payments to insurers to reimburse the expenses of cost sharing reductions (CSRs) mandated by the ACA were never appropriated by Congress.
- The Obama administration's overly broad inference of permanent appropriations by Congress would provide no limiting principle to prevent future administrations from paying for virtually any ACA program by linking it to section 1401 premium tax credits.
- For the last six years, the Obama administration has been frustrated by its inability to get Congress to support more funding for a number of its less-popular objectives under the ACA. It keeps trying to stretch appropriations law and administrative guidance to spend money without necessary consent or authority.
- If we are ever going to reduce the partisan rancor and operational gridlock in remedying the long list of dysfunctional components of the ACA, taking illegal shortcuts and making expedient administrative revisions in the law must be replaced by offering a more persuasive case for legislative changes in the underlying statute.

Thank you Chairman Murphy, Subcommittee Ranking Member DeGette, and Members of the Subcommittee for the opportunity to testify today on the Obama administration's funding decisions regarding the cost sharing reduction program under the Affordable Care Act (ACA).

I am testifying today as a health policy researcher and a resident fellow at the American Enterprise Institute (AEI). I also will draw upon previous experience as a senior health economist at the Joint Economic Committee and health policy researcher at several other Washington-based research organizations.

My testimony will outline the background behind this issue and highlight the key governing principles of appropriations law and practice. I will summarize the main legal arguments and developments thus far in litigation concerning the administration's funding practices and then place them within a broader context. After briefly touching on the foreseeable parameters for the future economic and health policy consequences of any final ruling that might strike down the current funding for cost sharing reduction subsidies, I will conclude with an overview of what is at stake here in upholding the constitutional authority of Congress to determine spending by the federal government.

On July 30, 2014, the U.S. House of Representatives voted to authorize a lawsuit that challenged the legality of the Obama administration's funding of cost sharing reduction (CSR) subsidy payments to insurers providing Silver-level coverage to eligible lower income enrollees in ACA Marketplace plans. On May 12, 2016, Judge Rosemary Collyer of the United States District Court for the District of Columbia granted summary judgment to the House in *United States House of Representatives v. Sylvia Matthews Burwell* (*House v. Burwell*). The judgment enjoined any further reimbursements under

Section 1402 of the ACA until a valid appropriation is in place. However, Judge Collyer issued a stay of the injunction pending any appeal by the parties, and federal government attorneys on behalf of Burwell and the U.S. Department of Health and Human Services (HHS) remain certain to do so later this month

Although the litigation is likely to continue for many more months, if not years, the ruling reaffirmed the longstanding rules of appropriation law in concluding that the advance payments to insurers to reimburse them for the expenses of CSR coverage subsidies mandated by the ACA were never appropriated by Congress. The court decision upheld the rule of law and signaled that at least this particular example of the Obama administration's repeated efforts to stretch implementation of the 2010 law beyond legal norms and the plain meaning of the ACA's statutory text had gone past permissible limits. If upheld on appeal, the ruling essentially leaves the ultimate funding decision back where it belongs – before the U.S. Congress.

This issue needs to be seen within the context of many questionable maneuvers by this administration to rewrite and re-interpret the legal requirements of the ACA in implementing its provisions. Other legal challenges remain on the horizon to additional misuse of taxpayer dollars to benefit certain private insurers. This subcommittee's continuing investigation and oversight of those policies and practices are essential to maintaining political accountability and the rule of law.

Background for How We Got Here

The court case involved several sections of the ACA that provide subsidies to eligible low-income enrollees in certain Marketplace insurance plans. Section 1401 authorizes refundable tax credits to make their insurance premiums more affordable, while section 1402 reduces various cost sharing expenses that would otherwise be imposed by insurers. Section 1412 requires the Secretary of the Treasury and the Secretary of HHS to establish a program to make eligibility determinations in advance for the premium tax credits under section 1401 and the cost sharing reductions under section 1402.

Although section 1401 was funded by adding it to a preexisting list of permanently-appropriated tax credits and refunds (31 U.S.C. section 1324), section 1402 was not added to that list. Judge Collyer accordingly found that the section 1402 reimbursements to insurers were not funded through that same, permanent appropriation, nor anywhere else within applicable federal law.

Appropriations Law 101

Under article 1, section 9 of the U.S. Constitution, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” Although authorizing legislation establishes or continues the operation of a federal program or agency, appropriations legislation is needed to provide funds for authorized programs. An appropriation must be expressly stated; it cannot be inferred or implied. Moreover, “a direction to pay without a designation of the source of funds is not an appropriation.”¹

In the case of section 1402 subsidies, the ACA first requires insurers to provide coverage with reduced cost sharing for those eligible enrollees, and it then provides that the HHS Secretary shall make periodic and timely payments to the insurance issuer equal to the value of the reductions. However, the ACA does not designate a source of funds to make the cost sharing reimbursements. Nor do any of its provisions specifically appropriate money for cost sharing reductions. Nothing in section 1402 prescribes a process for the “periodic and timely payments to the issuer equal to the value of the reductions.” Nor does it condition the insurers’ obligations to reduce cost sharing on the receipt of offsetting payments.

The Obama Administration’s Arguments for Funding CSRs Anyway

The administration initially assumed that the cost sharing reduction reimbursement payments required an annual appropriation by Congress. Its Fiscal Year 2014 budget request described cost sharing payments as “annually-appropriated accounts.”² Its May 20, 2013 *Sequestration Preview Report* for FY 2014, issued by OMB, also listed “Reduced Cost Sharing” as subject to sequestration in the amount of \$286 million (7.2% of the requested appropriation). Including those payments on a list of sequestration-bound programs further acknowledged that no permanent appropriation was available for section 1402 reimbursements.

Congress decided not to appropriate funds for the CSR reimbursement payments for FY 2014. For example, on July 14, 2013, the Senate Appropriations Committee issued a report, in appropriating funds to HHS and other agencies for FY 2014, that stated its recommendations did not include a mandatory appropriation, *requested by the administration*, for reduced cost sharing assistance ... as provided for in sections 1402 and 1412 of the ACA.” (emphasis added). Two subsequent continuing resolutions signed into law, on October 17, 2013, failed to include an appropriation for section 1402 reimbursements; nor did the Consolidated Appropriations Act for 2014, signed by President Obama on January 17, 2014.

In early 2014, the Obama administration apparently changed its mind and determined that it did not need an annual appropriation to make the advance CSR reimbursement payments to insurers. It has proceeded to do so since then. In response, the House filed its lawsuit in federal district court.

The administration offers a number of legal rationales to try to find authority for its CSR funding practices. The primary one is that those subsidies are inextricably intertwined with the ACA’s advance premium tax credits, which are permanently appropriated within section 1401.

A lesser argument points to another ACA provision that would apply prohibitions on use of CSR-subsidized plans to pay for abortions, as either a redundancy -- given the longstanding Hyde amendment restriction on annual HHS appropriations -- or evidence that Congress did not consider CSR payments part of such appropriation programs.

Administration legal briefs in *House v. Burwell* also contend that another congressional provision enacted in the October 2013 Continuing Appropriations Act, which required HHS to certify eligibility both for premium tax credits and reductions in cost sharing before making those subsidies available, is further evidence that Congress had not already precluded the CSR payments from being made by failing to appropriate any funds for them.

Another administration legal argument notes the absence of standard language (“authorized to be appropriated such sums as are necessary”) in section 1402 for CSR payment funding means that Congress felt it unnecessary, because those payments were already funded permanently.

Administration attorneys also have noted as further support for the funding of CSR payments:

- Subsequent absence of any congressional appropriation riders limiting or eliminating funding for CSR payments (unlike, for example, riders restricting funding for ACA risk corridor payments to insurers),
- Past assumptions in CBO scoring of ACA provisions that CSR payments were “direct spending” and therefore expected to be adequately funded by appropriations, and
- Various negative budgetary and coverage consequences of failure to permanently appropriate CSR funds.

They also dismiss post-enactment requests by the administration for CSR funding as legally inconsequential.

This long list of imaginative, if not legally decisive, arguments was rebutted and dismissed by Judge Collyer. The plain text of the ACA outweighed them in most cases, when other important textual distinctions did not already. The congressional prerogative to refuse to appropriate funds cannot be overridden by rewriting the ACA's statutory text.

In particular, the CSR payments and premium tax credit provisions use different eligibility standards, operate differently, and are funded differently. Only section 1401 makes permanent appropriations – and just for premium tax credits. The CSR payments operate independently of the federal tax system. They are free of any income-based reconciliation process for individual beneficiaries (unlike advance premium tax credit payments).

Most of all, the administration's overly broad approach to inferring permanent appropriations by Congress in this case provides no limiting principle to prevent future administrations from paying for virtually any ACA program on the theory that it is linked in some way to section 1401 premium tax credits. However, the district court ruled in *House v. Burwell* that every permanent authorization does not also necessarily constitute a permanent appropriation. Any negative consequences due to Congress's continuing refusal to appropriate funds in this, or other cases, flow from its prerogative and powers under the Constitution.

Will Insurers Still Collect CSR Reimbursements, One Way or Another?

Another recurring contention by backers of the administration's CSR funding practices is that although insurers participating in ACA marketplaces still will be compelled to provide cost sharing reductions to eligible plan enrollees, they ultimately will prevail in the U.S. Court of Federal Claims under the Tucker Act to recover reimbursements that are owed to them under the ACA. Although Judge Collyer did not rule directly on this point, attorneys for the House argue persuasively that the ACA text does not confer an actionable right upon the insurers.

The Tucker Act does not create a substantive cause of action, but only jurisdiction for certain claims against the United States government. Its Judgment Fund does not waive sovereign immunity. Its general appropriations for payment of judgments against the federal government does not provide an all-purpose fund for judicial disbursement.

Unlike other Tucker Act cases involving money-mandating statutes but insufficient appropriated funds to pay successful claims,³ the CSR reimbursement issue here would involve a complete absence of any valid, congressionally appropriated funds. Hence, no insurer would have any basis for claiming an actionable interest in the payments authorized (but not appropriated) by the ACA.⁴

A different line of argument by some critics of the *House v. Burwell* decision is that it is likely to trigger other damaging consequences in insurance markets, including higher overall costs to taxpayers. Such projections require a number of assumptions about how health insurers and their customers will react to the loss of CSR reimbursement payments, as well as the timing of any transition to new payment rules. The initial valid premise is that insurers participating in ACA Marketplaces will still be required by law to

provide CSR coverage to eligible enrollees. The likelihood that premiums for such plans would rise then would trigger higher advance premium tax credit subsidies for individuals choosing Silver plan coverage. One model of the fiscal effects projects that the costs of essentially swapping CSR reimbursement subsidies for larger premium tax credits, including spillover effects on other Marketplace enrollees, would increase taxpayer costs by a net \$47 billion over ten years and increase Silver plan premiums in ACA Marketplaces by an average of \$1040.⁵

A good bit of such worst-case modeling relies on a number of narrow assumptions regarding timing; no insurer exits, and early exits from plans by healthier individuals. Other simplified assumption relate to spreading higher premium costs across a broader set of non-Silver and even non-Marketplace plans; the combined effects of risk selection, risk adjustment, and single pool pricing in particular market segments; and lack of any countering responses by Congress, the executive branch, or competing insurers. Those assumptions make such modeling far easier, if not more predictively accurate.

Somewhat ironically, the Urban Institute analysis actually predicts that elimination of the CSR reimbursement payments would *reduce* the total number of uninsured American by about 400,000, primarily because more of them would become eligible for premium tax credits as Marketplace insurance premiums rise. However, the effects of eliminating CSR subsidies in raising insurance premiums might hit hardest somewhat wealthier policyholders who continue to purchase those plans without premium tax credits.⁶

The Contingencies of Future Consequences

The coverage and subsidy components of the ACA have many moving parts that can interact in less predictable ways if one of them (like CRS reimbursement payments) is altered. Even oversimplified assumptions about one-dimensional changes in policy are more likely to point in the right general direction than pinpoint the magnitude of its consequences. In the case of CRS reimbursements, proper application of appropriations law and enforcement of the ACA's statutory text would at least accomplish one fundamental principle: These issues are to be decided by members of the U.S. Congress, who remain politically accountable to voters.

The next Congress, and future ones, must decide whether to appropriate funds for CSR payments to insurers. The next House of Representatives may decide whether to reauthorize and continue to pursue its *House v. Burwell* litigation against the executive branch, settle it, or drop further appellate activity. The next Congress may instead reopen debate over the operations of the ACA, particularly concerning how certain types of insurance coverage might be subsidized differently (such as through flatter, age-adjusted tax credits rather than more income-related premium subsidies), and whether it allows more, or less, cost sharing. Political pressure will be brought to bear to preserve, or restore, CSR payment subsidies, as well as to end or alter them. The future fate of those subsidies might also be used to leverage broader changes in the underlying law governing health care.

Clearly, a number of upcoming electoral and political variables will determine control of Congress and the White House and reshape the resulting range of policy change. Hence, more static modeling of budgetary and coverage consequences, based on current parameters, could have a brief shelf life.

This particular legal controversy needs to be placed within a larger, unfortunate context. For the last six years, the Obama administration has been frustrated by its inability to get Congress to support more funding for a number of its less-popular objectives under the ACA. Hence, when it's not looking under the budgetary account sofa cushions at HHS and CMS for some more spare change, it keeps trying to stretch appropriations law and administrative guidance to spend money without necessary consent or authority.

The administration has a lengthy "rap sheet" in bypassing the Constitution, statutory law, and norms of administrative law. They extend beyond being flagged in federal district court this May for unconstitutional spending of funds for risk sharing reduction reimbursements that were never appropriated by Congress. HHS has made up ad hoc rules to renegotiate unilaterally the terms of an older budgetary deal with insurers in 2010 regarding another temporary reinsurance program for early retirees, in order to redirect funds from the U.S. Treasury to dispense more generous reinsurance subsidies, ahead of statutory schedule, to certain insurers offering qualified health plans in the ACA-regulated individual insurance market.⁷ Contrary to the ACA's statutory requirements, this diversion of taxpayer funds essentially allows those insurers to pay less in special reinsurance taxes while gaining a larger proportionate share, ahead of schedule, of what those taxes are supposed to yield in revenue.

Earlier this year, Iowa state insurance regulators had to sue CMS to try to stop it from jumping ahead of other creditors in line for the liquidation of claims against a failed co-op plan – in violation of the ACA statute, well-established state practices in handling insurer insolvencies, an earlier court order to which Obama administration officials never objected, and even the co-op loan agreement terms and regulations promulgated by CMS several years earlier.⁸

At various times in recent years, the Obama administration has been tempted to promise more generous payment of risk corridor subsidies than congressional appropriations, and even some of the administration's earlier interpretations of the ACA statute, allow. Annual appropriations riders have kept those ambitions in check recently, but the administration remains poised to revisit the issue of "budget-neutral" risk corridor payments again.

The federal district court ruling in *House v. Burwell* provides a broad warning shot to the Obama administration that its many previous maneuvers at the edges of the law and beyond remain in jeopardy. In this case, the legal transgressions involved violation of a fundamental provision of the U.S. Constitution – the power assigned to Congress to control funding through appropriations. Judge Collyer appropriately distinguished the case from the Supreme Court decision in *King v. Burwell*⁹ because the latter involved interpretation of possible statutory ambiguity whereas the former was simply a matter of "a failure to appropriate, not a failure in drafting." There was no ambiguity involved in applying appropriations law to an otherwise clear statutory provision. She concluded that the key consequences in the case were that if the federal

government's argument prevailed, every permanently authorized benefit program would then automatically include a permanent appropriation (contrary to current law).

More fundamentally, the legal authority to spend taxpayer money must require more than just the consent of executive branch administrators and the businesses they regulate and subsidize. Laws passed by Congress are not just "suggestions" to be selectively revised or discarded by the executive branch. Elections matter and so do the decisions by the elected representatives in Congress they empower.

Challenging opponents to just go ahead and sue in court undermines the minimum level of respect we need for, and from, our government agencies and officials. Trust in the basic integrity of our government institutions and their adherence to the rule of law is a key foundation of democratic accountability, civil discourse, and economic progress. If we are ever going to reduce the partisan rancor and operational gridlock in remedying the long list of dysfunctional components of the ACA, taking illegal shortcuts and making expedient administrative revisions in the law must be replaced by making a more persuasive case for legislative changes in the underlying statute.

Almost 30 years ago, another White House got caught diverting funds for purposes expressly prohibited by Congress in the Iran-Contra scandal. Once you start swapping taxpayer dollars outside of legal channels to hide earlier mistakes, the temptation is to keep doing it more and more.¹⁰

Notes

¹ U.S. Government Accounting Office, GAO-04-261SP, *Principles of Federal Appropriations Law (Vol. I)* 2-17 (3d ed. 2004).

² Department of Health and Human Services, CMS, *Justification of Estimates for Appropriations Committees for Fiscal Year 2014*, at 7 (2013).

³ See, e.g., *County of Suffolk, New York v. Sebelius*, 605 F. 3d 135 (2d Cir. 2010); *Greenlee County Arizona v. United States*, 487 F. 3d 871 (Fed. Cir. 2007).

⁴ See, e.g., *OPM v. Richmond*, 496 U.S. 414 (1990). (“A claim for payment of money from the Public Treasury contrary to a statutory appropriation is prohibited by the Appropriations Clause of the Constitution.”)

⁵ Linda J. Blumberg and Matthew Buettgens, *The Implications of a Finding for the Plaintiffs in House v. Burwell*, Urban Institute Health Policy Center, January 2016.

⁶ Seth Chandler, “Why the House Lawsuit over Cost Sharing Reductions Might Win but Won’t Kill Obamacare,” January 14, 2016, <http://www.forbes.com/sites/theapothecary/2016/01/14/why-the-house-lawsuit-over-cost-sharing-reductions-might-win-but-wont-kill-obamacare/#4ecc81ddfcfb>

⁷ C. Boyden Gray, “Allocation of Funds Collected under the Affordable Care Act’s Transitional Reinsurance Program between Treasury and Reinsurance-Eligible Issuers,” May 23, 2016, <http://galen.org/assets/Reinsurance-Opinion-Letter.pdf>

⁸ *Nick Gerhart and Dan Watkins v. U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, Sylvia Matthews Burwell, and the United States*, Complaint for Declaratory Judgment and Injunctive Relief, No. 16-cv-00151, United States District Court, Southern District of Iowa, Central Division, filed May 3, 2016.

⁹ *David King et al. v. Sylvia Burwell, Secretary of Health and Human Services, et al*, 576 U.S. ____ (2015).

¹⁰ See, e.g. Nicholas Bagley, “Legal Limits and the Implementation of the Affordable Care Act,” University of Michigan Law School, Public Law and Legal Theory Research Paper Series Paper No. 492 (January 2016). Bagley warns that “the administration’s efforts to put the ACA on surer financial footing may embolden the next president to further slip the reins of legislative control – a dynamic that could have especially serious consequences for foreign affairs, where the appropriations power ‘remains one of the Congress’s few effective legal tools to regulate presidential initiatives.’” *Ibid.* at 25.

Mr. MURPHY. Thank you, Mr. Miller.

Now Mr. Rosenberg, you are recognized for 5 minutes. Just make sure your mic is on and you pull it close to you. Thank you. Could you turn your microphone on? OK.

STATEMENT OF MORTON ROSENBERG

Mr. ROSENBERG. I'm pleased to be here, Mr. Chairman and members of the committee. This is a welcome return to be before a committee that I learned whatever I think I know about investigative oversight from a legendary chairman like John Moss and John Dingell and their great staffs.

I did more work for this committee between 1975 and 2005 than I did for any other committee in the Congress, and if I had to boil down the essence of what I've learned about oversight it would be this. Committees wishing to engage in successful oversight must establish their credibility with the White House and the executive departments and agencies that they oversee early, often and consistently, and in a manner evoking respect, if not fear.

Although the standing committees and special committees have been vested with an array of very formidable tools and rules to support their powers of inquiry, it is absolutely critical to the success of the investigative power that there be a credible threat of meaningful consequences for refusal to provide necessary information in a timely manner. In the past that threat has been the possibility of a citation of criminal contempt of Congress or even earlier in our history a trial at the bar of the House, either of which could result in imprisonment. There can be little doubt that such threats were effective in the past at least until 2002.

Between 1975 and 1998 there were ten votes to hold Cabinet level officials in contempt of Congress. Four of those votes came from this committee and were very effective in getting information. Indeed, the first two votes, which were the first two votes ever to hold Cabinet level officials in contempt, involved an issue that is raised here. It involved two statutes that had noncompliant and confidentiality provisions and the heads of each of those departments, the Commerce Department in 1975 and HEW in 1978, claimed that a broad, nondisclosure provision applied to Congress.

John Moss challenged that in both cases, and in both cases preliminary votes of contempt in the subcommittee were sufficient to have the documents released and the testimony given that was wrought. And similar things happened during the early '80s under John Dingell.

As I said, all of these ten resulted in one way or another of substantial compliance with information demands in question before the necessity of any criminal trial. It was my sense that those instances established such a credible threat of a contempt action it was possible that until 2002 even the threat of a subpoena was often sufficient to move an agency to an accommodation with respect to document disclosures or the testimony of agency officials and the White House to allow even officials to testify without a subpoena.

The last such instance was the failed Presidential claim of privilege during the chairmanship of Dan Burton in its 2002 investigation of two decades of informant corruption in the FBI's Boston of-

fice. I might add that it was a bipartisan effort in which the contempt was a virtual certainty.

The current situation is that Congress is presently under a literal siege by the executive. The last decade has seen among other significant challenges an unlawful raid on a congressional office, Department of Justice prosecutions of Members that successfully denied them speech debate protections, Presidential cooption of legislative agency rulemaking, among other things.

But with respect to investigative oversight since 2000 and recently, the executive branch has adopted a stance of— which was first enunciated by the Department of Justice in 1984—that the historic congressional processes of criminal and inherent contempt designed to ensure compliance with its information gathering prerogative are unconstitutional and unavailable to a committee if the President unilaterally determines that such officials need not comply.

Mr. MURPHY. Mr. Rosenberg, I just want to say you are out of time. If you could just give a final statement, then I have to move on.

Mr. ROSENBERG. Congress has to protect its investigative authority. The current stance of the Justice Department means that every time you issue a subpoena for documents or testimony that is not going to be complied with they're going to force you into District Court. And forcing you into District Court will mean delay and the possibility of aberrant judicial decisions which has occurred in the Myers case and in the present Fast and Furious litigation which in total with its investigative time——

Mr. MURPHY. Thank you.

Mr. ROSENBERG [continuing]. And the time before the courts has gone on for 5 ½ years without resolution.

[The prepared statement of Morton Rosenberg follows:]

54

STATEMENT
OF
MORTON ROSENBERG
Legislative Consultant
BEFORE THE
HOUSE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
OF THE ENERGY AND COMMERCE COMMITTEE
CONCERNING
“THE ACA’S COST SHARING REDUCTION PROGRAM: RAMIFICATIONS
OF THE ADMINISTRATION’S DECISION ON THE SOURCE OF FUNDING
FOR THE CSR PROGRAM”
PRESENTED ON
JULY 8, 2016

Mr. Chairman and Members of the Committee:

My name is Morton Rosenberg. For over 35 years I was a Specialist in American Public Law with the American Law Division of the Congressional Research Service (CRS). Among my areas of professional concern at CRS were the problems raised by the interface of Congress and the Executive which involved the scope and application of congressional oversight and investigative prerogatives. Over the years I was called upon by committees to advise and assist on a number of significant inquiries, including Watergate, Iran-Contra, Rocky Flats, the organizational breakdown of the Justice Department's Environmental Crimes Program, Whitewater, Travelgate, Filegate, campaign fundraising during the 1996 election, the Clinton impeachment proceeding in the House, informant corruption in the FBI's Boston Regional Office, and the removal and replacement of nine U.S. Attorneys in 2006. I also assisted committee Members and staff, majority and minority, on such matters as the organization of probes, subpoena issuance and enforcement, the conduct of hearings, contempt of Congress resolutions, and the validity of the issuance of House resolutions authorizing civil enforcement of subpoenas. Since my retirement I have written a handbook on investigative oversight entitled "When Congress Comes Calling: A primer on the Principles, Practices, and Pragmatics of Legislative Inquiry," which was funded and published by the Constitution Project in 2009. I am presently updating and expanding that work. I have also continued to comment and testify on matters regarding congressional prerogatives.

You have asked me here today to provide legal and historical background to assist your Subcommittee in assessing the substantiality of the Treasury Department's refusals, even in the face of subpoenas, to provide information, either through documents or the testimony of knowledgeable Department personnel, that would explain the manner and process by which the conclusion was reached that the funding for cost sharing reduction payments under the Affordable Care Act (ACA) would be through the permanent appropriation in 31 U.S.C. § 1324 (b). I will also describe and assess the current problematic situation respecting the enforcement of congressional subpoenas directed executive branch officials.

Background

A letter dated June 29, 2016 from the Treasury Department's Office of Legislative Affairs to the Committees explained that witnesses who have thus far "agreed to be interviewed" have been constrained by a long standing Executive branch policy "that protect[s] from disclosure 'documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" As authority for this stance the Department points to the failure of the Subcommittee (and the House Ways and Means Committee) to strictly adhere to the interbranch accommodation process dictated by the D.C. Circuit in *United States v AT&T Co.*¹; the pendency of an "unprecedented lawsuit by the House on the same subject matter" which purportedly "threatens to compromise the integrity of the judicial proceedings by circumventing the established rules of discovery;" a district court ruling that makes the common law deliberative process privilege applicable to congressional informational demands; and IRS "*Touhy* regulations" which are said to "govern the conditions and procedures by which agency employees may testify about work-related issues" in order to protect internal deliberative processes.

The Flawed Premises of Treasury's Arguments

None of these arguments pass legal muster. My understanding of the historical experiences and legal rulings pertinent to congressional access to information regarding the administration and enforcement activities of executive departments and agencies that are established, empowered and funded by the Congress indicates that such an asserted withholding policy has been consistently overridden in the face of legitimate exercises of a committee's constitutionally based investigatory prerogatives. The law is clear: an inquiring committee need only show that the information sought is within the broad subject

¹ 567 F. 2d 121, 127 (D.C. Cir. 1977).

matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern in order to present an enforceable information demand. This was established by the Supreme Court's 1927 ruling in *McGrain v. Daugherty*² which provided the foundational authority for modern congressional investigative oversight. The case emanated from the Teapot Dome inquiries of the mid-1920's which centered on the Department of Justice. As part of its investigation, a Senate select committee issued a subpoena for the testimony of the brother of the Attorney General, Harry Daugherty. After Daugherty failed to respond to the subpoena the Senate sent its Deputy Sergeant at Arms to arrest him and bring him before the Senate. This action was challenged as beyond the Senate's constitutional authority. The case reached the High Court which upheld the Senate's authority to investigate charges concerning the propriety of the Department's administration of its statutory mission. The Court first emphasized that the power of inquiry, with the accompanying process to enforce it, is "an essential and appropriate auxiliary to the legislative function," and that Congress must have access to the information "respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which is frequently so—recourse must be had to others who do possess it. Experience has taught that the mere requests for such information often are unavailing, and also that the information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed."³ The Court also made it clear that the target of the Senate investigation, the Department of Justice, like all other departments and agencies, is a creation of the Congress and subject to its plenary legislative and oversight authority in order to determine whether and how it is carrying out its mission:

[T]he subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.⁴

The Limits of Negotiation and Accommodation

The oft-cited *AT&T* ruling established a number of important precedents. It recognized the authority of the House to allow one of its committees intervene in a court proceeding to protect its constitutionally-based oversight and investigative prerogatives. It also recognized that when core powers of the political branches conflict, a court should be reluctant to intervene and should adjure the political branches to seek accommodation through negotiation. It did rule that, in the situation before it, neither branch had the absolute right to withhold or obtain the sensitive intelligence information at issue. But it

² 273 U.S. 135 (1927).

³ *Id.* at 174-75.

⁴ *Id.* at 177-78

did not close the door to judicial resolution if there is a legitimate impasse, though it did not define when such an impasse would be reached. It is clear, however, that both sides need not agree that a stalemate has occurred and it is apparent that current circumstances have reached that point. Sixteen months have passed and the Department's actions, together with its June 29 letter, has drawn a clear line that signals that further negotiations would be futile. No court would fault the Subcommittee for moving on to seek compulsory enforcement of its information demands.

The Irrelevance of a Concurrent Investigation and Litigation

Treasury and the Justice Department have characterized the pending House legal challenge to the alleged use of unappropriated funds to support the ACA as "extraordinary" and a basis to refuse unrestricted witness testimony and the production of documents which might prejudice its defense against the House claims. The Supreme Court, however, has long held that congressional inquiries cannot be thwarted by ongoing litigation that may parallel its proceeding. In another Teapot case that reached the High Court, *Sinclair v. United States*⁵, a witness at the congressional hearings refused to provide answers and was prosecuted for contempt of Congress. Based upon a separate lawsuit brought by the government against the witness' company, the witness had declared "I shall reserve any evidence I may be able to give for those courts...and shall respectfully decline to answer any questions propounded by your committee." The Court upheld the witness' conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness' contention that the pending lawsuits provided an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves "operated to divest the Senate, or the committee, of power to further investigate the actual administration of the law."⁶ The Court further explained: "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly, or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in those suits."⁷ The Court reiterated its conclusion in *Hutchison v. United States*⁸, holding that a committee's investigation "need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding...or when crime or wrongdoing is disclosed."

The Questionable Availability of the Common Law Deliberative Process Privilege

Treasury has not actually asserted the deliberative process privilege (DPP) but it has invoked its essence in justifying its withholding documents that relate to "documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" and by referencing a recent district court recognizing the applicability in the context of a congressional inquiry.⁹ The problematic validity of that finding is fully discussed below, but even if it is applicable, it is easily overcome by an investigative body's showing of jurisdiction, authority and a need for the information. A District of Columbia Circuit Court ruling has held that the DPP is a common law privilege that Congress can more easily overcome than the constitutionally rooted presidential communications privilege. Moreover, in congressional investigations the DPP "disappears altogether when there is any reason to believe government misconduct has occurred."¹⁰ The court's understanding thus severely limits the extent to which agencies can rely upon

⁵ 279 U.S. 263 (1929).

⁶ 279 U.S. at 295.

⁷ *Id.*

⁸ 369 U.S. 599, 617 (1962).

⁹ See *Committee on Oversight and Government Reform v. Lynch*, 2016 U.S. Dist. LEXIS 5713 (D.D.C. Jan. 19, 2016).

¹⁰ *In re Sealed Case (Espy)*, 121 F. 3d 729, 745-46 (D.C. Cir. 1997). The appeals court also stated "[W]hen there is reason to believe the documents sought may shed light on government misconduct, 'the [deliberative process] privilege is routinely denied' on the ground that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government.'" *Id.* at 737-38.

the DPP to resist congressional investigative demands.

Agencies May Not Deny Committee Access to Proprietary, Trade Secret, Privacy or Other Sensitive Information: The Anomaly of “Touhy Regulations”

Congress’ authority and power to information, including but not limited to proprietary or confidential information is extremely broad. Upon occasion, Congress has found it necessary and appropriate to limit its access to information it would normally be able to obtain by exercise of its constitutional oversight prerogatives. But where a statutory confidentiality or nondisclosure provision is not made explicitly applicable to the Congress, the courts have consistently held that agencies and private parties may not deny congressional access to such provisions on the basis of such provisions.¹¹ Ambiguities in such statutes as the Trade Secrets Act and the Privacy Act have been resolved in a committee’s favor.¹² Indeed, this Subcommittee has twice in the past voted for contempt citations against Department heads¹³ who refused to disclose information under legislation that contained nondisclosure provisions that were silent with respect to congressional access. In both instances the information was supplied soon after the votes was taken.

It is anomalous then that an agency regulation authorized by Congress and designed to regulate record management in the face of subpoenas issued for private sector litigants, and is silent about its application to congressional requests, is allowed to act as a device to impede, or perhaps intimidate, agency employees from freely responding to committee questioning or communicating with committees. It does this at Treasury by its requirement that IRS employees get permission to talk to Congress, and then limits what they can say to Congress to those topics approved by IRS. OMB has a similar Touhy regulation. Although a federal statute, 5 U.S.C. 7211, articulates First Amendment rights of federal employees to petition and communicate with Congress, there is no enforcement mechanism. Annual appropriations limitations have provided protections against the abuse of the nondisclosure regulations but I am unaware of any active utilization of the protections. It is possible that the understandable fear of “whistleblower” retaliation limits the incentive to utilize it.

The Current State of Investigative Oversight

Throughout its history, Congress has engaged in oversight of the Executive Branch—the review, monitoring, and supervision of the implementation of public policy. Congress’s right of access to executive branch information is constitutionally based and is critical to the integrity and effectiveness of our scheme of separated but balanced powers. The first several Congresses inaugurated such important oversight techniques as special investigations, reporting requirements, resolutions of inquiry, and use of the appropriations process to review executive activity. In the face of Executive challenges to its authority, the legislature’s capacity and capabilities to check on and check the Executive have increased over time. Supreme Court and lower court rulings have recognized the institutional importance and necessity for its broad inherent authorities of information gathering and self-protection against

¹¹ See, e.g., *FTC v. Owens-Corning Fiberglass Corp.*, 626 F. 2d 966, 970 (D.C. Cir. 1980); *Exxon Corp. v. FTC*, 589 F. 2d 582, 585-86 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979); *Ashland Oil v. FTC*, 548 F. 2d 977, 979 (D.C. Cir. 1976).

¹² See, e.g., *Devine v. United States*, 202 F. 3d 547, 551 (2d Cir. 2000); *FTC v. Owens-Corning Fiberglass corp.*, supra; *Exxon Corp. v. FTC*, supra; *Ashland Oil v. FTC*, supra.

¹³ See, Hearings, “Contempt Proceedings Against Secretary of Commerce Rogers C.B. Morton” before the Subcomm. on Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, 94th Cong. 1st Sess. (1975); “Contempt Proceedings Against Secretary of HEW Joseph Califano, Jr.” “Business Meeting of the Subcomm. on Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 19780 (Comm. Print No. 95-76).

aggrandizement by the coordinate branches. Public laws, congressional rules, and historical practices have measurably enhanced Congress's implied power under the Constitution to conduct oversight.

The Essential Premise of Successful Investigative Oversight

The enduring practical lesson I learned in my 35 years with CRS is that committees wishing to engage in successful oversight must establish their credibility with the White House and the Executive departments and agencies that they oversee early, often and consistently, and in a manner evoking respect, if not fear. Thus, although standing and special committees have been vested with an array of formidable tools and rules to support their powers of inquiry, and have developed an efficacious nuanced, staged investigatory process, one that proceeds from one level of persuasion or pressure to the next to achieve a mutually acceptable basis of accommodation with the Executive, it has been absolutely critical to the success of the investigative process that there be a credible threat of meaningful consequences for refusals to provide necessary information in a timely manner. In the past that threat has been the possibility of a citation for criminal contempt of Congress or a trial at the bar a House of an official, either of which could result in imprisonment and fines. There can be little doubt that such threats were effective in the past, at least until 2002. But though the formidable rules, tools and authorities remain intact, that threat, and the continued efficacy legislative oversight, has now come into serious question.

Congress Under Siege

Congress is presently under literal siege by the Executive. The last decade and a half has seen, among other significant challenges, an unlawful FBI raid on a Member's congressional office to obtain alleged incriminating documents; Department of Justice (DOJ) criminal prosecutions of Members that have successfully denied Members Speech or Debate protections for legislative actions; the presidential cooption of legislative oversight of agency rulemaking; refusals to ensure the faithful execution of enacted statutory directions; an attempted usurpation of the Senate's exclusive confirmation prerogative; failures to submit timely nominations for vacant Inspector General positions thereby allowing unconfirmed acting officials to hold such sensitive positions, often for years; the issuance of a DOJ Office of Legal Counsel (OLC) opinion that authorizes heads of agencies and departments to decline Inspector General requests for information necessary to perform their investigative and audit authorities; and OLC opinions asserting expanded presidential control over agency decision making through broad interpretations of the concept of a unitary executive and of the traditional understandings of the scope of executive privilege claims that have been utilized by departments and agencies to delay or deny congressional access to requested information.

With particular respect to congressional investigative oversight of the actions of the Executive Branch, there has been the adoption of an aggressive stance, first officially enunciated by OLC in 1984¹⁴, that the historic congressional enforcement processes of criminal and inherent contempt, designed to ensure officials' compliance with its core information gathering prerogative, are unconstitutional and unavailable to a committee if the president unilaterally determines that such officials need not comply. In such instances, DOJ will not present contempt citations voted by a House to a grand jury as is required by law. A more recent DOJ opinion declared that it has determinative authority whether to prosecute an executive official found in contempt of Congress even in instances when presidential privilege has not been invoked.¹⁵ The consequence has been that committees have been forced to seek subpoena compliance through civil court enforcement actions, a tactic that has been shown in two recent cases to cause intolerable delays that undermine the effectiveness of timely committee oversight and opens the

¹⁴ Prosecution for the Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. Off. Legal Counsel 101 (1984)(Olson Memo). See also, Responses to Requests for Information Made Under the Independent Counsel Act, 10 Op. Off. Legal Counsel 68 (1986)(Cooper Memo).

¹⁵ Letter to The Honorable John A. Boehner, Speaker, U.S. House of Representatives, from Ronald C. Machen, Jr., United States Attorney, District of Columbia, dated March 31, 2015.

door to aberrant judicial rulings.

The Miers Litigation

The first of those cases, *Committee on the Judiciary v. Miers*¹⁶, involved an inquiry into whether the presidential firings of nine U.S. Attorneys in 2006 were politically motivated. The sensitivity of the allegations forced the highest echelons of the Justice Department to testify before the Committee without the necessity of subpoenas either in public or in executive sessions. But it soon became apparent that all roads led to the White House and its role in the matter. Several lower level aides were subpoenaed and some were granted immunity. Focus soon centered on the former White House Counsel, Harriet Miers, and political advisor Karl Rove. They were subpoenaed, along Chief of Staff Joshua Bolten, who was the White House custodian of documents. The President claimed presidential privilege and then ordered them not to appear to testify or produce documents, asserting that his invocation of privilege cloaked them with absolute immunity from compulsory process. The House voted Miers and Bolten in contempt of Congress. The Attorney General advised the Speaker that any contempt citation issued would not be presented to a grand jury. As a consequence, the House was forced, for the first time in history, to institute a civil suit to enforce a subpoena against executive officials. Members of the minority party leadership filed an *amicus* brief arguing that the suit should be dismissed.

The district court ruled that the House had inherent constitutional power to authorize a civil action to enforce committee subpoenas and that a presidential invocation of privilege did not provide, as claimed, absolute immunity for White House aides which shielded them from responding in any way to the Committee's subpoenas. The court did not reach the question of the validity of the presidential privilege claim itself. The suit also did not challenge the validity of the refusal to present the contempt citation to a grand jury. A change of administration resulted in a settlement that allowed limited *in camera* testimony and document disclosures in March 2009 that mooted a pending appeal. The investigation and litigation spanned over two years with an inconclusive resolution. However, the cloud remaining respecting the likelihood of Executive repetition of the obstructive tactic made the victory appear Pyrrhic. That fear was shortly confirmed.

The Fast and Furious Litigation

The next such case, *House Committee on Oversight and Government Reform v. Lynch*,¹⁷ arose out of an investigation commenced in January 2011 following the disclosure that DOJ's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) was engaging in a law enforcement program, denominated Operation Fast and Furious, in which the ATF knowingly allowed firearms purchased illegally in the United States to be unlawfully transferred to third-parties and transported into Mexico. The goal of the operation was to let the guns "walk" without interdiction so as to enable ATF to follow the flow of the firearms to the Mexican drug cartels that purchased them. This tactic was publically exposed after guns that had been illegally purchased were recovered at the scene of a December 2010 firefight in Arizona in which a U.S. Customs and Border Protection agent was killed. Congressional inquiries in January 2011 to ATF requested information about allegations that the agency had knowingly used these inappropriate law enforcement tactics. A DOJ Assistant Attorney General replied on February 4, 2011 on behalf of ATF and flatly denied that the agency had ever "sanctioned or otherwise knowingly allowed the sale of assault weapons to a straw purchaser." The House Committee on Oversight and Government Reform (COGR) was skeptical of the reply and continued its investigation. The inquiry was re-invigorated in December of 2011 when DOJ withdrew its February 4 letter, conceding that it had contained "inaccurate information" about the depth of DOJ's knowledge of ATF's actions and that the operation itself was fundamentally

¹⁶ 558 F. Supp. 2d 53 (D.D.C. 2008).

¹⁷ 2016 U.S. Dist. LEXIS 5713 (D.D.C. Jan. 19, 2016). The original defendant, former Attorney General Eric Holder, left office and his successor was substituted as the defendant of record.

flawed.

The concession shifted the focus of COGR's investigation to the questions as to how DOJ had initially provided the Committee with such inaccurate information; why it took almost ten months to correct the mistake; and whether the agency had sought to obstruct the Committee's inquiry by providing misleading information. COGR then narrowed its attention to documents created after the February 4th letter relating to DOJ's response to COGR's investigation. There followed subpoenas and negotiations and an ultimate refusal by Attorney General Holder to turn over key documents, which was supported by a presidential claim of privilege. The full House voted Holder in contempt on June 28, 2012. Following the vote DOJ advised the Speaker that, as in *Miers*, no action would be taken to prosecute the Attorney General. In anticipation of DOJ's stance the House had passed a resolution authorizing a civil suit, which was instituted on August 13, 2012. On December 20, 2012 five prominent Members of the House minority party filed an amicus brief in support government's motion to dismiss the Committee's suit.

Several important rulings have been issued by the district court since the institution of the litigation. On September 30, 2013, the court initially ruled that the Committee had standing to institute its suit to enforce its subpoena demands¹⁸, essentially following the similar ruling in *Miers*, and rejected political question and prudential arguments for dismissing the complaint. The next critical issue to be faced was whether the government's asserted deliberate process privilege (DPP) is constitutionally based or is solely a common law creation. District of Columbia Circuit Court rulings have established that the constitutional presidential communications privilege (PCP) encompasses the deliberative process privilege but only when the communications relate to a "quintessential and non-delegable presidential power" that requires direct presidential decision making and must have been authored or solicited and received by the President or a close White House advisor who has operational proximity to the President. Heads of departments and agencies are not deemed "close advisers."¹⁹ Otherwise, the DPP is a common law privilege.²⁰ In a longstanding and consistent congressional committee practice, acceptance of the DPP asserted by executive agencies, as with other common law privileges, has been subject to the discretion of the individual committees on a case-by-case basis. In such instances, a committee only needs to show that it has jurisdiction and authority and that the information sought is necessary to its investigation. But a plausible showing the existence of fraud, waste, abuse or maladministration would, in any event, conclusively vitiate an agency assertion of the privilege.

In an August 20, 2014 Order dismissing cross motions for summary judgment, the Court ruled that DOJ could assert the DPP as to deliberative documents not involving presidential communications. Judge Jackson determined "that there is a constitutional dimension to the deliberative process aspect of the executive privilege, and that the privilege [therefore may] be properly invoked in response to a legislative demand." This "dimension" or aura was seen to derive from the fact that both the PCP and DPP are "closely affiliated" in that "[both] are executive privileges designed to protect executive branch decision making."²¹ The Court, however, avoided both the immediate necessity of balancing the legislative and executive interests involved and determining whether agency misconduct vitiated the claim. Instead it found that DOJ's "blanket assertion" of privilege was insufficient. DOJ was directed to review all the withheld documents and either produce them to COGR or provide a detailed privilege log substantiating each assertion of deliberative process.

Sixteen months later, on January 19, 2016, the Court issued an opinion and order in response to

¹⁸ *Committee on Oversight and Government Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013). The basis of the court's standing ruling differed from that rendered in *Miers* which found the cause of action was based on the Constitution's inherent vestment of investigatory power in Congress.

¹⁹ *In re Sealed Case (Espy)*, 121 F. 3d 729 (D.C. Cir. 1997); *Judicial Watch, Inc. v. Department of Justice*, 365 F. 3d 1108 (D.C. Cir. 2004).

²⁰ *Espy*, 121 F. 3d at 745-46.

²¹ Citing *Espy* out of context.

the Committee's motion to compel production of the withheld documents. It reiterated its prior ruling that the deliberative process privilege could be invoked in response to COGR's demands. It then detailed the results of the Court's perusal of the list and descriptions of 10, 446 documents withheld in whole or part. It concluded that 5342 were sufficiently documented to be properly covered by the DPP but declined to rule upon 5096 documents which were withheld by DOJ on the grounds that they contain attorney-client privileged material, attorney-work product, private information, law enforcement sensitive material, and foreign policy sensitive material. The remaining eight documents, which provided no reasons at all for their withholding, were ordered to be disclosed.

With respect to the DPP documents, however, the Court determined that it was not necessary for it to engage in the usual process of balancing the competing interests of the two branches with respect to the legitimacy of COGR's investigation or the Committee's need for the information against the impact that the revelation of any record could have on candor in future executive decision making. DOJ, it found, had repeatedly acknowledged the legitimacy of COGR's investigative concerns. Further, it concluded, by requesting and complying with a parallel DOJ Inspector General investigation, "any harm that might flow from the public revelation of the deliberations at issue here has already been self-inflicted: the emails and memoranda that are responsive to the subpoena are described in detail in a report by the Department of Justice Inspector General that has already been released to the public.... Since any harm that would flow from the disclosures sought here would be merely incremental, the records must be produced." As a further consequence of this rationale, the Court saw no need to confront the issue of agency misconduct: "The Court emphasizes that this ruling is not predicated upon a finding of misconduct." Finally, the Court refused to rule on DOJ's withholding of the 5096 documents raising privilege claims other than the DPP, reasoning that only the DPP claim had been the subject of the original complaint. It suggested that for resolution of that matter the parties should engage in further negotiations which, if unsuccessful, might be presented to the Court.

Arguably, the unusual ruling perhaps reflects that the judge may have had second thoughts about her initial ruling on the applicability of the DPP to congressional demands and was attempting to foreclose an appeal. That is, since the Committee would have gotten all it originally asked for, arguably that potentially mooted any appeal. Similarly, since DOJ had garnered an important privilege precedent that would be available for agencies to rely on for some time to come, it might wish to allow it to stand until at least the inevitable next challenge. At the urging of the Committee, however, the Court issued a "FINAL, APPEALABLE ORDER" on February 8, 2016. On April 8, the Committee filed a notice of appeal with the D.C. Circuit. At that point the investigation and subsequent litigation had spanned over five years with no satisfactory resolution in sight.

The Urgent Need for Constitutional Clarity Respecting Congress's Investigative Enforcement Authority

The portent of *Miers* has been realized in the Fast and Furious litigation. The DOJ tactic for undermining effective congressional investigative oversight by forcing committees to seek civil court enforcement of information gathering subpoenas has succeeded. The inevitable attendant extensive delays in accessing information respecting legitimate oversight inquiries has rendered its ultimately untimely availability essentially useless.²² The dubious ruling by the Fast and Furious court, approving the invocation of the common law deliberative process privilege in these enforcement proceedings, has now invited future such claims by agencies as a matter of right in investigative inquiries, with the likelihood of the assertion of a panoply of other common law and policy claims that heretofore have been

²² See Stanley Brand & Sean Connolly, *Congressional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 Cath. U.L. Rev. 71, 81, 84 (1986)(noting the effect of delay in hindering congressional oversight).

acceptable only at the discretion of committees.

The continued use of the tactic by executive agencies in the future is all but certain. There is accumulating current evidence of agency slowdowns in responding to committee information requests and an uptick in claims resting on the deliberative process privilege. Continued congressional acquiescence to the DOJ tactic will result in inestimable, if not irreparable, damage to its core legislative functions, responsibilities and the public's confidence in the institution's competence and authority. A commentator writing shortly after the unsatisfactory resolution of the *Miers* litigation, but before the Fast & Furious rulings, bluntly put forward its implications: "To put it succinctly, Congress cannot win in court—even if the courts ultimately side with it over the executive branch, the Administration can insure that those final rulings come far too late to allow Congress effectively to oversee executive branch operations....But Congress's self-inflicted wounds may well go deeper. In seeking the aid of the judiciary, the House was announcing to the world its belief in its own impotence....And the House, in choosing to invoke the court's authority has played right into this perception. It has reinforced the idea that the judiciary is the domain of reasoned, principled judgments that must be respected, while congressional action in defense of its powers is 'unseemly'."²³ Justice Kennedy has warned that Congress cannot expressly abdicate its core responsibilities but by inaction or acquiescence it can be effectively ceded elsewhere.²⁴

The constitutional basis of Congress's virtually plenary oversight and investigative powers is irrefutable. The courts have consistently recognized that in order to perform its core constitutional responsibilities, Congress can and must acquire information from the President and the departments and agencies of the Executive Branch.²⁵ The structure of the checks and balances rests on the principle that Congress has a right to know everything that the executive is doing, including all the policy choices and all the successes and failures in the implementation of those policies. The Supreme Court has made it clear that Article I presupposes Congress's access to information so that it can responsibly exercise its obligations to make laws requiring or limiting executive conduct, to fund the programs supporting the executive policies of which it approves, to deny funds to those policies of which disapproves, and to pursue investigations of executive behaviors that raise concerns.²⁶ Without knowledge of the policy choices and activities of the Executive Branch, which is often unavailable unless provided by the Executive, Congress cannot perform those duties the Framers envisioned. Finally, the Supreme Court and appellate courts have approved practices and processes Congress has adopted for the conduct of its oversight and investigative hearings that do not accord witnesses the entire panoply of procedural rights enjoyed by witnesses in adjudicatory proceedings,²⁷ as well as mechanisms, such as inherent and statutory

²³ Josh Chafetz, *Congress's Constitution*, 160 U. Pa. L. Rev. 715, 740-41 (2012)(Chafetz).

²⁴ *Clinton v. City of New York*, 524 U.S. 417, 452 (1998)("That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less than those of other Congresses to follow....Abdication of responsibility is not part of the constitutional design.")(Kennedy, J., concurring in the Court's rejection of a congressional delegation of line item veto authority to the President).

²⁵ See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 111 (1959)(noting that the power of Congress to inquire is "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); *McGrain v. Daugherty*, 273 U.S. 135, 174-75 (1927)(remarking that the legislature has all the necessary power under the Constitution to perform the legislative function, including compelling appearance and testimony).

²⁶ See, e.g., *Barenblatt*, 360 U.S. at 111; *Watkins v. United States*, 354 U.S. 178, 187 (1957); *McGrain*, 273 U.S. at 174.

²⁷ *United States v. Fort*, 443 F.2d 670 (D.C. Cir. 1970), cert. denied, 403 U.S. 932 (1971)(Witnesses have no right of cross-examination of adverse witnesses or to discovery of materials utilized by a committee as the basis for questions); *Hannah v. Larch*, 363 U.S. 420, 445 (1971)(observing that "only infrequently have witnesses...[in congressional hearings] been afforded procedural rights normally associated with an adjudicatory proceeding.").

criminal contempt proceedings²⁸, all of which are intended to encourage and support the expeditious gathering of information for legislative purposes from officials and private parties.

The current situation is not an interbranch impasse to be resolved by negotiation. It is an Executive challenge to the long understood and established constitutional allocation of core powers between the political branches. In this case it involves the refusal of the Executive to recognize and adhere to the historic, constitutionally recognized coercive mechanisms designed to assure timely congressional access to information necessary carry out its legislative function by insisting that it is unconstitutional to utilize the criminal or inherent contempt processes against federal officials when the President has invoked executive privilege. A committee's sole recourse now is to seek compliance by means of a civil enforcement action. A committee is given no other timely, effective choice. The result is that the critical lines of constitutional authority in this vital area have become unclear and the uncertainty is having, and will continue to have, a paralyzing effect on congressional oversight. Until it is resolved it raises the specter of the concomitant danger of Executive encroachment and aggrandizement.

The Rationale for a Constitutional Challenge

In a seminal essay, Professors Eric A. Posner and Adrian Vermeule examine the political phenomenon of "constitutional showdowns" and attempt to provide a usable definition of the idea, an analysis of the circumstances under which showdowns will, will not or should occur, observations about whether our constitutional system produces too many or too few showdowns, and what are the socially optimal circumstances for seeking a constitutional showdown.²⁹ The authors posit that "[s]howdowns occur when the location of constitutional authority for making important policy decisions is ambiguous or contested, and multiple political agents (branches, parties, sections, governments) have a strong interest in establishing that the authority lies with them."³⁰ Clear allocations of authority, the authors avow, are essential to constitutional stability. "Since institutions share power, whether one institution should press the limits of its power depends to a great extent on whether other institutions are misusing their powers. It is hard to see how ambiguity about the contours of authority could be desirable in the abstract; its effect is just to create uncertainty among citizens who are regulated by the various institutions. All else equal, uncertainty is a systemic cost, which can only be justified on second-best grounds; what those grounds might be is obscure....Governmental violation of a clear allocation of power can trigger resistance because the stipulated allocation serves as a focal point for resistance. Creeping aggrandizement is more, not less, likely when the constitutional allocation of powers is ill defined."³¹

Posner and Vermeule conclude that the confluence of certain social, legal and political circumstances impel "constitutional showdowns." "Under certain conditions, then—where the value of setting precedents now is especially high, because similar issues will recur in future generations and little new information will be gained by delay—the active virtues are superior to the passive virtues from the social point of view. We do not claim that these conditions are more common than the conditions under which the passive virtues are socially desirable. All we claim is that the theorists of the passive virtues fail to consider the full range of social costs and benefits, and are too sanguine about their conflict-avoiding prescriptions."³² As will be fully detailed below, the Executive's current tactic of forcing committees to seek civil court actions as the sole means of enforcement of subpoena demands for information has no basis in law or historical practice and thwarts the accomplishment of Congress's core legislative functions and responsibilities. It is an act of Executive usurpation and aggrandizement that threatens the long understood constitutional scheme of separated and balanced powers, one that demands legislative

²⁸ See, e.g., *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821) (Recognizing the authority of each House to conduct inherent contempt proceedings to protect its institutional integrity).

²⁹ Posner & Vermeule, *supra* note 1 at 992-93, 1010

³⁰ *Id.* at 1002.

³¹ *Id.* at 1022.

³² *Id.* at 1043.

challenge and judicial redress.

The Constitutional, Legal, Historical and Practical Insubstantiality of Executive Refusals to Recognize and Adhere to Constitutional and Statutorily Established Mechanisms to Enforce Congressional Demands for Information

The formal articulation of the Executive's current position refusing legal recognition of congressional contempt citations issued pursuant to either the legislature's statutory criminal contempt or inherent contempt authorities appears in two opinions rendered by DOJ's Office of Legal Counsel (OLC) in 1984 and 1986.³³ Both have been cited as the basis for Executive non-compliance with the contempt citations in the above-recounted *Miers* and *Fast & Furious* investigations and litigations.³⁴ But it has taken the Executive thirty years to attempt to implement a strategic decision that on its face poses profound constitutional separation of powers implications. In order to fully and properly assess the legal substantiality of the stratagem it is useful, and indeed necessary, to understand the immediate context that prompted the preparation of the OLC opinions as well as the intervening three decades of events that apparently impelled effectuation of the tactic.

--The Position of the Justice Department on the Use of Inherent and/or Criminal Contempt of Congress Against Executive Branch Officials: The Immediate Origins of the Olson and Cooper Memoranda

In 1970, in response to the growing perception and alarm over Executive actions, often taken in secret, and all reflective of a disdain for legislative authority and prerogatives in foreign and domestic affairs, Congress began taking counteractions to shore up its ability to know what the Executive is doing and to be able respond effectively and in a timely manner to protect its institutional integrity. The hard earned lessons learned from the Viet Nam war, presidential impoundment tactics, and Watergate and the Nixon impeachment proceedings resulted in congressional measures that expanded its ability to gain access to sources of vital information and to assure its timely receipt. These actions included passage of the Legislative Reorganization Act of 1970³⁵, the Congressional Budget Act of 1974³⁶, the War Powers

³³ See, *Prosecution for the Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 101 (1984)(Olson Memo); and *Response to Congressional Requests for Information Made Under the Independent Counsel Act*, 10 Op. Off. Legal Counsel 68 (1986)(Cooper Memo).

³⁴ See, e.g., Memorandum for the Counsel to the President, Fred F. Fielding, from Stephen G. Bradbury, Principal Deputy Attorney General, Office of Legal Counsel, *Immunity of Former Counsel to the President from compelled Testimony*, July 10, 2007; Letter to George T. Manning, Counsel for Ms. Miers, from Fred F. Fielding, Counsel to the President, July 10, 2007 (directing Ms. Miers not to appear before the House Judiciary Committee in response to a subpoena); Letter to House Judiciary Committee Chairman John Conyers, Jr., from George T. Manning, counsel for Ms. Miers, July 17, 2007 (explaining legal basis for Ms. Miers refusal to appear); Letter from James M. Cole, Deputy Attorney General, to John Boehner, Speaker of the House, June 28, 2012.

³⁵ 84 Stat. 1156, 1168-71, 1181-85 (making express the duty of all standing committees to engage in oversight on a "continuing basis," strengthening the program evaluation responsibilities of the General Accounting Office (GAO), tripling the personnel complement of the Congressional research Service and directing the hiring of senior level experts in over 20 categories of legislative concern, strengthening its policy analysis role and expanding its other responsibilities to Congress, and increasing the number of permanent staff for standing committees, including a provision for minority staff hirings).

³⁶ 88 Stat. 302,325, 326,327-29 (further expanding committee oversight authority by permitting them to appraise and evaluate programs by themselves 'or by contract, or [to] require a Government agency to do so and furnish a

Resolution of 1973³⁷, the Impoundment Control Act of 1974³⁸, the Inspector General Act of 1978³⁹, and the Ethics in Government of 1978⁴⁰.

Of particular interest here, however, were the historic internal institutional reforms of the committee system in the House installed at the beginning of the 94th Congress in 1975⁴¹ which had the effect of abandoning the seniority system for committees, which had vested absolute control in full committee chairs, by decentralizing and disbursing committee authorities over legislation and oversight to subcommittees and their chairs. As a result, any committee with over 20 members is required to establish a separate committee solely devoted to oversight. Also significant was the appointment in 1977 of the first House General Counsel by Speaker Thomas "Tip" O'Neill to represent institutional interests in court actions and to provide legal guidance to committees, members and the leadership. Remarkably, before that time the Justice Department frequently represented congressional interests in court proceedings, often to the legal detriment of Congress.⁴²

The effect of the reforms was immediate, with aggressive committee actions producing important supporting precedents underlining the efficacy and institutional necessity of having available the credible threat of a contempt of Congress citation to support compliance with valid compulsory committee demands for information. Between 1975 and 1998 there were 10 votes to hold cabinet-level executive officials in contempt. All resulted in complete or substantial compliance with the information demands in question before the necessity of a criminal trial.⁴³ During this period, and indeed until 2002, the very threat of a contempt vote was sufficient to elicit compliance.⁴⁴ Four refusals raised executive privilege claims, one asserted a "conditional" claim of constitutional privilege, and the remainder raised claims of statutory exemption or

report thereon to the Congress," directing the Comptroller General of GAO to review and evaluate government agency programs and activities on his own initiative or by requests by committees or members and to establish a special office to carry out these responsibilities, and strengthening GAO's role in acquiring fiscal, budgetary and program-related information; and establishing the Congressional Budget Office (CBO) which is authorized to "secure information, data, estimates, and statistics from the various departments, agencies, and establishments of the government to share with the newly established House and Senate budget committees).

³⁷ Pub. L. 93-148, 87 Stat. 134 (1973)(requiring the prompt reporting to Congress of military actions taken by the President).

³⁸ 2 U.S.C. 683 (limiting the ability of the President to refuse to obey statutory directions to spend appropriated funds).

³⁹ Pub. L. 95-452, *codified at* U.S.C. Appendix 3 (establishing offices of inspectors general in all cabinet and larger agencies to monitor the efficiency and propriety of their administrative actions by means of independent internal audits and investigations that may be reported to Congress).

⁴⁰ Pub. L. No. 95-521, 92 Stat. 1824 (establishing the process of appointing an independent counsel to investigate and prosecute allegations of criminal conduct at the higher reaches of the executive bureaucracy).

⁴¹ See H. Res. 988, 93d Cong., effective Jan. 3, 1975.

⁴² For a discussion of the history legal representation for the House and Senate see Chapter __ *infra* at __.

⁴³ Secretary of Commerce Rogers C.B. Morton (1975); Secretary of State Henry A. Kissinger (1975); Secretary of Health, Education and Welfare Joseph A. Califano (1978); Secretary of Energy Charles W. Duncan (1980); Secretary of Energy James B. Edwards (1981); Secretary of the Interior James Watt (1982); Environmental Protection Administration head Anne Gorsuch Burford (1982-83); Attorney General William French Smith (1983); White House Counsel John M. Quinn (1996); and Attorney General Janet Reno (1998). The details of these instances may be found in Louis Fisher, *The Politics of Executive Privilege*, 111-134 (2004)(Fisher)..

⁴⁴ See Alissa Dolan and Todd Garvey, *Congressional Investigations of the Department of Justice, 1920-2012: History Law and Practice*, CRS Report R42811, 32-33, 38-39 (Nov. 5, 2012), describing successful investigations of the Rocky Flats Environmental Crimes Plea Bargain and the investigation of the Misuse of Informants at the FBI's Boston Regional Office.

agency policy concerns. There is evidence in some of the cases that the contemnors were reluctant to risk a criminal prosecution to vindicate a presidential claim of privilege or policy, which led to settlements.⁴⁵ In addition, in 1976, the House, by resolution, twice authorized Rep. John Moss, chairman of the House Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce, to intervene in pending litigation to ensure compliance with issued subpoenas. In both cases the courts accepted the congressional appearances.⁴⁶ Those precedents proved to be decisive for the courts in the *Miers* and *Fast* and *Furious* litigations in upholding the House's right to authorize *initiation* of civil enforcement proceedings by a House resolution. It may also be noted that Rep. Moss and his Subcommittee were also the motivating force behind the Rogers Morton and Califano contempt proceedings. It was into this almost exuberant atmosphere of successful exercises of congressional authority that President-elect Ronald Reagan warily but prepared stepped.

The advent of the Reagan administration in 1981 marked the beginning of a determined and carefully conceived legal and political effort to retrieve a perceived loss in strength of the presidency.⁴⁷ President Reagan campaigned for and sought to implement a broad deregulatory agenda. Implementing that goal required asserting control over administrative agencies. But by the end of 1982 it became readily apparent that this could not be accomplished through legislative means⁴⁸ and the administration turned to an aggressive administrative and litigative strategy. Fundamental to this scheme was the establishment of a highly centralized bureaucratic structure of government that would ensure that ultimate control of decision making in all executive branch agencies, including independent regulatory agencies, would rest in the hands of the President or his delegate. In support of this end, the administration and its supporters articulated a constitutionally based theory of a unitary executive, a conception that left no constitutional space for independent agencies—those protected from removal under a good cause standard—much less the new independent counsel statute. It is founded on the notion that that Article II's vesting of "executive power" in the President combined with the President's authority to "take Care that the Laws be faithfully executed", requires that the President have the power to supervise and control the implementation of federal law, and bars Congress from imposing restrictions on his power to fire executive officers at will. The new independent counsel law was seen as an especial intrusion on core presidential prerogatives since it imposed removal restrictions on an officer whose functions are paradigm exercises of executive power: criminal investigations and prosecution.⁴⁹

On this basis the administration began taking a variety of actions to make that idea an operative fact. These included centralizing control of agency rulemaking in the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) by executive

⁴⁵ See, e.g., Anne M. Burford, *Are You Tough Enough?* 145-159 (McGraw Hill 1986)(quoting James Watt's warning about his and Attorney General Smith's contempt experience and Burford's description of her despair at her treatment by the Justice department)(Burford).

⁴⁶ See *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 301 (D.D.C. 1976) *aff'd* 548 F. 2d 977 (D.C. Cir. 1976) and *United States v. AT&T*, 551 F. 2d 384,392 (D.C. Cir.1976). See also Fisher, *supra* at 95-97 discussing *Ashland*.

⁴⁷ See Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 Geo. Wash. L. Rev.627 (1989)(Rosenberg); Kevin Stack, *The Story of Morrison v. Olson: The Independent Counsel and Independent Agencies in Watergate's Wake*, Vanderbilt Law School Public Law and Theory, Working Paper Number 09-06, 401-431 (Stack), *accessible at* http://ssrn.com/abstract_id=1340124; Peter I. Strauss, Foreword: Overseer, or "The Decider?" The President in Administrative Law, 75 Geo. Wash. L. Rev. 696 (2007)(Strauss).

⁴⁸ Rosenberg, at 628 n. 2.

⁴⁹ Stack at 409-10.

orders,⁵⁰ challenging the constitutionality of independent regulatory agencies; asserting the inability of Congress to vest discretionary authority in subordinate executive officials who are free from presidential supervision and control; refusing to implement congressional enactments it deemed unconstitutional; questioning the authority of Congress to vest the appointment of an executive officer with prosecutorial powers in the courts and to provide for removal of that officer only for cause; and denying the authority of Congress to empower an agency to issue statutorily prescribed unilateral compliance orders to sister agencies found in violation of laws and regulations applicable to them or to resort to court action to force compliance with such orders.⁵¹

It should then come as no surprise that the Reagan Administration would take special umbrage to Congress's exercise of its criminal contempt power against its own cabinet rank officials. The first such citation, against Energy Secretary James Edwards by a House Government Operations Subcommittee, involved documents regarding contract negotiations between the department and a major oil company. Members were concerned the deal was going too fast, but the real conflict was between officials in the administration. The Energy Secretary wanted to sign the contract but wouldn't turn over the documents until it was consummated. On the morning of the scheduled full committee contempt vote the President avoided the potential conflict by siding with the Secretary. The contract was signed and the documents were delivered.⁵²

The next citation, against Interior Secretary James Watt, was more contentious and saw the first invocation of executive privilege by President Reagan. At issue were 31 documents relating to a reciprocity provision in a statute that involved Canada. Attorney General Smith argued that the documents should be withheld because the House Energy and Commerce Subcommittee wanted them for oversight and not legislative purposes; the documents would expose pre-decisional deliberative matters and would chill the candor of future deliberations; and the documents related solely to sensitive foreign affairs matters. After the Subcommittee rejected the claims and announced it would prepare a contempt citation all but seven of the documents had been turned over. When the refusals with respect to the remaining documents continued the Subcommittee voted him in contempt. When Watt continued to resist compliance, the full committee voted to hold him in contempt. At that time a compromise was reached whereby Subcommittee members would be able to peruse the documents for four hours and take notes and agreed not to release information that might harm Canada.

The ranking minority member commented that there was nothing sensitive in the documents and that Watt would have turned over the materials had not the White House intervened.⁵³ This was confirmed by Watt himself in relating his reaction to being told by White House Counsel Fred Fielding that when Attorney General Smith was cited for contempt the administration "didn't want to create any embarrassment for the general, so we gave them the paperwork." Watt said he responded: "*Fred Fielding!* You're telling me that the Attorney General had a case similar to mine, and the principle for which you marched me to the end of the plank is not important enough for him to stand on and get abused like I've been abused?" When Fielding responded "That's the way it goes, Jim," Watt says he retorted: "You get me out within twenty-four hours or I'm going to the Congress personally and hand deliver those papers—because I will not be abused by the White House or the Department of Justice. If the principle is not strong enough for the Attorney General of the United States to fight for, I'm not going to let

⁵⁰ See E.O. 12,291, 3 CFR 127 (1981) and E.O. 12,498, 3 CFR 323 (1985).

⁵¹ See Rosenberg at 629-30 and notes 5 through 9 detailing the almost uniform lack of litigation success.

⁵² See Fisher at 123.

⁵³ See Fisher at 124-26.

you guys use me any longer.”⁵⁴

The White House and DOJ thought that they were better prepared for the next confrontation which evolved from an investigation by two House committees, the Oversight Subcommittee of the Public Works and Transportation Committee and the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee into the Environmental Protection Agency’s (EPA) implementation of provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund). Initially, EPA voiced no objection to the requests seeking documents contained in its open litigation files regarding enforcement of the Superfund program “so long as the confidentiality of the information in the files was maintained.” Shortly thereafter the Reagan administration decided that Congress should not be able to see the documents in active litigation files. A presidential memorandum directed Gorsuch to refuse to turn over the documents, claiming that they represented “internal deliberative materials containing enforcement strategy and statements of the government’s positions of various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites” by the EPA or the Justice Department. Subpoenas were issued by both committees seeking the documents. In compliance with the President’s directive Gorsuch refused to comply on the ground they were “enforcement sensitive.”⁵⁵

The Subcommittee, and ultimately the full House Committee on Public Works, approved a criminal contempt of Congress citation and forwarded it to the full House for consideration. On December 16, 1982, the House voted 259-105 to adopt the citation,⁵⁶ the first time in history a cabinet-level officer was ever so charged. But before the Speaker of the House could transmit the citation to the United States Attorney for the District of Columbia for presentation to a grand jury, the DOJ filed a lawsuit seeking to enjoin the transmission of the citation and to have the House’s action declared unconstitutional as an intrusion into the president’s authority to withhold such information from the Congress. According to the Department, the House’s action imposed an “unwarranted burden on executive privilege” and “interferes with the executive’s ability to carry out the laws.”⁵⁷

The District Court for the District of Columbia dismissed the DOJ suit on the grounds that judicial intervention in executive-legislative disputes “should be delayed until all possibilities have been exhausted.”⁵⁸ In addition, the court noted that ultimate judicial resolution of the validity of the President’s claim of executive privilege could only occur during the course of the trial for contempt of Congress.⁵⁹ The court urged both parties to devote their energies to compromise and cooperation, not confrontation.⁶⁰ After the court’s ruling, DOJ chose not to appeal, in part due to Gorsuch’s reluctance to continue.⁶¹ Throughout the litigation and subsequent negotiations, however, the U.S. Attorney refused to present the contempt citation to a grand jury

⁵⁴ Burford, *supra* at 146-47.

⁵⁵ See generally, Congressional Proceedings Against Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, for Withholding Subpoenaed Documents Related to the Comprehensive Response, Compensation and Liability Act of 1980, H.R.Rept. 97-968, 97th Cong., 7-9, 42-43 (1982)(hereinafter Gorsuch Contempt Report).

⁵⁶ 128 Cong. Rec. 31,776 (1982).

⁵⁷ See generally, *United States v. U.S. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

⁵⁸ *Id.*, 556 F. Supp. at 152’

⁵⁹ *Id.*, stating that “[c]onstitutional claims and other objections to congressional investigations may be raised as defenses in a criminal prosecution.”

⁶⁰ *Id.*, at 153.

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for its consideration, despite a clear statutory direction to do so.⁶² Following a brief period of negotiation with the Public Works and Transportation Committee, it was agreed that the documents would be released to the Subcommittee in stages, beginning first with briefings and redacted copies, and eventually ending with unredacted copies that could only be examined by committee members and up to two designated committee staffers.⁶³

The Chairman of the House Energy and Commerce Committee, Rep. John Dingell, refused to accept the agreement between DOJ and the Public Works Committee given its limitations on access and time delays. After a threat to issue new subpoenas and pursue a further contempt citation, negotiations were resumed. The result was an agreement that all documents covered by the initial Energy and Commerce subpoena were to be delivered to the Subcommittee. There were to be no briefings and no multi-stage process of redacted documents leading to unredacted documents. The Subcommittee agreed to handle all "enforcement sensitive" documents in executive session, giving them confidential treatment. The Subcommittee, however, reserved for itself the right to release the documents or use them in public session, after providing "reasonable notice" to the EPA. If the EPA did not agree, the documents would not be released or used in public session unless the Chairman and Ranking Minority Member concurred. If they did not concur, the Subcommittee could vote on the release of the documents and their subsequent use in a public session. Staff access was to be decided by the Chairman and Ranking Minority Member. The agreement was signed by Chairman Dingell, Ranking Member Broyhill, and White House Counsel Fred Fielding.⁶⁴ The ultimate agreement is illustrative of the autonomy of jurisdictional committees in the House.

The released documents provided evidence that raised allegations of perjury, conflict of interest, and political manipulation of the agency. As part of the final agreement the House withdrew its contempt citation of Gorsuch and she subsequently resigned along with 20 other top agency officials. One official, Rita Lavelle, the manager of the Superfund program, was found in contempt of Congress for defying a subpoena to testify and was tried and convicted of lying to Congress and received a prison sentence and fine.

The Premises of the Olson and Cooper Memoranda

Theodore Olson was the Assistant Attorney General heading the Office of Legal Counsel (OLC) during the period of the Watt and Gorsuch contempts and is generally credited as the developer of the failed strategy to defeat Congress's use of the threat of citations for criminal contempt to force the compliance by senior executive officials to comply with compulsory demands for testimony and documents. After the Watt and Gorsuch debacles Olson decided to memorialize the legal rationale he developed for use in the future in more amenable situations by means of an OLC opinion issued in 1984. In that opinion he revisited the statutory, legal and constitutional issues that were not resolved by the Superfund dispute. The opinion concludes that, as a function of prosecutorial discretion, a U. S. Attorney is not required to refer a contempt to a grand jury or otherwise to prosecute an executive branch official who is carrying out the President's direction to assert executive privilege.⁶⁵ In addition, the opinion determined that a

⁶² See 2 U.S.C. §§ 192 and 194 imposing a "duty" on the U.S. Attorney "to bring the matter before the grand jury for its action."

⁶³ See Memorandum of Understanding Between the Committee on Public Works and Transportation and the Department of Justice, Concerning documents Subpoenaed from the Environmental Protection Agency, February 18, 1983; see also H. Rept. No. 323, 98th Cong., 1st Sess. 18-20 (1983).

⁶⁴ See EPA Document Agreement, CQ Weekly Report, March 26, 1983.

⁶⁵ Olson Memo, *supra* 22 at 102, 114-15, 118-28.

review of the legislative history of the 1857 enactment of the criminal statute and its subsequent implementation demonstrates that Congress did not intend the statute to apply to executive officials who carry out a presidential directive to assert executive privilege.⁶⁶ Finally, as a matter of constitutional law, the opinion concludes that simply the threat of criminal contempt would unduly chill the President's ability to effectively protect presumptively privileged executive branch deliberations.⁶⁷ According to the OLC opinion:

The Presidents exercise of this privilege, particularly when based upon the written legal advice of the Attorney General, is presumptively valid. Because many of the documents over which the President may wish to assert a privilege are in the custody of a department head, a claim of privilege over those documents can be perfected only with the assistance of that official. If one House of Congress could make it a crime simply to assert the President's presumptively valid claim, even if a court subsequently were to agree that the privilege claim was valid, the exercise of the privilege would be so burdened as to be nullified. Because Congress has other methods available to test the validity of a privilege claim and to obtain the documents that it seeks, even the threat of a criminal prosecution is an unreasonable, unwarranted, and therefore intolerable burden on the exercise by the President of his functions under the Constitution.⁶⁸

The 1984 opinion focuses almost exclusively on the criminal contempt statute, as that was the authority invoked by the Congress in the Superfund dispute. In a brief footnote, however, the opinion contains a discussion of Congress's inherent contempt power, summarily concluding that the same rationale that makes the criminal contempt statute inapplicable and unconstitutional as applied to executive branch officials applies to the inherent contempt authority:

We believe that the same conclusion would apply to any attempt by Congress to utilize its inherent "civil" contempt powers to arrest, bring to trial, and punish an executive official who asserted a Presidential claim of executive privilege. The legislative history of the criminal contempt statute indicates that the reach of the statute was intended to be coextensive with Congress' inherent civil contempt powers (except with respect to the penalties imposed). Therefore, the same reasoning that suggests that the statute could not constitutionally be applied against a Presidential assertion privilege applies to Congress' inherent contempt powers as well.⁶⁹

The 1986 OLC memo issued by Charles Cooper, Olson's successor, reiterates the reasoning of the Olson Memo, but added the observation that the inherent contempt power had not been used since 1935 (at that time over 50 years) and that "it seems unlikely that Congress would dispatch the Sergeant-at-Arms to arrest and imprison an executive branch official who claimed executive privilege."⁷⁰ The Cooper opinion also suggest that then current Supreme Court opinions indicated that it was "more wary of Congress exercising judicial authority" and,

⁶⁶ *Id.* at 129-134 (stating that "[t]he Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial or Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals.").

⁶⁷ See *id.* at 102, 135-142.

⁶⁸ *Id.* at 102.

⁶⁹ *Id.* at 140 n. 42.

⁷⁰ Cooper Memo, *supra* n. 22 at 86.

therefore, might revisit the question of the continued constitutionality of the inherent contempt power.⁷¹

The Historical and Constitutional Flaws of the Olson and Cooper Memos

The OLC memos rest their conclusions on history that is inaccurate, constitutional theory that has been rejected by the Supreme Court and lower federal courts, and a misapprehension of the core, fundamental constitutional basis of the need for access to all information necessary for Congress to perform its legislative function and the constitutionally recognized mechanisms intended to protect it against intrusions and disruptions of the Framers' separation of powers design.

--Historical Errors

The assertion that the legislative history of the 1857 statute establishing the criminal contempt process demonstrates that it was not intended to be used against executive branch officials is not supported by the historical record. The floor debates leading to the enactment of the statute make it clear that the legislation was intended as an alternative to, not a substitute for, the inherent contempt authority. This understanding has been reflected in numerous Supreme Court opinions upholding the use of the inherent contempt process.⁷² A close review of the floor debate indicates that Rep. H. Marshall expressly pointed out that the broad language of the bill "proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of this House by an attempt to corrupt a Representative of the people." More to the point, Rep. Orr, the sponsor of the bill, specifically stated that "this House has already exercised the power and authority of forcing a disclosure [from executive officials] as to what disposition had been made for the secret-service fund. And it is right and proper it should be so. Under our Government-under our system of laws-under our Constitution-I should protest against the use of any money by an executive authority, where the House had not right to know how every dollar had been expended, and for what purpose."⁷³

Rep. Orr had reference to a contentious investigation in 1846 regarding charges that Daniel Webster, while Secretary of State, had improperly disbursed monies from a secret contingency fund used by the President for clandestine foreign operations. The ensuing investigations saw the issuance of subpoenas to two former presidents and a sitting Secretary of State and a request for documents from a sitting President that resulted testimony and/or depositions from the former presidents and sitting Secretary of State and the voluntary production of documents by the sitting President. It therefore appears clear from the 1857 debate that the House was cognizant about its oversight investigative prerogatives vis-a-vis the executive branch and that the contempt statute was not intended to preclude the House's oversight of that branch. A complete examination and analysis of the Webster investigation is appended to the end of this chapter.

The 1857 floor debate is also pertinent to the Executive's persistent claim of the

⁷¹ *Id.* (citing *INS v. Chadha*, 462 U.S. 919, 962-966 (1983); *Buckley v. Valeo* 424 U.S. 1 (1976); *United States v. Brown*, 381 U.S. 437 (1965); *United States v. Lovett*, 328 U.S. 303,317 (1940)). It is important to note that the Cooper memo pre-dates the Supreme Court's rulings in *Morrison v. Olson*, 487 U.S. 654 (1988) and *Mistretta v. United States*, 488 U.S. 361 (1988), both of which to undercut significant portions of the Cooper Memo's reasoning..

⁷² See, e.g., *Journey v. McCracken*, 294 U.S. 125 (1935); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *In re Chapman*, 166 U.S. 661, 671-72 (1897).

⁷³ 42 Cong. Globe 431 (1857).

applicability of common law privileges before Congress. Specifically, Rep. Orr was asked about the potential instances in which the proposed legislation might interfere with recognized common law and other governmental privileges, such as the attorney-client privilege, in probes like the Webster inquiry which touched on "diplomatic" matters.⁷⁴ Rep. Orr responded that the House has and would continue to follow the practice of the British Parliament, which "does not exempt a witness from testifying upon any such ground. He is not excused from testifying there. That is the law of the Parliament."⁷⁵ Later in the same debate, a proposed amendment to expressly recognize the attorney-client privilege was overwhelmingly defeated.⁷⁶

Finally, it is asserted that the inherent contempt process has never been utilized against an executive official. In fact it has, twice.⁷⁷ The first occurred in 1879 as a result of allegations received by the House Committee on Expenditures in the State Department that George F. Seward, then Minister to China, had misappropriated a large sum of money from the consulate. When Seward returned from China he was subpoenaed for ledger books and his testimony. He refused to comply and asserted his Fifth Amendment rights, which was rejected. At the request of the committee the House ordered that he be arrested and brought to the bar of the House. There he argued that he should not be forced to incriminate himself while there was ongoing impeachment proceeding against him. Articles of impeachment were reported out by the committee but were never acted upon by the Judiciary Committee.

The second instance of an arrest occurred in 1916 of the United States Attorney for Southern District of New York, H. Snowden Marshall, who had been investigating Rep. Frank Buchanan for Sherman act violations. Buchanan had accused Marshall of committing high crimes and misdemeanors. Two weeks later a grand jury convened by Marshall indicted Buchanan under the Sherman Act. Buchanan then introduced a House resolution to investigate Marshall which was adopted. Marshall then instigated a newspaper article accusing the investigating committee of trying to frustrate the grand jury inquiry. He then admitted his role in publishing the article in a letter to the subcommittee that was personally highly offensive. The committee then adopted a resolution declaring the letter "defamatory and insulting" which brought the House into "public contempt" and was guilty of violating "the privileges of the House, its honor and its dignity." The sergeant-at-arms was sent to New York to arrest and bring him to bar of the House. Marshall's habeas petition was denied by Judge Learned Hand but was reversed by the Supreme Court in *Marshall v. Gordon*.⁷⁸ It is clear, however, that the Court had no doubt that the House had the "power implied to deal with contempt in so far as that authority was necessary to preserve and carry out the legislative authority given" in the Constitution, but since all that was involved were dignity offenses "not intrinsic to the right of the House to preserve the means of discharging its legislative duties" the citation was inappropriate in those circumstances.⁷⁹ Neither the House nor the Court appeared to have any doubt that the House could arrest and hold a federal prosecutor for actions which were appropriately within the scope intended to be protected by Congress's contempt power.⁸⁰

⁷⁴ *Id.* at 431.

⁷⁵ *Id.*

⁷⁶ *Id.* at 441-43.

⁷⁷ See, Josh Chafetz, Executive Branch Contempt of Congress, 76 U. Chic. L. Rev 1083, 1137-38 (2010)(Chafetz Contempt).

⁷⁸ 243 U.S. 521 (1917),

⁷⁹ 243 U.S. at 541, 545-46.

⁸⁰ It is to be noted that between 1857 and 1934 Congress relied on its inherent contempt power almost exclusively, despite the availability of the criminal statute. A detailed history of its usage indicates that in at least 28 instances, witnesses who were either threatened with, or actually charged with, contempt of Congress purged their citations

The Supreme Court Has Thus Far Rejected the Concept of a Unitary Executive

As indicated previously, the principal goal of the incoming Reagan administration in 1981 was the establishment, in law and practice, of an administrative regime in which the President has the ultimate power of supervision, direction and control of the entire executive bureaucracy, a true unitary executive. The greatest obstacle was Supreme Court rulings that recognized the authority of Congress to limit removal of presidentially appointed officials in independent regulatory agencies only for cause.⁸¹ The task was finding the proper litigation vehicle for presentation to the High Court at the right time. White House and OLC legal strategists determined that the Independent Counsel statute was the one.

The leading supportive case, *Myers v. United States*⁸², in strong dicta indicated that the President must be able to remove at-will officials performing purely executive functions. Eight years later the Court, in *Humphrey's Executor v. Federal Trade Commission*, modified *Myers* to allow for cause removal protections for the commissioners but only because the Court found they performed "quasi-legislative" and "quasi-judicial" functions and not "purely executive" duties.⁸³ The removal restrictions on the independent counsel, who exercised prosecutorial duties, a quintessentially pure executive task, was seen as a vulnerable target. In addition, then recent Supreme Court separation of powers rulings indicated it was inclining toward strict construction of core structural constitutional provisions. In *INS v. Chadha*⁸⁴ in 1983 the Court held legislative vetoes unconstitutional because Congress may not control the execution rules except through Article I procedures; and in *Bowsher v. Synar*⁸⁵ in 1986 it ruled that Congress may not delegate executive functions to an official, the Comptroller General, who is subject to congressional removal.

Indeed, they thought they had the perfect foil as a plaintiff, Theodore Olson, who was part of the team that developed the strategy. After the Gorsuch contempt was settled the House Judiciary Committee commenced a two year inquiry about the role the Justice Department, and particularly Olson, played during the controversy. It wanted to determine whether the Department, not EPA, had made the decision to persuade the President to assert executive privilege; whether the Department had directed the U.S. Attorney for the District of Columbia not to present the Gorsuch contempt citation to the grand jury for prosecution and had made the decision to sue the House; and, generally, whether there was a conflict of interest in the Department's simultaneously advising the President, representing Gorsuch, investigating alleged executive wrongdoing, and enforcing the congressional criminal contempt statute. It was a contentious inquiry during which Olson was the central figure and target. The Committee issued its final report in December 1985.⁸⁶ Among other abuses cited by the Committee were the withholding of relevant documents until the Committee had independently learned of their

by either testifying or providing documents to the inquiring congressional committees. See Carl Beck, Contempt of Congress: A Study of the Prosecutions Initiated by the Committee on Un-American Activities, 1945-1957, 191-214 (1959)

⁸¹ See, e.g., *Humphrey's Executor v. FTC*, 295 U.S.602 (1935). Constitutional challenges to the prosecutorial authorities of the SEC and FTC in the early 1980's were uniformly rebuffed by lower courts. See Rosenberg, *supra* n. 36 at 629 n. 5.

⁸² 272 U.S. 52 (1927).

⁸³ *Humphrey's*, 295 U.S. at 628-29.

⁸⁴ 462 U.S. 919, 944-45.

⁸⁵ 478 U.S. 714, 736.

⁸⁶ EPA Withholding Report, H. Rept. 99-435 (1985).

existence, as well as the “false and misleading” testimony before the committee by the head [Olson] of the Department’s Office of Legal Counsel.” The report led to a request to Attorney General Meese seeking appointment of an independent counsel to investigate possible criminal conduct of Olson and others.

In the Spring of 1986 Meese referred Olson to be the subject of the investigation. It is not clear whether Olson was a willing subject but he played his role well. Independent Counsel Morrison issued a grand jury subpoena for his testimony and he refused to comply, challenging the constitutionality of the Ethics Act. The judicial high water mark was reached in 1988 with the split ruling of a panel of the District of Columbia Circuit Court of Appeals holding that the independent counsel provisions of the Ethics in Government Act were unconstitutional.⁸⁷ Although the principal basis for the panel’s decision rested upon its interpretation of the Appointments Clause,⁸⁸ the majority propounded as an alternate ground of decision the idea of the unitary executive. The appeals court decision represented the first judicial application of the unitary executive concept to the merits of a controversy and the initial recognition of a substantive content to the “take care” clause.⁸⁹ That is, for the first time a court acknowledged a constitutionally-based power in the President to direct the actions of subordinate executive officials contrary to the expressed intent of a congressional enactment.

However, any doubt raised by the appeals court ruling were emphatically allayed by the Supreme Court’s ruling *Morrison v. Olson*⁹⁰ upholding the appointment and removal provisions of the Independent Counsel Act. In an opinion remarkable for its breadth and near unanimity⁹¹, the High Court dealt directly and unequivocally with the notion of a unitary executive. Addressing the argument of dissenting Justice Scalia that “the language of Article II vesting the executive power of the United States in the President requires that every officer of the United States exercising any part of that power must serve at the pleasure of the President,”⁹² Chief Justice Rehnquist held that “[t]his rigid demarcation—a demarcation incapable of being altered by law in the slightest degree, and applicable to tens of thousands of holders of offices neither known or foreseen by the framers—depends upon an extrapolation from general constitutional language which we think is more than the text will bear.”⁹³

The Court dealt directly and boldly with the argument that an executive officer who is exercising “purely executive” must be subject to direct at-will removal by the President by simply discarding the *Humphrey’s Executor* precedent. The Court held that the validity of insulating an inferior officer from at-will removal by the President will no longer turn on whether such an officer is performing “purely executive” or “quasi-legislative,” or “quasi-judicial” functions.⁹⁴ The issue raised by a “good cause” removal limitation, the majority opinion explained, is whether it interferes with the President’s ability to perform his constitutional duty.⁹⁵ It is in that light that the function of the official in question must be analyzed. The Court noted that the independent counsel’s prosecutorial powers are executive in that they have been “typically” been performed

⁸⁷ *In re Sealed Case*, 838 F.2d 476, *rev’d sub nom. Morrison v. Olson*, 487 U.S. 654 (1988).

⁸⁸ It found that the independent counsel was a superior office and thus had to be appointed by the President with Senate advice and consent.

⁸⁹ U.S. Const., art II, §3.

⁹⁰ 487 U.S. 654 (1988).

⁹¹ The vote was 7-1 with Justice Scalia dissenting. Justice Kennedy had recused himself.

⁹² 487 U.S. at 690 n.29

⁹³ *Id.*

⁹⁴ *Id.* at 689–92

⁹⁵ *Id.* at 691

by executive branch officials.⁹⁶ But, the Court held, the exercise of prosecutorial discretion is in no way "central" to the functioning of the executive branch.⁹⁷ In other words, it is not a core constitutional presidential prerogative. Further, since the independent counsel could be removed by the by the Attorney General, this is sufficient to ensure that she is performing her statutory duties, which is all that is required by the "take care" clause.⁹⁸ Finally, the limited ability of the President to remove the independent counsel, through the Attorney General, was also seen as providing enough control in his hands to reject the argument that the scheme of the Ethics Act impermissibly undermines executive powers or disrupts the proper constitutional balance by preventing the executive from performing his functions.⁹⁹ Although the Court did not define with particularity what would constitute sufficient "cause" for removal, it did indicate that it would at least encompass misconduct in office.

In sum, then, *Morrison* appears to vitiate the essential supporting legal rationale of the unitary executive theory, *i.e.*, that the President must have absolute discretion to discharge at will subordinate officials whose functions include purely executive tasks. *Morrison* teaches that there are no rigid categories of officials who may or may not be removed at will. The question that arises in such cases is whether for-cause insulation, together with other prescribed duties of the officer in question, impermissibly undermines executive powers or would disrupt the proper balance between the coordinate branches by preventing the executive from performing his assigned function. Resolution of such agency arrangement cases will be determined by the pragmatic, functional analysis approach exemplified by *Nixon v. Administrator of General Services*.¹⁰⁰ Absent the issue aggrandizement, a court need only satisfy itself that the relative balance between the constitutional actors and the agencies has been maintained.¹⁰¹

The next year, in *Mistretta v. United States*,¹⁰² the Court reiterated its holding in *Morrison* by rejecting, in an 8-1 ruling, the contention that Congress was without authority to locate an agency, the Sentencing Commission, with no judicial powers, but with authority to promulgate binding rules, in the judicial branch, determining that the separation of powers was not violated by structural arrangements that are either innovative or seemingly innovative.¹⁰³

The Aftermath of Morrison

Executive interpreters of *Morrison*, when commenting at all, have construed it narrowly. A well-known 1996 Office of Legal Counsel (OLC) on separation of powers highlighted the narrow range of officers to which it applied: inferior officers. OLC asserted that the ruling "had no occasion to consider the validity of removal restrictions affecting principal officers, officers with broad statutory responsibilities, or officers involved in executive branch policy formulation."¹⁰⁴ An opportunity to revisit *Morrison* in 2010 in *Free Enterprise Fund v. Public*

⁹⁶ *Id.*

⁹⁷ *Id.* at 691-92.

⁹⁸ *Id.* at 693.

⁹⁹ *Id.* 692.

¹⁰⁰ 433 U.S. 425, 443 (1977).

¹⁰¹ Any doubt about this reading of the breadth of the majority opinion is invited to peruse Justice Scalia's dissent at 487 U.S. at 697-727, and particularly 708-712.

¹⁰² 488 U.S. 361 (1989).

¹⁰³ 488 U.S. at

¹⁰⁴ The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, *28 (May, 1996).

Company Accounting Oversight Board,¹⁰⁵ which dealt with a situation where the members of the agency that appointed the members of the Board and exercised substantive oversight over it, the SEC, have for cause protections from at-will removal by the President, and Board members had similar protection from SEC removals. The Court deemed the Board members inferior officers and held that the "dual for-cause on the removal of Board members contravened the Constitution's separation of powers" and voided that provision alone. A close reading of the 5-4 opinion's rationale, which favorably cited the *Myers* ruling, arguably would have sufficed to bring down the SEC's protection as well.¹⁰⁶ Whether the Court was held back by the fact that PCAOB members were inferior officers or that a one of the Justice's was unwilling to go that far is matter for speculation. A case in which the constitutionality of the for-cause protections accorded the head of the Consumer Financial Protection Board is a prime issue is now before a panel of the District of Columbia Circuit. Oral argument there centered on the applicability of the *FEF* ruling.¹⁰⁷

The set back of the *Morrison* ruling effected a subtle change in the tactics by the supporters of the unitarian vision. Thus, much of the post-*Morrison* commentary has focused on the increasingly evident unilateral presidential actions that cross the line of supervision, coordination and oversight to operational direction and control. The emergence of what one scholar has called the "New Presidentialism,"¹⁰⁸ has become a profound influence in administrative and structural constitutional law. It is a combination of constitutional and practical argumentation that holds that most of the government's regulatory enterprise represents the exercise of "executive power" which, under Article II, can legitimately take place only under the control and direction of the President and is coupled with the claim that the President is uniquely situated to bring to the expansive sprawl of regulatory programs the necessary qualities necessary qualities of "coordination, technocratic efficiency, managerial rationality, and democratic legitimacy" because he alone is elected by the entire nation.¹⁰⁹ It is the incremental, stealth road to the unitary executive.

The nature of the actual, dramatic incursions that are taking place is detailed in a still widely cited 2001 article by the then dean of the Harvard Law School, Elena Kagan,¹¹⁰ who

¹⁰⁵ 561 U.S. 477 (2010).

¹⁰⁶ See Neomi Rao, A Modest Proposal : Abolishing Agency Independence in *Free Enterprise Fund v. PCAOB*, 79 Fordham L. Rev. 101 (2011).

¹⁰⁷ See *PHH Corporation v. CFPB*, No. 15-1177 (D.C. Cir.) on direct appeal from an order of the CFPB. The death of Justice Scalia, part of the majority in *FEF*, may make problematic a revival of the *Myers* view if *PHH* or a similar CFPB challenge should reach the Court.

¹⁰⁸ Cynthia R. Farina, Undoing the New Deal Through the New Presidentialism, 22 Harv. J. of Law and Policy 227 (1988).

¹⁰⁹ For the proposition that the Constitution confers decisional authority on the President see, e.g., Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L. J. 541, 549-50 (1994); Christopher S. Yoo, Steven G. Calabresi, & Anthony Colangelo, The Unitary Executive in the Modern Era, 1945-2004, 90 Iowa L. Rev. 601, 730 (2005). For the proposition that the Constitution does not confer decisional authority but it should be presumed Congress intends it, given then the realities of modern administration, see, e.g., Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2251 (2001)(Kagan); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 2-3(1994). For the proposition that the President, unless directly authorized, is only an overseer, see, e.g., Peter L. Strauss, Foreword: Overseer, or "The Decider"? The President in Administrative Law, 75 Geo. Wash. L. Rev. 696 (2007)(Strauss); Kevin M. Stack, The president's Statutory Powers to Administer the Laws, 106 Colum. L. Rev. 263, 267 (2006)(Stack); Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 Chi-Kent L. Rev. 987, 987-89(1997).

¹¹⁰ Kagan, supra n. 97.

posits the foregoing notions and further suggests that when the Congress delegates administrative and lawmaking power specifically to department and agency heads, it is, at the same time making a delegation of those authorities to the President, *unless the legislative delegation specifically states otherwise*. From this flows, she asserts, the President's constitutional prerogative to supervise, direct and control discretionary actions of all agency officials. Kagan states that "a Republican Congress proved feckless in rebuffing Clinton's novel use of directive power—just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan's use of a newly strengthened regulatory review process."¹¹¹ She explains that "[t]he reasons for this failure are rooted in the nature of Congress and the lawmaking process. The partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power—or, what is the same thing, to deny authority to other branches of government."¹¹² She goes on to effectively deride the ability of Congress to restrain a President intent on controlling the administration of the laws:

Presidential control of administration in no way precludes Congress from conducting independent oversight activity. With or without a significant presidential role, Congress can hold the same hearings, engage in the same harassment, and threaten the same sanctions in order to influence administrative action. Congress, of course, always faces disincentives and constraints in its oversight capacity as this Article earlier has noted. Because Congress rarely is held accountable for agency decisions, its interest in overseeing much administrative action is uncertain; and because Congress's most potent tools require collective action (and presidential agreement), its capacity to control agency discretion is restricted. But viewed from the simplest perspective, presidential control and legislative control of administration do not present an either/or choice. Presidential involvement instead superimposes an added level of political control of administration onto a congressional oversight system that, taken on its own and for the reasons just given, has notable holes.¹¹³

Former Dean Kagan's observations and theories appear to have been almost a blueprint for understanding the presidential actions taken over the past 15 years.¹¹⁴ These have included incursions by means of executive orders designed to control rulemaking authority vested in expert agencies; executive directives agencies to act or not act in areas committed to their discretion; signing statements to message limited agency adherence to congressional statutory directions; limitations on intelligence information access to jurisdictional committees and Inspector General access to agency information needed to effectively monitor the efficiency and propriety; and a myriad of OLC opinions that range from defining its perceived scope of the presidential communications privilege for the executive bureaucracy and how they are to deal with congressional information requests to legal support for the President's failed attempt to assert that he can unilaterally declare when the Senate was out of session for recess appointment purposes. There has even been an unsuccessful, unconstitutional raid on a congressional office to avoid the bother of a document subpoena which would have involved the time consuming process of according members their constitutional rights under the Speech or Debate Clause. Indeed, the current effort to block contempt enforcement of information demands through traditional means may be seen as the next, and perhaps ultimate, step in the Executive's effort to establish a unitary executive. If Congress cannot get the information

¹¹¹ Kagan at 2314.

¹¹² *Id.*

¹¹³ *Id.* at 2347.

¹¹⁴ See generally, Strauss, *supra* n. 98.

necessary to perform its legislative functions, it must act blindly or not at all. Either way the Executive wins.

The Constitutional Basis of Congress's Exercise of Its Contempt Powers Against Executive Officials

The Supreme Court has developed a long, consistent line of structural separation of powers rulings in which it has invalidated provisions of law or actions that either "accrete to a single branch powers more appropriately diffused among the separate branches or that undermine the authority and independence of one or another coordinate branch."¹¹⁵ It reflects the Court's continuing concern over "encroachment and aggrandizement that has animated our separation of powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the limits of its power.'"¹¹⁶ These have included nullifications of attempts by Congress to appoint executive officials¹¹⁷ and to control the execution of laws by means of legislative vetoes¹¹⁸ and the President's endeavor to exercise a line item veto¹¹⁹ and to unilaterally decide when the Senate was out of session in order to exercise his recess appointment authority. In each instance the Court's rulings rested upon the breach of an identified core institutional prerogative recognized by the Constitution: the exclusive powers of presidential appointment, Senate confirmation and congressional law making.

Just as there is no express provision in the Constitution authorizing the conduct of congressional oversight and investigations, there also is an absence of express authority to punish nonmembers for disobedience of the rules and orders of each House or the disruption of their legislative processes. In dealing with both these matters the Supreme Court has firmly established that such powers are so essential to the legislative function as to be implied from the general vesting of legislative power in Congress. With respect to investigative oversight, the Court declared that the "scope of its power of inquiry...is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."¹²⁰ In *Watkins v. United States*¹²¹ the Court emphasized that the "power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."¹²² The Court further stressed that Congress's power to investigate is at its peak when focusing on alleged fraud, abuse, or maladministration within a government department. Specifically, the Court explained that investigative power comprehends probes into departments of the federal government to expose corruption, inefficiency and waste."¹²³ The court further noted that that the first Congress's held "inquiries dealing with suspected corruption, or mismanagement of government officials."¹²⁴

¹¹⁵ *Mistretta v. United States*, 488 U.S. 361, 382 (1989).

¹¹⁶ *Id.*

¹¹⁷ *Buckley v. Valeo*, 424 U.S. 1, 128-31 (1976).

¹¹⁸ *INS v. Chadha*, 462 U.S. 919, 958-59 (1983).

¹¹⁹ *Clinton v. City of New York*, 524 U.S. 417 (1998).

¹²⁰ *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975).

¹²¹ 354 U.S.178 (1957).

¹²² 354 U.S. at 187.

¹²³ *Id.*

¹²⁴ *Id.* at 182. *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

Court recognition of inherent contempt authority came much earlier but was emphatic as to its important relation to the law making power. Early commentators on the Constitution were surprised at the absence of a congressional power to punish. Joseph Story remarked that that each houses "power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behavior or disobedience to those rules."¹²⁵ Story found it "remarkable" that the Constitution did not explicitly mention a power to punish nonmembers, "yet it is obvious that unless such a power, to some extent, exists by implication, it is utterly impossible for either house to perform its constitutional functions."¹²⁶ Story, moreover, concluded that in America, as was the case in Britain, "the legislative body was the proper and exclusive forum to decide when the contempt existed and when there was breach of its privileges; and that the power to punish followed, as a necessary incident to the power to take cognizance of the offense."¹²⁷

In fact, almost from the beginning of legislative operations both houses of Congress believed they had the constitutional authority to hold nonmembers in contempt¹²⁸, and in 1821 in *Anderson v. Dunn*¹²⁹ the Supreme Court emphatically upheld the practice. The unanimous Court framed the issue as "whether the House of Representatives can take cognizance of contempts committed against themselves, under any circumstances?" The answer was an unequivocal affirmation because the alternative:

obviously leads to the annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness and caprice, or even conspiracy, may mediate against it. The result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberative assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them, composed of the most distinguished citizens, selected and drawn together from every quarter of great nation, whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity, that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.¹³⁰

The Court also endorsed the existing parliamentary practice that the contemnor could not be held beyond the end of the legislative session,¹³¹ a limitation that impelled passage of the criminal contempt alternative in 1857.

Although subsequent rulings have tinkered with the permissible scope of congressional contempt against nonmembers, none of those decisions has doubted its existence¹³² and in *McGrain v. Daugherty*, the keystone authority for the breadth and importance of contemporary investigate oversight, which arose in the context of an inherent contempt proceeding, the Court

¹²⁵ Joseph Story, 1 Commentaries on the Constitution of the United States § 837 at 607 (Little Brown 5th ed. 1891).

¹²⁶ *Id.* §845 at 612-13.

¹²⁷ *Id.* §847 at 615.

¹²⁸ See Todd Garvey and Alissa M. Dolan, Congress's Contempt Power and the Enforcement of Congressional Subpoenas : Law History, Practice, and Procedure, CRS Report RL34097 (recounting early utilization).

¹²⁹ 19 U.S. (6 Wheat.) 204 (1821).

¹³⁰ *Id.* at 228-29.

¹³¹ *Id.* at 231.

¹³² See *Kilbourn v. Thompson*, , 103 U.S. 168 (1881); *In re Chapman*, 166 U.S. (1897); *McGrain v. Daugherty*, 273 U.S. 135 (1927); and *Jurney v. MacCracken*, 294 U.S. 125 (1935).

underlined the inextricable constitutional connection of an effective information enforcement process with the accomplishment of Congress's core legislative responsibility:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; or where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be made to others who may have it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed as inhering in it.¹³³

Thus, both houses of Congress, as well as the Supreme Court, have concluded that the structural and historical evidence supports the exercise of an inherent power in each house to hold nonmembers, including executive branch officials, in contempt.

The Need for a Congressional Challenge to the Executive's Obstruction of Its Ability to Compel Access to Information by Inherent or Statutory Criminal Contempt Processes is Imperative and Supported by Substantial Constitutional Authority

The lessons of the *Miers* and *Fast and Furious* forced civil enforcement litigations are clear and alarming. Delay is inevitable and that alone inhibits effective oversight which often requires timely access of information for satisfactory remedial legislative actions. The *Fast and Furious* investigation and litigation has dragged for over five years with no end in sight, an intolerable hindrance. The always present possibility of an aberrant judicial ruling has compounded the situation. The court's recognition of the availability of assertions by agencies of the deliberate process privilege (and possibly other common law privileges) to support withholding defenses militates the necessity for a House appeal, portending more delay in that case. But that ruling, which runs counter to the longstanding understanding of committees that such claims are available only at the discretion of the committees, has now encouraged other agencies under scrutiny to make similar assertions, further widening the instances of investigative delays and the apparent need for judicial assistance. Continued congressional acquiescence to this tactic would be an irresponsible and unnecessary abdication of its constitutional prerogatives.

The foregoing discussion has exposed the flawed historical and constitutional basis on which DOJ bases its position. It has argued that when the criminal contempt statute was enacted in 1857 to supplement (but not supplant) the then established inherent contempt process, there was no intention that it would be utilized against executive branch officials, and that there has never been an instance in which the inherent process ever being used against such officials. In fact, with respect to the first assertion, that very question was raised in the debate and the sponsor of the legislation responded that it was the clear intention of the legislation being applied to cabinet officials and cited a recent investigation House investigation in which subpoenas and requests for documents were successfully used against sitting and former presidents secretaries of state. As to the second assertion, there have been two arrests of federal officials pursuant to inherent contempt proceedings.

¹³³ *McGrain*, 273 U.S. at 175; see also *Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *Eastland*, 421 U.S. at 504-505.

Moreover, neither the criminal nor inherent contempt processes can be dismissed out of hand as an aspect prosecutorial discretion as DOJ attempts to do. Four Supreme Court rulings since 1821 have concluded and reiterated that each House has the inherent power, and responsibility, to protect itself by punishing for contempt or else it would “be exposed to every indignity and interruption, that rudeness, or even conspiracy, may mediate against it.” Those decisions make it abundantly clear that the power derives from and is an integral part of the inviolable, exclusive core constitutional responsibility of the Congress to make all the laws. Such a structural constitutional role assignment can neither be encroached upon by another branch nor abandoned by the devoted branch.¹³⁴ The 1857 criminal contempt legislation was passed in light of the same self-protective authority because of the Supreme Court’s limitation of punishment under the inherent power to the end of a legislative session. It must be recalled, and taken into account, that there was no Justice Department in 1857 (it was not created until 1870) and United States attorneys at the time were contract employees of the executive. They were simply seen as the vehicle to obtain judicial assistance to vindicate the House’s integrity. This situation and rationale did not change with the establishment of the Department.¹³⁵

The similar, well recognized, self-protective authority enjoyed by federal court judges provides an apt analogy. In *Young ex rel. Louis Vuitton et. Fils*¹³⁶, the Court recognized that district courts may appoint private attorneys to act as prosecutorial officers for the limited purpose of vindicating their authority. The next year, in its landmark ruling in *Morrison v. Olson*,¹³⁷ upholding the validity of the Independent Counsel legislation, it cited *Young* prominently, among other precedents, as authority for court appointment of a private prosecutor “where there is no incongruity between the functions normally performed by the courts and the performance of their duty to appoint.”¹³⁸ Significantly, the Court also noted that “Congress, of course, was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high ranking officers. If it were to remove the appointing authority from the Executive

¹³⁴ See, e.g., *Clinton v City of New York*, 524 U.S. 417,452 (1998)(“That a cession of power is voluntary does not make it innocuous. The Constitution is a compact that is enduring for more than out time, and one Congress cannot yield up its own powers, much less those of other Congress’s to follow....Abdication of responsibility is not part of the constitutional design.”)(Justice Kennedy concurring in the voiding a delegation of line item veto authority to the President); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)(rejecting 9-0 the President’s claim that he could unilaterally determine when the Senate was out of session for recess appointment purposes that “the Senate is in session when it says it is.”).

¹³⁵ See, Hearing, Prosecution of Contempt of Congress, before the House Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, 98th Cong., 1st Sess. 21-22 (Nov.15, 1983)(testimony of Stanley Brand, former House General Counsel, explaining the refusal of the U.S. Attorney to present the contempt citation of EPA administrator Gorsuch to a grand jury on grounds of prosecutorial discretion “frustrated the congressional intent of the [1857] statute , which is to delegate to the judicial branch the responsibility to prosecute congressional contempts. That is a very important element, because under the U. S. attorney’s theory , and the Department’s theory, they were claiming it had been delegated to them. It had not been delegated to them; it had been—Congress had enlisted the aid of the judiciary to enforce its subpoenas. ...The U.S. attorney is merely the agent through which this matter gets referred to the court, but in this instance, by virtue of the U.S. attorney having completely refused to bring this case under any circumstances, and I would submit that as not any exercise of prosecutorial discretion; that is sheer obstructionism, that this case could never get to court.”

¹³⁶ 481 U.S. 787 (1987).

¹³⁷ 487 U.S. 654 (1988).

¹³⁸ 487 U.S. at 676-77.

Branch, the most logical place to put it was in the Judicial Branch.”¹³⁹ Finally, the *Morrison* opinion made clear that prosecution was not a core presidential authority.¹⁴⁰

It appears, then, that a strong argument may be made that the notion put forward by Olson and Cooper opinions that it is properly raising a claim of presidential privilege is misplaced. The only defense it should be able to put forth is that it would face a conflict of interest if it is asked to represent the House by presenting a contempt citation to a grand jury against one its clients. But DOJ's own rules provide a solution to such problems: appointment by the Attorney General of a private counsel as prosecutor or appointment of a DOJ counsel who is made independent.¹⁴¹ A challenge to the next DOJ refusal to present a criminal contempt to a grand jury, asking a court to order the Attorney General to appoint a prosecutor in accordance with its own rules, would appear to be a credible option.

With respect to DOJ's claim that the House's use of traditional inherent contempt practices, *i.e.*, arrest, detention and incarceration, would be unconstitutional, the short answer would be that there is no legal authority for the claim as at least four Supreme Court rulings have found to the contrary. Although there is case law, academic, and even congressional, commentaries that arrest, detention and incarceration practices of inherent proceedings are overly tough and onerous,¹⁴² or in the words of Judge Bates in his *Miers* ruling, “unseemly,” no court has ever held the process and procedure unlawful and it is agreed that it has not been utilized since 1935 because it took up too much valuable floor time and that criminal contempt was more expeditious and an effective threat. There is, however, no reason why inherent contempt cannot be made “seemly” and still be effective. This can be accomplished by the exercise of the rule making authority of each house.

Although the majority of the inherent contempt actions by both the House and Senate were conducted via trial at the bar of the full body, there is historical evidence to support the idea that this is not the exclusive procedure by which such proceedings can occur. This history, when combined with a 1993 Supreme Court decision addressing the power of Congress to make its own rules for the conduct of impeachment trials,¹⁴³ strongly suggests that the inherent contempt process can be supported and facilitated by the conduct of evidentiary proceedings and the development of recommendations at the committee level before any such trial. In addition, again by internal rule making, the penalty for conviction can limited to a monetary fine of the official that effects a direct, immediate reduction in pay, perhaps graduated to the speed of the contemnors compliance.

There are immediate benefits to such a renovated contempt process. It is entirely

¹³⁹ *Id.* at 677.

¹⁴⁰ *Id.* at 691-92 (“Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President’s need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law the counsel be terminable at will by the President.”).

¹⁴¹ See 28 C.F. R. Part 600 (2015), General Powers of Special Counsel.

¹⁴² See, e.g., *United States v. Fort*, 443 F. 2d 670, 877-78 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971); *Tobin v. United States*, 306 F. 2d 270,275-776 (D.C. Cir. 1962), *cert. denied* 371 U.S. 902 (1962); *Committee on the Judiciary v. Miers*, 558 F. Supp.2d 53, 92 (D.D.C. 2008); Representation of Congress and Congressional Interests In Court, Hearings before the Senate Judiciary Committee, Subcommittee on Separation of Powers, 94th Cong., 2d Sess. 556-68 (1976); Theodore Sky, Judicial review of Congressional Investigations: Is There An Alternative to Contempt, 31 Geo. Wash. L. Rev. 399, 400 n.3 (1962).

¹⁴³ See *United States v. Nixon*, 506 U.S. 224 (1993).

internal to the institution, thereby avoiding the inevitable *habeus corpus* judicial challenge of the traditional inherent contempt procedure because there will be no arrests or detentions. There will also be no need for cooperation of the Executive as there is with criminal contempts. It will be more expeditious with respect to demands of floor time. It will be seen to be "seemly." And after the first successful convictions, the very threat of a such a proceeding will likely see negotiated settlements.¹⁴⁴ Since this is an adjudicatory proceeding with due process protections accorded, a successful Bill of Attainder challenge is unlikely. A Congressional Research Service (CRS) study notes that there was consideration of the use of committees to develop the more intricate details of an inquiry into charges of contempt of Congress that date back to the very first such proceeding in 1795 and that it was in fact utilized in a number of proceedings thereafter. The CRS study also describes hints in several of the Supreme Court's inherent contempt rulings that fines are a possible penalty and refers to the analogy of court imposed fines for disobedience of court orders. Congress also can, and has, disciplined its own members with fines. It would also appear logical that if it has been appropriate to imprison convicted contemnors, the lesser penalty of a fine would not appear out of line.¹⁴⁵

Recommendations for Future Enforcement of Contempts of Congress

For enforcement of future contempt citations, if the President and the Department of Justice continue to adhere to their refusal to acknowledge the constitutionality and enforceability of the inherent and criminal processes for contempts of Congress, the House should take two courses of action simultaneously: By House resolution authorize the House General Counsel to challenge the refusal to present the citation for criminal contempt to a grand jury and ask the court to direct the Attorney General to appoint an independent prosecutor pursuant to his authority under 28 U.S.C. Part 600. At the same time as the refusal occurs, the House should commence the new "seemly" inherent contempt proceeding. The Supreme Court has ruled, in *In re Chapman*, that both proceedings can be done simultaneously or serially and that there is no double jeopardy problem.¹⁴⁶ Since both contempt processes serve different ends, both should be legitimized and made available as future options. Inherent contempt is meant to encourage compliance in the provision of testimony or documents. An agreement to comply would end pay reductions. Criminal contempt is meant to punish obstructive recalcitrance. Compliance after conviction does not vitiate the sentence.

Both options must be available to investigating committees. In the past, with respect to inherent contempt, there is evidence ample evidence that the threat of such action brought potential contemnors to the bargaining table.¹⁴⁷ Similarly, the experiences of the period between 1975 to 2002 also demonstrate that the credible threat of the utilization of criminal contempt provided sufficient, but not overbearing, leverage to convince the Executive that accommodation was necessary, most often well before a full House vote of contempt. None of the ten instances cited in the above text could be shown to be an illegitimate exercise of the investigative power by the committees involved. A similar observation can be made with respect *Miers* and *Fast* and *Furious* inquiries. Indeed, the judge in *Fast and Furious* expressly found that the Justice Department had conceded the legitimacy of the probe. It is not unfair, callous or cynical to say that it would be a rare agency official would agree to endure the potential risk and personal cost

¹⁴⁴ See Beck, *supra* n. detailing the high rate of settlements resulting from the credible threat of arrest and detention under the traditional inherent contempt process.

¹⁴⁵ Todd Garvey and Alissa M. Dolan, Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure, CRS Report RL34097, 11-17 (May 8, 2014).

¹⁴⁶ 166 U.S. 661, 671-74 (1897).

¹⁴⁷ See Beck, *supra* at n.

of a public trial that could end in possible imprisonment and/or fine for the sake of protecting a presidential desire for secrecy. It has not been so in the past. And the past revelations made as a result of the pressure applied have not ever been shown to have crippled or endangered the presidency or the national interest.

The present circumstances meet the criteria posited by Professors Posner and Vermuele for a "constitutional showdown." The evidence of *Miers* and *Fast and Furious* litigations have indubitably demonstrated that the Executive's strategy of forcing subpoena enforcement into the courts is crippling Congress's essential information gathering authority and thereby effectively obstructing its core, constitutionally-mandated legislative function. The uncertainty whether committees can impose meaningful consequences for delays or outright refusals to comply with necessary information requests has already fostered an environment of agency slow-walking responses and raising assertions of non-constitutional privilege claims traditionally available only at the discretion of a committee in the first instance and judicially challengeable thereafter only after imposition of a citation of contempt. As with Justice Department subpoenas to Member for documents, the Member and the House must make the initial determination whether privilege applies.

Timely oversight under the present circumstances is inevitably stymied and the long-term costs to the integrity of the institution within our constitutional scheme is incalculable. The continuation of a posture of acquiescence will do no more than encourage further Executive usurpations. The failure to mount immediate constitutional challenges would be an abdication of the Congress's vested responsibilities.

Mr. MURPHY. Thank you very much, sir. I appreciate it. Mr. Lazarus, you are recognized for 5 minutes.

STATEMENT OF SIMON LAZARUS

Mr. LAZARUS. Thank you very much, Mr. Chairman, and I think the mic is now on. As Senior Counsel to The Constitutional Accountability Center, I helped draft an amicus curiae brief which CAC filed in *House of Representatives v. Burwell* which you referenced, Mr. Chairman. That brief was on behalf of Democratic Leader Pelosi and other leading members of the House Democratic Caucus. It supports the Administration's determination that it has authority to fund the Affordable Care Act cost sharing provisions that are at issue in that case and in this hearing. And my sole narrow mission here is to explain why.

To begin with, as all of us here know the Cost Sharing Reduction Program was designed and has in practice operated as an integral component of the Affordable Care Act. However, House leadership and district court for the District of Columbia judge contend that there is no appropriation for the cost sharing reductions even though as they concede 31 U.S.C. Section 1324 does provide a permanent appropriation for the law as complementary premium assistance tax credits program.

With respect, this assertion is at odds with the ACA's plan for restructuring individual insurance markets with the mechanisms Congress designed to effectuate that plan with textual provisions defining those mechanisms and how they are intended to operate and with multiple other provisions which would make no sense under these ACA opponents' interpretation. The Administration has determined that the premium tax credits and cost sharing reductions are commonly funded by that permanent appropriation in 31 U.S.C. Section 1324. That interpretation, the Administration's interpretation, suffers from none of the above fatal deficiencies and enables the act to operate as Congress intended.

Just 1 year ago in *King v. Burwell*, the Supreme Court rejected a similarly perverse, contrived interpretation which in the words of its architects was contrived to drive a stake through the heart of Obamacare. I believe at a conference of the American Enterprise Institute I think that was stated. In that case Chief Justice John Roberts held for a six-justice majority in terms which I think everyone interested in how to interpret the provisions at issue here, the Cost Sharing Reductions provision, should read very carefully. He said Congress passed the Affordable Care Act to improve health insurance markets not to destroy them. If at all possible we must interpret the act in a way that is consistent with the former and avoids the latter. Section 36(b) can fairly be read consistent with what we see as Congress' plan and that is the reading we adopt.

One year later, ACA opponents have mounted a transparent rerun of the same strategy. Once again they brandish an acontextual, hyperliteralist, contrived interpretation ignoring the statute as a whole, crafted to undue the statutory design, and to yield results that are inconsistent with the ACA's plan for improving health insurance markets, precisely the sort of scenario that the court in *King* ruled out.

The House leadership's argument is that section, the ACA Section 1401 which prescribes the tax credits specifically amends 31 U.S.C. Section 1324, whereas there's no such reference in Section 1402 which addresses the CSR subsidies. But this is a too narrow prism. The text and structure of the ACA overall made clear that the CSR subsidies and the premium assistance tax credits form a mutually interdependent package and that together both are critical to what the Supreme Court characterized as the ACA's series of interlocking reforms.

And I should also add that the House leadership's narrow interpretation would generate as the Department also explained a cascading series of nonsensical results. Now most nonsensical among these—and I think that there's something like 40 of them, 40 provisions which would make no sense under the leadership's interpretation and the district court's interpretation. Most nonsensical, federal expenditures would actually increase and from the same fund from which the House leadership's interpretation purports to save taxpayer dollars.

Chairman Upton is not here and so I can't point this out to him, but the Department of Health and Human Services has determined that the net budget impact of the district court's interpretation would cost the government, quote, billions of dollars higher annually, and I believe that my colleague—

Mr. MURPHY. Sir, if you could just wrap up, because we are late and we need to get going.

Mr. LAZARUS. OK. I'm sorry I'm over. I didn't know that. I apologize. So in sum, the Administration has lawfully acted to provide intended benefits for the 6.4 million individuals currently receiving cost sharing reductions. Withdrawing funding for that lifeline would flout the design of the ACA and the textual provisions which establish that design, which is why this latest effort to undermine health reform is no more likely to succeed than its predecessors. Thank you very much.

[The prepared statement of Simon Lazarus follows:]

Written Statement of Simon Lazarus
Before the House of Representatives Energy & Commerce Committee
Subcommittee on Oversight & Investigations
“The ACA’s Cost Sharing Reduction Program: Ramifications of the
Administration’s Decision on the Source of Funding for the CSR Program.”

July 8, 2016

Thank you, Chairman Murphy and Ranking Member Degette, and members of the Subcommittee, for providing this opportunity to participate in this hearing.

I am Senior Counsel to the Constitutional Accountability Center, a public interest law firm, think tank, and action center dedicated to realizing the progressive promise of the text and history of the Constitution. I helped draft an *amicus curiae* brief which CAC filed with the District Court for the District of Columbia in *House of Representatives v. Burwell*, on behalf of Democratic Leader Pelosi and other leading members of the House Democratic Caucus.¹ Our brief supports the Administration’s determination that it has authority to fund the Affordable Care Act cost-sharing provisions at issue in that case and in this hearing. Here is why.

As both the Subcommittee members and we on the other side of the witness table are well aware, the cost-sharing-reductions program at issue in the hearing was designed and has in practice operated as an integral component of the Affordable Care Act. It is essential to the ACA’s extension of access to health insurance and health care to 20 million Americans who previously lacked coverage. However, members of the

¹ Brief of *Amici Curiae* Members of Congress in Support of Defendants’ Motion for Summary Judgment, *U.S. House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC, 2016 WL 2750934 (D.D.C. May 12, 2016), available at http://theusconstitution.org/sites/default/files/briefs/House_v_Burwell_Brief_Final.pdf.

majority party in the House of Representatives allege that the Administration's payments to implement this program are unlawful, on the ground that Congress has not appropriated funds to support those payments. They have filed a lawsuit seeking to strip the funding for that benefit, despite the fact that millions of ACA beneficiaries depend on the CSR subsidies for access to health care. In May of this year, a federal District Court for the District of Columbia upheld the House's challenge. Earlier this week, on July 6, the Administration filed in the D.C. Circuit its notice of appeal from the District Court's decision.

In my view, the Administration's implementation of the CSR program is lawful, and the House's complaint, and this District Court decision, have got the applicable law wrong. ACA opponents contend that there is no appropriation for the cost-sharing reductions, even though, as they concede, 31 U.S.C. § 1324 provides a permanent appropriation for the premium tax credits. With respect, this assertion is at odds with the ACA's plan for reforming and restructuring individual insurance markets, the mechanisms Congress designed to effectuate that plan, textual provisions defining those mechanisms and how they are intended to operate, and multiple other provisions of the Act which would make no sense under these ACA opponents' interpretation. The Administration has determined that the premium tax credits and cost-sharing reductions are commonly funded by the permanent appropriation in 31 U.S.C. § 1324. That interpretation suffers from none of the above fatal deficiencies, and enables the Act to operate as Congress intended, vastly expanding – as Congress also intended – the number of Americans who can enjoy the security of affordable access to health insurance and health care.

Just one year ago, in *King v. Burwell*, the Supreme Court rejected a similarly perverse “interpretation,” contrived – in the words of its architects – to “drive a stake through the heart” of the ACA. In that case, Chief Justice John Roberts, writing for a six-justice majority, held, in terms that plainly bear on the interpretive question at issue here:

“Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress’s plan, and that is the reading we adopt.”

One year later, ACA opponents have mounted what amounts to a rerun of the same strategy for undermining a law they have not been able to invalidate or repeal – as if *King*, and the well-established precedents and other authorities on which it was based, had never happened. Once again they brandish an a-contextual, hyper-literalist “interpretation”, ignoring the statute as a whole, crafted to “undo” the statutory design, and yield results inconsistent with the ACA’s plan for improving health insurance markets – precisely the sort of scenario that the Court in *King* ruled out. The Administration’s interpretation of the pertinent provisions of the ACA and the IRC fits the law’s design and avoids such self-defeating results. It is correct, and, I believe, will be so held, as Judge Collyer’s decision is appealed to higher courts.

The basis for the House’s position to the contrary is that Section 1401 of the ACA, which prescribes the tax credits, specifically references, and amends, 31 U.S.C. §1324, as a permanent source of funding, whereas there is no such reference in Section 1402, which addresses the CSR subsidies. Revealingly, the House’s brief in support of its motion for summary judgment before Judge Collyer literally did not cite

King at all. Judge Collyer herself dismissed the Supreme Court's decision as "inapposite." It's not hard to understand why these opponents need for *King* to go away. The CSR subsidies operate as a package with the premium assistance tax credits, for lower-earning persons eligible for the tax credits, providing those comparatively lower income individuals with complementary assistance necessary to enable them to purchase health care products and services covered by their insurance.² The CSR part of that package is no less essential than the tax credits component.

No one doubts that the premium tax credits and the cost-sharing reductions are integrally related, and that both are critical to what the Supreme Court characterized, in *King v. Burwell*, as the ACA's "series of interlocking reforms designed to expand coverage in the individual health insurance market." The ACA "bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge"; it "generally requires each person to maintain insurance coverage or make a payment to the [IRS]"; and it "gives tax credits to certain people to make insurance more affordable." These three reforms, the Court made clear, "are closely intertwined"; the first reform would not work without the second, and the second would not work without the third.³

The text and structure of the ACA make clear that the cost-sharing reductions and the premium tax credits are both integrally-connected to each other and to the "interlocking reforms" adopted by the law. Indeed, the ACA's text makes the two

² Premium assistance tax credits are available to persons purchasing insurance through ACA-sanctioned state-level exchanges who earn between 100% and 400% of the Federal Poverty Level (FPL). Cost-sharing subsidies are available to persons eligible for premium assistance tax credits and whose incomes are between 100% and 250% of the FPL.

³ *King v. Burwell*, 135 S. Ct. 2480, 2485, 2487 (2015).

complementary mechanisms components of a single "program," in which eligibility for the CSR component is predicated on eligibility for the tax credit component, which the Act directs the Government to "establish," to ensure unified advance payments of both components. Pursuant to this program, the Secretary of the Treasury must "make[] advance payment" of both premium tax credits and cost-sharing reductions "in order to reduce the premiums payable by individuals eligible for such credit," and to "establish a program under which . . . advance determinations are made . . . with respect to the income eligibility of individuals . . . for the premium tax credit . . . and the cost-sharing reductions," and "make[] advance payments of such credit or reductions to the issuers of the qualified health plans in order to reduce the premiums payable by individuals eligible for such credit." ACA § 1412 (42 U.S.C. §§ 18082(a), 18082(a)(1), 18082(a)(3), §18082(c), 18071(f)(2)). As the Department of Justice explained in its final brief in the District Court, "Within this integrated program, both portions of the advance payments, including the advance cost-sharing reduction payments at issue here, are 'refunds due from' Section 36B within the meaning of 31 U.S.C. § 1324(b) because both are compensatory payments made available through the application of Section 36B, which sets forth conditions necessary to qualify for cost-sharing reductions as well as premium tax credits." In the same vein, the Act (in the above-cited section) defines the term "applicable State health subsidy program" as "the program under this title for the enrollment of qualified health plans offered through an Exchange, including the premium tax credits under section 36B of Title 26 and cost-sharing reductions under section 1402."

As the text of the ACA makes clear, an integral component of the statute's "interlocking system" for achieving its goal of near-universal coverage is its package of subsidies for ensuring that lower income individuals and families can afford to participate – premium assistance tax credits and cost-sharing reduction payments, that reduce the costs of both health insurance and of health care purchased with that insurance. 26 U.S.C. § 36B; 42 U.S.C. §§ 18071, 18082. Under the terms of the ACA, the premium tax credits "*shall* be allowed" for individuals with household incomes from 100% to 400% of the federal poverty line to help them purchase insurance, 26 U.S.C. § 36B(a), (c)(1)(A) (emphasis added), and insurance issuers "*shall* reduce the cost-sharing under the plan" for individuals with household incomes from 100% to 250% of the federal poverty level to help them defray the costs of health care purchased with that insurance (*i.e.*, expenses such as co-payments and deductibles), 42 U.S.C. § 18071(a)(2) (emphasis added); 45 C.F.R. § 155.305(g). Congress also gave insurance issuers a legal right to payment from the federal government for the amount of those mandatory cost-sharing reductions. The law provides that "the Secretary *shall* make periodic and timely payments to the issuer equal to the value of the reductions." 42 U.S.C. § 18071(c)(3)(A) (emphasis added); *id.* § 18082(c)(3).

As with the premium assistance tax credits unsuccessfully challenged in *King v. Burwell*, the House leadership's narrow interpretation of CSR funding authority would similarly generate, as the Justice Department explained to the District Court, a "cascading series of nonsensical and undesirable results that" would follow "if the Act did not allow the government to comply with the statutory directive to reimburse . . . insurers for the cost-sharing reductions"). Two such bizarre results are especially worth

noting. As detailed in an *amicus curiae* brief filed on behalf of fifteen economic and health policy scholars (including the Director of the Congressional Budget Office from 2009 through 2015), if not reimbursed by the government for reducing cost-sharing expenses incurred by their beneficiaries, insurers will raise premiums for all affected plans – namely, the “silver” plans the Act specifies as required for eligibility for CSR subsidies. Those higher premiums would apply to *all* such silver plans, including those covering individuals not eligible for CSR benefits, *and even individuals not insured through the exchanges at all*. Any such individuals who have opted to purchase such plans would have an incentive either to buy cheaper and less protective plans, or, possibly, to purchase more protective “gold” plans, which, paradoxically, could become less expensive than silver plans, or such persons would drop coverage altogether. Obviously, such results would flout the “market improvement” design of the ACA.

Second, even more nonsensical, these scholars explain, “the amount of the premium tax credits offered to subsidized enrollees would increase *across the board*.”⁴ As a result, federal expenditures would increase – and from the same fund – the permanent appropriation provided by 31 U.S.C. §1324 – from which the House leadership’s interpretation purports to save taxpayer dollars.⁵ A December 2015 issue brief issued by the Department of Health & Human services summarized the “net result” of that perverse interpretation:

⁴ Brief *Amici Curiae* for Economic and Health Policy Scholars In Support of Defendants, *U.S. House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC, 2016 WL 2750934 (D.D.C. May 12, 2016), available at <http://premiumtaxcredits.wikispaces.com/file/view/4552756-2--24176.pdf/569554697/4552756-2--24176.pdf>.

⁵ Linda J. Blumberg & Matthew Buettgens, *The Implications of a Finding for the Plaintiffs in House v. Burwell*, Urb. Inst. (Jan 26, 2016), <http://www.urban.org/research/publication/implications-finding-plaintiffs-house-v-burwell>

... [R]ather than directly reimbursing insurers for the CSRs they are required to provide, the federal government would cover the cost ... through a larger [premium tax credit]. ... [which would be paid to] all PTC recipients [not just CSR recipients]. ... [T]his approach would be ... *billions of dollars higher annually* than it would otherwise be. Thus, federal deficits would be higher ... than the current structure in which the federal government directly reimburses insurer costs for CSRs.”⁶

Because these mandatory payments were so critical to the effective operation of the ACA, Congress did not leave the funds for their payment to the vicissitudes of the annual appropriations process. Instead, Congress provided for their payment out of a permanent appropriation via 31 U.S.C. § 1324. At the time Congress was debating and enacting the ACA, this understanding was shared on a bipartisan basis. During the debate, some members expressed concern that these permanently appropriated subsidies would not be subject to the Hyde Amendment, which under certain circumstances limits the use of annually-appropriated funds to pay for abortions.⁷ To address those concerns, Congress adopted a provision to apply such funding restrictions to the subsidies that were permanently appropriated in the law, and in doing so, it made explicit that premium tax credits *and* cost-sharing reductions were the subject of permanent appropriations.⁸

Since the ACA's enactment, Congress has not used its ample legislative powers to reverse or even to defund the Administration's implementation of the CSS subsidy

⁶ *Potential Fiscal Consequences of Not Providing CSR Reimbursements*, ASPE Issue Brief, Department of Health & Human Services (December 1, 2015),

https://aspe.hhs.gov/sites/default/files/pdf/156571/ASPE_IB_CSRS.pdf

⁷ See, e.g., 155 Cong. Rec. S12660 (daily ed. Dec. 8, 2009) (Sen. Hatch) (“this bill is not subject to appropriations”).

⁸ See 42 U.S.C. § 18023(b)(2)(A) (“If a qualified health plan provides coverage of [abortions for which public funding is prohibited], the issuer of the plan shall not use any amount attributable to any of the following for purposes of paying for such services: (i) The credit under section 36B of Title 26 ... (ii) Any cost-sharing reduction under section 18071 of this title ...”).

program – even though it has done just that with respect to other aspects of the Administration’s ACA implementation, as members of this subcommittee well know. “Congressional appropriators have used a number of legislative options available to them through the appropriations process in an effort to defund, delay, or otherwise address implementation of the ACA.” C. Stephen Redhead & Ada S. Cornell, Congressional Research Service, R44100, *Use of the Annual Appropriations Process to Block Implementation of the Affordable Care Act (FY2011-FY2016)*, at 5 (2016), <https://www.fas.org/sgp/crs/misc/R44100.pdf>. Among other things, House appropriators “repeatedly have added limitations,” provisions “that restrict the use of funds provided by the bill.” *Id.*; see *id.* (noting that limitations either “cap[] the amount of funding that may be used for a particular purpose or . . . prohibit[] the use of any funds for a specific purpose”). They have also added “several reporting and other administrative requirements regarding implementation of the ACA,” including “instructing the HHS Secretary to establish a website with information on the allocation of [specified] funds and to provide an accounting of administrative spending on ACA implementation.” *Id.* at 6. But, as far as I know, no ACA opponent has yet so much as drafted, let alone taken steps to enact, proposed legislation to overrule the Administration’s determination that it has authority to fund the ACA’s mandate to provide CSR subsidies.

On the contrary, post-enactment congressional action has *confirmed* that Section 1324 provides a permanent appropriation for the advance payments that the ACA directs the Secretary make to insurers for the cost-sharing subsidies. For fiscal year 2014, both houses passed an appropriations bill that conditioned the payment of cost-sharing reductions (and premium tax credits) on a certification by HHS that the

Exchanges verify that applicants meet the eligibility requirements for such subsidies.⁹

To comply with this provision, HHS subsequently certified to Congress that the Exchanges “verify that applicants for advance payments of the premium tax credit and cost-sharing reductions are eligible for such payments and reductions.” Because there was no yearly appropriation for the payments, it would have made no sense for Congress to enact such a law if, as plaintiff now argues, Congress believed that there was no permanent appropriation available to fund the payments.

* * * *

In sum, the Administration has appropriately and lawfully acted to ensure access to affordable health insurance and health care for the 6.4 million individuals currently receiving cost-sharing reductions – who represent 57% of the 11.1 million consumers receiving health insurance coverage through the exchange market-places across the nation. Withdrawing funding for that lifeline would flout the design of the ACA and the textual provisions which establish that design – which is why this latest effort to undermine the health reform law is no more likely to succeed than its predecessor attempts have.

⁹ Continuing Appropriations Act, 2014, Pub. L. No. 113-46, Div. B, § 1001(a) (2013).

Mr. MURPHY. Thank you very much. I now recognize myself for 5 minutes of questions. At the Ways and Means hearing yesterday, a Department of the Treasury official stated on the record, quote, if Congress doesn't want the monies appropriated it could pass a law saying do not appropriate the monies from that account.

Now Mr. Miller, there you are. Is that how appropriations laws are supposed to work that Congress has to pass a law specifying how the executive branch cannot spend a specific account or appropriations? You may have heard me reference the idea that which is not permitted is allowed.

Mr. MILLER. Your question implies the answer, Chairman Murphy. That's exactly the opposite as to what happens. It's trying to say we can spend whatever we want until you stop us as opposed to it is the role of Congress under the Constitution to first authorize and then appropriate the funding. Failing to say you can't spend is not the same thing as saying it was originally approved for spending.

Mr. MURPHY. Thank you.

Mr. Rosenberg, in the course of this investigation the committee has really faced unprecedented obstruction. The Administration has refused to comply with subpoenas issued by this committee and the committee on Ways and Means, and has grossly restricted the testimony of important fact witnesses giving us no legally recognizable basis to do so. And one of the excuses given is that the House v. Burwell litigation prevents the Administration from complying with our request. In your professional opinion did the House lawsuit preclude the Congress from conducting oversight over the source of funds for the Cost Sharing Reduction Program? Yes or no.

Mr. ROSENBERG. No.

Mr. MURPHY. OK. And then why not?

Mr. ROSENBERG. Because the Supreme Court has addressed this issue in at least two major cases, one of them a Teapot Dome case called *Sinclair v. United States*. And that question specifically arose that the witness got up and said, I'm involved in a lawsuit that I'm going to have to testify at and I'm going to leave my testimony for that lawsuit. For that he was held in contempt of Congress, and the Supreme Court upheld it saying there's no way that he can avoid the breadth and the need of Congress to continue investigations into knowing what was going on there.

A second case some years later came to the same conclusion with regard to a witness who claimed that the committee that litigation that was going on, this might cause him concern or may even reveal evidence that he was criminally responsible. The court said too bad.

Mr. MURPHY. Let me ask in addition to that. The Administration has further refused to provide documents or testimony that include any internal or deliberative materials. Now it claims it can withhold this information based on longstanding executive branch confidentiality interest. Is this a valid or a legal reason to withhold information from Congress? Yes or no.

Mr. ROSENBERG. No.

Mr. MURPHY. And why not?

Mr. ROSENBERG. When Congress operates it has in practice kept for itself the discretion to determine whether common law privi-

leges such as deliberative process, attorney-client privilege, work product privilege will be recognized by the chair. Indeed, your processes of investigation and holding hearings is based on the need and its ability to get all the information possible no matter what. The Congress has the discretion whether or not to accept a claim of deliberative process. It is entitled to know everything and under law that's the final word.

Mr. MURPHY. So Mr. Badger, in expanding from your testimony too, why do you think the Administration is taking these kind of positions that where we see the executive branch bending the law or stretching it?

Mr. BADGER. Well, I think, Mr. Chairman, if Chief Justice Roberts believes that the ACA has improved individual markets and not destroyed them he doesn't get out much. What has happened is that this has turned into a Dumpster fire for insurers forcing them to rely on a series of unlawful subsidies as I laid out in my testimony.

And again I'll return to the ranking member's opening remarks. The idea of honestly addressing these I think would be a very good approach for Congress to take. What happened was as we moved into 2014, the Administration realized what was happening, insurers realized what was happening, and that caused the series of sudden regulatory improvisations of dubious legality to try to get more money to insurance companies to keep them in the game. That has not worked.

Mr. MURPHY. Thank you. I see I am out of time. I would now turn to Ms. DeGette for 5 minutes.

Ms. DEGETTE. Thank you, Mr. Chairman.

Mr. Lazarus, as I read your biography you are a constitutional law expert. Is that correct?

Mr. LAZARUS. I'll have to leave that expert part to—

Ms. DEGETTE. Well, that is what you do.

Mr. LAZARUS. I try.

Ms. DEGETTE. Thank you. And in fact you wrote the amicus brief on behalf of the House Democrats that was filed with the court in this case. It is a subject of—

Mr. LAZARUS. I helped write it. I was one of three people.

Ms. DEGETTE. OK. So I want to ask you a couple of questions about your view of the Administration's interpretation of the statutory provisions at issue here. The first thing is, I think I heard you say in your testimony that you believe the Administration's position that the ACA makes clear that the CSRs and the advance premium tax credits are integral components of a single program that are both funded out of an explicit permanent appropriation in the statute; is that correct?

Mr. LAZARUS. That is correct.

Ms. DEGETTE. And why do you believe that?

Mr. LAZARUS. Well, let's try to be brief about it, but the Administration has a perfectly coherent interpretation of the statute which in my view is clearly the most reasonable in—excuse me.

Ms. DEGETTE. No. OK, go ahead. Just move the microphone—yes.

Mr. LAZARUS. The Administration has a perfectly reasonable well thought through interpretation of the appropriation issue with re-

spect to the Cost Sharing Reductions provisions. It's outlined very clearly in the Justice Department's briefs and supporting briefs like ours. Just in brief——

Ms. DEGETTE. Let me just stop you there and say, now—because we have got your brief and we have got your testimony too.

Mr. LAZARUS. Right.

Ms. DEGETTE. Now as you know, the district court decision went against your position and the Administration position, correct? Yes will work.

Mr. LAZARUS. Well, the district court——

Ms. DEGETTE. OK. Their ruling went against——

Mr. LAZARUS. They simply said that there is no appropriation, it's therefore unconstitutional.

Ms. DEGETTE. And the case is up on appeal now; is that correct?

Mr. LAZARUS. The case is definitely on appeal.

Ms. DEGETTE. And in your experience some of these, most of these lawsuits that have been filed around the ACA have had a diversity of district court opinions and many have been reversed on the appellate court level.

Mr. LAZARUS. That is also true.

Ms. DEGETTE. And so is it your view that the Administration has an excellent case on appeal?

Mr. LAZARUS. I believe that it has on the case——

Ms. DEGETTE. OK.

Mr. LAZARUS [continuing]. Both with respect to whether or not the House of Representatives can claim that it has standing to bring the lawsuit and with respect to the merits——

Ms. DEGETTE. Merits.

Mr. LAZARUS [continuing]. Interpretation.

Ms. DEGETTE. Now you testified that just a minute ago that the CSR fund has 6.4 million people receiving that benefit; is that correct?

Mr. LAZARUS. It is correct that I so testified and I got that information from I think a report by the Department of Health and Human Services.

Ms. DEGETTE. OK. And of those 6.4 million people they are all middle class or lower class because that is what the requirement for the fund is. Is that right?

Mr. LAZARUS. Well, they would have to have incomes that are between 100 and 250 percent of the federal poverty level.

Ms. DEGETTE. OK, of the federal poverty level. OK. And I know you are narrowly an expert on constitutional law, but as you wrote your amicus brief in this matter and as you have reviewed this, were you aware of any proposal that is pending in Congress to replace this fund, the CSR program, with something else? Are you aware of any pending legislation?

Mr. LAZARUS. No, I am not aware. But I would point out that Congress instead of wringing its hands has every ability to change the law if it disagrees with the Administration.

Ms. DEGETTE. Right. And in fact what will happen if the lawsuit is, if the trial court opinion is upheld by the Court of Appeals the result of that will be that the CSR fund which benefits 6.4 million people will be struck down.

Mr. LAZARUS. Yes. It'll be a very complicated process as my colleagues on the other side have explained in their testimony. But that will be the result.

Ms. DEGETTE. Yes, so the result—and so you are not aware of any pending legislation in Congress to fix this issue.

Mr. LAZARUS. No, I'm not.

Ms. DEGETTE. So if they win their lawsuit then these people will lose their benefits.

Mr. LAZARUS. I believe that that is true. Yes.

Ms. DEGETTE. OK, thank you. I yield back.

Mr. MURPHY. Thank you. I now recognize the vice chair of the full committee, Mrs. Blackburn, for 5 minutes.

Mrs. BLACKBURN. Wonderful. I want to come to you, Mr. Miller, because you have looked at the report. You know that we find that the Administration does not have the authority to do these payments, yet they go ahead and they do that. So let's kind of go back to the legislation. In your opinion, does the ACA designate any source of funding for the Cost Sharing Reduction Program?

Mr. MILLER. No, it does not. The provisions which provide for, in effect, mandatory appropriations by linking it to some preexisting, a list of those categories, added the premium tax credits to that but there's no language that links it to the cost sharing reduction payments so therefore there is not that appropriation.

Mrs. BLACKBURN. Can a program or can money be appropriated by inference?

Mr. MILLER. Well, you can try in this Administration and it's tried that pretty extensively. But under our Constitution you cannot do that and under standard appropriations law which the GAO is longstanding the expertise in that area lays out the general categories of how you approach—

Mrs. BLACKBURN. And what would the consequences be for an executive branch that chooses to appropriate money by inference?

Mr. MILLER. Well, there are several consequences. I don't know whether you mean legal consequences. I mean, first, they're getting a free ride. They're able to basically run roughshod over—

Mrs. BLACKBURN. And that is why we are doing oversight.

Mr. MILLER. That's correct. And basically saying we're going to do this until you can stop us, and that's why we're in this type of impasse. It's an unusual lawsuit by the House as an institution to have to go into court in order to assert its constitutional authority and that's why they got the ruling they did. But as a general rule this has worked out in the political process.

We're in a very unusual moment where to oversimplify and carry on with my colleague Doug Badger, the Congress passed a law that didn't work. Now the executive branch decided they couldn't fix it or wouldn't fix it and so we're stuck. They're making the law into something other than what it is and trying to appropriate money which wasn't appropriated as opposed to fixing the law which would resolve it or at least bring the issue out more transparently in a political manner.

Mrs. BLACKBURN. So basically what they did, as you are saying, they passed something. They realized that it is not a workable program much like we in Tennessee realized years ago that TennCare was not a workable program. It was established by an 1115 waiver.

It was too expensive to afford, and a Democrat governor came in and completely reshaped it. It took 35.3 percent of the state budget by the year 2005, and he removed 300,000 people from the program and reshaped the drug program because of the number of scrips that were being written and said this is not sustainable.

The good thing there was we had a governor who would say I am going to be transparent in this and you need to know what this is going to cost you. They couldn't shift the money around and play a game of chess behind the curtain that nobody was going to see. So what they decided to do federally was say, oh my gosh, our theories don't work. We can't afford this. The insurance companies are going to bale on us. Let's start moving some money around here because this is too expensive to afford and we don't want egg on our face—pretty much?

Mr. MILLER. Pretty much. Again this is structure, just respond to what Mr. Lazarus said. This is not a rerun of *King v. Burwell*, although we differ in terms of how much statutory ambiguity there may or may not have been on that. This is simply a core provision of the Constitution which says it's the role of Congress assigned to them to appropriate money. It's pretty straightforward. The law doesn't have to change if Congress votes tomorrow to appropriate funds for this. It decided not to. There's not any authority for that money to be spent.

Mrs. BLACKBURN. Thank you. I yield back.

Mr. MURPHY. The gentlelady yields back. I recognize the gentlelady from Florida, Ms. Castor, for 5 minutes.

Ms. CASTOR. Thank you, Mr. Chairman. Thank you to the witnesses for being here. Approximately 20 million Americans have gained coverage since the Affordable Care Act became law about 6 years ago, but my Republican colleagues continue to look for ways to pull the rug out from under these Americans. In addition to the over 64 votes to repeal the law, the Republicans in Congress have decided to sue, targeting now the cost sharing reductions that are a key part of ensuring that our neighbors back home have access to affordable health care.

Now the Affordable Care Act, it is a complex law. It had a number of different components. Part of it was to end discrimination against our neighbors who had a preexisting condition, like a cancer diagnosis or diabetes, so insurance companies could no longer block them from purchasing insurance.

Another part of the law was intended to stabilize insurance markets because this was a fundamental change in the way people would purchase insurance, and especially if you had people with preexisting conditions coming in, and I think everyone agrees to that. I would hope so. My Republican colleagues have said we are going to repeal the act in its entirety. It is important to have a stable insurance market especially when they are state based.

And another important part of it was to ensure that our neighbors, our working class neighbors who are doing everything right can go in and purchase a policy. This has been a remarkable improvement to the way things were handled in the past. We have all talked to so many of our friends and neighbors that now have that stability in their life that they didn't have before.

So of the approximately 11 million consumers who enrolled at the end of March of this year including 1.6 million Floridians, my neighbors at home, nearly 6.4 million individuals were benefiting from this cost sharing reduction piece that helps make their coverage more affordable. And what that really means, it makes the difference on whether or not they can get to see a doctor or nurse, get the checkups they need or not.

So Mr. Lazarus, in your understanding how does the cost sharing reduction piece fit within the broader mission of the Affordable Care Act?

Mr. LAZARUS. Thank you. The cost sharing reduction enables people who have insurance and who got premium assistance tax credit funding to afford their insurance premiums, but people who could not afford actually to purchase health care because the deductibles and copays were too much for them to afford, the cost sharing reductions enable those people to have confidence that they will be able to actually use their insurance and therefore it encourages them to purchase it.

Ms. CASTOR. So these are—

Mr. LAZARUS. And without that the act wouldn't work because as you just said, insurers must accept people without respect to their health status and unless the pool includes a large number of people, including healthy people, the markets will be destabilized. So the cost sharing reduction provisions are essential to achieving that stabilization.

Ms. CASTOR. So this is kind of another tack that my Republican colleagues have taken. In addition to the repeal votes, the Republican majority, the Republicans in Congress filed a lawsuit in federal court to undermine families' ability to purchase affordable insurance. And I was surprised about the lower court ruling, but let's be clear here that if the House Republicans prevail in this lawsuit it is going to be our neighbors all across America who are hurt.

Mr. Lazarus, if the House Republicans are successful here what is the impact to families across America? And do you know, out of all these 64 votes they have brought there has not been a corresponding plan to address their needs. Are we just going to have many of our neighbors that are out of luck? They have been successful in pulling the rug out from under them and they won't be able to find affordable insurance?

Mr. LAZARUS. Well, first of all, I would certainly not lose hope that the district court's decision is going to be upheld. I think that the Administration has a very powerful case both on whether or not the House standing to get itself into court over this and also on the merits of the Administration's interpretation, which is a very compelling interpretation.

What I do know is I believe that something like 57 percent of all of the people getting insurance on the exchanges—57 percent, that's many millions of people—are eligible for and receiving the cost sharing reduction. So we're talking about a lot of your neighbors.

Ms. CASTOR. Thank you.

Mr. MURPHY. Thank you. The gentlelady's time is expired. I just want to say that with regard to the—I think there is some confusion about the CSR and also the premium tax credit. The Adminis-

tration admitted in lawsuits that beneficiaries get the CSR reduction regardless of whether or not the insurers are paid and regardless of whether or not the district court ruling is upheld on appeal.

So the CSR is a subsidy to insurance companies and the premium tax credit goes directly to the people. I just want to make sure we have that on the record.

I recognize Mr. McKinley for 5 minutes.

Mr. MCKINLEY. Thank you, Mr. Chairman. I feel in many respects like a fish out of water on this. I go back 40 years ago when Sam Ervin was in the Watergate thing, hearings, and he said I am just a country lawyer, and he had made some fairly profound remarks. Well, I am just an engineer and I am dealing with something that is a medical and a legal issue more than anything else.

So I am really enjoying the conversation here with it, but I am caught with some of the discussion that we seem to be, from my perspective, more the ends justify the means. I am not sure that that is the way we are supposed to be doing that. I don't think there is any question that people that are getting health care and medical benefits that that is a good thing for them, but how do we get there? How do we get there?

I mean, I have made some mental notes to myself about food. We could rush food to market, but if we bypass the FDA in the process to make sure that the food is approved that was supposed to get to market, then we shouldn't do it, but they benefited from it. Same thing with medicine, we have a lot of medicine that could help people but we need to follow the process to make sure that it is appropriate for them.

I am lost with this. It just harkens back again to the same thing we heard a year or so ago, the Administration saying that he had no authority. He said it 22 times. I have no authority to deal with this immigration issue, but then he just went ahead and did it.

I know that back during the testimony they said that there was a request; that the President put in a request for appropriation just like he did on immigration. He needed to have authority to do it. Well, he asked for authority for appropriations but it was denied, but he went ahead and did it anyway. And then he apparently was just, said I am going to do it. I am just going to do it.

So I am curious as to whether we have a rule of law or a rule of man. I thought all the statements that we see on the walls around here these are all the rules of law. So I am going to go back to this, I guess to Rosenberg perhaps. If Lazarus is right and this thing gets overturned where do we go? Have we just opened the gates to lack of control? Is there something in the appropriation process that we should be doing to prevent this from happening?

If it is upheld then I think we are going to be OK, because it has been, it appears it will be clear you can't spend money that has not been appropriated or authorized, vice versa. What happens if they overturn it? What happens to us in our process? Can you elaborate a little on that how we might essentially, what should we be doing here in Congress then? Mr. Rosenberg.

Mr. ROSENBERG. With regard to the appropriations process?

Mr. MCKINLEY. Yes, the whole thing. If this thing is overturned what are we supposed to do?

Mr. ROSENBERG. Get a new plan.

Mr. MCKINLEY. Get a new what?

Mr. ROSENBERG. Pass laws. If the problem is there wasn't an appropriation and you think there should be an appropriation, pass it. But you have to have a plan and you have to have the votes to do it.

Mr. MCKINLEY. OK. Mr. Miller, same question. What should Congress be doing at this point?

Mr. MILLER. Well, we've tried to fix these problems in the past and your historical example is rather apt because there was a lot of controversy in the 1970s not only about the Watergate but about the budget process. I remember working on impoundment authorities and we passed the whole budget act was supposedly to deal with that.

It encourages the worst instincts in both sides. You get into trench warfare where Congress would retaliate in various ways not as effectively where you'd try to, you'd be shutting down the government, you'd be trying to hold other appropriations hostage, and that just makes our politics descend into a worse example is who can get away with as much as possible.

This is a fundamental, legal, structural, constitutional issue here beyond what you prefer in health policy in particular. All parties need to be accountable in broad daylight to say here's what our argument is. We're voting for it. We're going to find out what happens and what the public will support. You can't do an end run around the process or you get this type of improvisation where the Administration tries to run out in front of what the law says and then Congress has to play catch up.

Mr. MCKINLEY. Thank you. I yield back the balance of my time.

Mr. MURPHY. The gentleman yields back and now I will recognize Mr. Green for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman.

Mr. Lazarus, thank you for testifying, and I think your testimony clearly lays out why the Affordable Care Act includes what we call either permanent or mandatory appropriation for the CSR program. And mandatory spending is not unusual. The Affordable Care Act in 2010 did that along with a bill we just recently passed this year for mandatory funding for the SCHIP program and for the continuation of the FQHC program. So Congress does add on at times.

My Republican colleagues disagree with you and they disagree with the Administration in claiming that the Administration acted unlawfully in concluding it had the authority to fund the CSR program without an annual appropriation. In fact, this lawsuit shows that they even were willing to go to court.

Mr. Lazarus, Congress has many tools at its disposal when it disagrees with an agency on policy; is that correct?

Mr. LAZARUS. That is very definitely correct, and those tools are available to it right now. This is the sky is not falling, Mr. Miller, this is a simple matter of a difference of interpretation of the relevant statutory provisions on the part of the Administration and Congress. Congress can fix that in an instance if it wants to go on record casting a vote to take these subsidies away from people who need them. Congress has actually done that in the Affordable Care Act and we're all here very well aware of that. And as specifically

the risk corridor program, which has been a target of criticism from my colleagues on the right side here, and it has, Congress has actually acted to affirmatively deny appropriations to fund that program.

So you can put your money where your mouth is or your votes are if Congress wants to, and it shouldn't really be running to court to try to protect itself here.

Mr. GREEN. Well, some of my colleagues seem to claim victory on the legal issue because of the federal district court recently ruled in their favor. They suggest that the ruling is conclusive evidence. Being a lawyer I know there is an appeals process. And were you surprised by the district court's decision?

Mr. LAZARUS. Well, I wasn't surprised after going to the oral argument, frankly, but I was surprised because the precedents are very clear that there's no congressional standing simply to vet a disagreement over implementation of a law with the executive branch. So I was very surprised that the court ignored those precedents and granted standing.

Mr. GREEN. And do you expect the ultimate outcome of the case on the appeal?

Mr. LAZARUS. Well, I believe that it's more likely than not that on appeal the decision will be reversed, but of course I could be wrong about that. We have to wait and see what it is.

Mr. GREEN. Well, as a lawyer I normally don't ask a question I don't have the answer to, but I want to ask the panel. Doing health care policy for decades with Republican and Democratic administrations, some way you have to find a way to encourage the private sector to take the poorest folks, the ones who have a lot of claims, and CSR is part of that process.

Can any four of you think that over the period of time whether it be the prescription drug plan of 2003 that encouraged insurance companies to cover poor seniors who took a lot of medications? And I would be glad in my one point, 1 minute 10 seconds, how was that dealt with in 2003?

Mr. BADGER. Well, Congressman, I represented the White House in negotiations on that and the way it was done was that it was a bipartisan process to agree on a law. The difference here is—

Mr. GREEN. Oh, I disagree. I was here and it wasn't bipartisan, on our side.

Mr. BADGER. I will say on the Senate side we did have over 60 votes and that required substantial Democratic support, but they were part of the conference process. The difference here, Congressman, I don't want to be argumentative, but this is not working. The reality is that despite all of these corporate subsidies, despite all of these changes that were made during the first part of 2014 by the Administration, some of which do appear to be unlawful, the insurance companies are still losing money in the individual market. We haven't solved this problem yet.

And what I would encourage, just to correct the record, of the 6.4 million who are getting these subsidies, even if the Administration were to follow the law, Section 1402(a)(2) says the issuer shall reduce cost sharing under the plan. The insurer has an obligation to do it irrespective of the presence of these funds. But what I would hope that this would precipitate is this kind of conversation we had

with respect to Part D, where people work together, acknowledge that this is not working in many ways, and try to work together on getting something that does.

Mr. GREEN. Well, in my last 15, 20 seconds, whatever I have, I agree with you. We need to work together to see how we can fix it because these folks need that health care coverage, and just dropping six million off without this assistance. And the majority, we can deal with that and fix it instead of going to court and, you know, the law needs to be successful so we need to fix it.

Mr. MURPHY. Thank you. Mr. Griffith, you are recognized for 5 minutes.

Mr. GRIFFITH. Thank you, Mr. Chairman. I appreciate it very much. This is an important hearing because it points out some major flaws and problems that we have in the way that Washington is currently working. I think it is high time, and this is a classic example of it. It is high time that we start defending the legislative prerogative.

It is not a matter of Democrat or Republican or Independent or Socialist or whatever party you want to put on there. It is a matter of defending the Constitution from the congressional branch, the legislative branch of our government. We aren't doing it and we should be doing it whether it is Democrats or Republicans as I said.

And it is one of the reasons I really hope we will have a Republican President so that my colleagues on the other side of the aisle will see that if a Republican President were to flaunt the law as it has been flaunted in this particular circumstance and try to spend money not authorized by Congress, I will stand up and say to that President just as I am going to say today, you can't do that and we are not going to sit idly by and allow you to do that.

It doesn't matter whether it is a Republican or a Democrat, whether it is a program I like or dislike, we have got to follow the law. Just yesterday—we are not robots here just doing things. Yesterday I made an independent constitutional decision. We don't have to wait on the courts to tell us what is and isn't constitutional. We get to make some of those decisions ourselves. That is why we take an oath to uphold the Constitution. And I voted against a rule against my party because I thought paragraph 5 of the rule included something that I believe is unconstitutional. Now all that getting off my chest, I have to say this as well. I think the 60-vote rule in the Senate is killing us.

Mr. Lazarus, you said it is easy for us, we can just pass a law. We can in the House pass a law with a majority vote. You can't do that in the Senate. They have totally botched up the entire process. Again it doesn't matter whether you are Democrat or Republican, when it takes 60 of 100 votes to pass a piece of legislation it is wrong. The process doesn't work and it is weakening the legislative branch of government and it is dangerous to the Republic.

Mr. Rosenberg, you said to Mr. McKinley, if this ruling is upheld and we now have to flip things around where instead of voting for appropriations we have to vote against appropriations and say you can't spend money here, the problem with just passing a law and having a new plan is that 60-vote rule in the Senate. There, I got all that off my chest.

But I think it is very clear, just like in the Solyndra case where they didn't have authority to subrogate, then they subrogated and claimed that, before lunch was different than after lunch because it was an hour later you could subrogate because you weren't supposed to subrogate at the time of the initial loan but you could come back later.

It is the same kind of thing here. They are interpreting the law in such a way. And when we take the position as a legislative branch of government that we have to sit back and wait for the courts before we can take any action, we lose our authority and it diminishes the legislative branch. Mr. Rosenberg, would you disagree with what I have just said?

Mr. ROSENBERG. Not at all.

Mr. GRIFFITH. And I appreciate that. Mr. Miller, would you disagree with what I have just said?

Mr. MILLER. No. And I would just underscore that what was unique about the House v. Burwell case is—we need to think about this. The judge knocked out a different complaint that the House had about the employer mandate because that was a matter of statutory interpretation. However, this went to a core constitutional provision, the power of Congress to determine appropriations and spend money, and that's why it was uniquely moved forward and got past the standing considerations. There was really no other plaintiff you could have bring this case before a court and that's why the judge in a very unusual ruling said this is the only way to remedy this issue.

Mr. GRIFFITH. And I think we may have some more of those, but first we have to stop looking at ourselves as playing for the Republican team or the Democrat team and start playing for the legislative branch of government, because if we follow the process in the legislative branch of government we end up with better government.

I don't think that in due deference, Mr. Lazarus, I don't think that we can say we can flip it. I think that is bad for the Republic too, where you say that since we didn't specifically say they couldn't spend it they can spend it. I think that is an error for the——

Mr. MILLER. Mr. Griffith, if I could just add one thing you didn't mention. Beyond the 60 votes in the Senate you've got a Presidential veto. So you have an Administration which could act illegally and then protect its illegal actions by vetoing correction by Congress to try to override it.

Mr. GRIFFITH. Well, and that is true, although I respect the constitutional prerogative of the President to veto a bill. But at least if we could get it out of the Senate we could make it veto it, because my position is a President won't veto everything you send him. If we send him 70 bills he doesn't like we are going to get 10 or 15 of them at least past that veto pen.

And my time is almost up. Mr. Rosenberg, I would love to get the cites on that Teapot Dome case that you cited earlier because I think that is important again as a part of a legislative prerogative, and that is really what this hearing is about. It is not about trying to take down the ACA. It is about the legislature defending

its right to determine where it is going to spend money and where it is not going to spend money.

And unfortunately the Administration has totally disregarded it, and we need to be more aggressive. My time is up so unfortunately I can't let you respond.

Mr. ROSENBERG. In my testimony on page 5.

Mr. GRIFFITH. On page 5, all right, very good. And I yield back, Mr. Chairman.

Mr. MURPHY. The gentleman yields back. I recognize Ms. Clarke for 5 minutes.

Ms. CLARKE. Thank you very much, Mr. Chairman. I thank our expert witnesses for appearing here today. I just want to drill down a little bit more on some specifics with respect to the CSR. Our Congress designed the ACA Cost Sharing Reduction Program to reduce out of pocket costs for certain enrollees purchasing Silver plans on the exchanges. Cost sharing subsidies along with advance premium tax credits lower a beneficiary's pay for health insurance costs. Essentially these discounts lower the amount of money consumers must pay out of pocket for deductibles, coinsurance, and copayments. The Department of the Treasury then reimburses insurance companies for making these cost sharing reductions. This is the basic premise.

So Mr. Lazarus, how is the mission of the Cost Sharing Reduction Program consistent with the broader goals of the Affordable Care Act?

Mr. LAZARUS. Thank you very much. The Cost Sharing Reduction Program is essential to the overall operational plan of the Affordable Care Act. It enables people who otherwise couldn't afford health care even with premium assistance to help pay their insurance premiums to get health care and therefore encourages them to actually buy insurance. They become part of a larger insurance pool. That leads to the stabilization of markets and it enables the markets to accommodate the fact that the law now forbids insurance companies from turning away people if they have preexisting conditions and so forth. So all of these components work together, just as the Supreme Court ruled in *King v. Burwell* and the cost sharing reduction provisions are absolutely integral to that. So that's how that works.

Ms. CLARKE. Thank you. Since Congress passed the Affordable Care Act in 2010 the number of uninsured in the United States has fallen by 20 million people. This is a remarkable achievement, and such an achievement would not have been possible without ensuring that all elements of the law work together as designed to provide a stable and accessible insurance marketplace.

In his opinion in *King v. Burwell*, Chief Justice Roberts wrote, "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them." If at all possible we must interpret the act in a way that is consistent with the former and avoid the latter.

Mr. Lazarus, can you apply this same reasoning to the CSR program?

Mr. LAZARUS. Well, I would say that if you take the approach that Chief Justice Roberts elaborated there he was applying it to the premium assistance tax credits and stating that under that ap-

proach the law, an ambiguous provision in the law, should be interpreted to make them applicable in all states and not just in states with state run exchanges.

I would say that the cost sharing reductions part of the subsidies is on exactly the same footing as the premium assistance tax credits and would fit into that analysis in the same way, and therefore the Administration's interpretation is the proper interpretation.

Ms. CLARKE. Very well. Mr. Chairman, we have heard today that the Cost Sharing Reduction Program is a critical component of the Affordable Care Act and it has played a very important role in the efforts to provide health care security for working Americans. To attempt to dismantle this program without providing any other way to ensure access to critical health care services to deserving Americans is frankly, I believe, irresponsible, and I hope we can move on from this partisan investigation to provide all of our constituents with the health care coverage that they need. And having said that Mr. Chairman, I yield back.

Mr. MURPHY. Thank you. Dr. Bucshon, you are recognized for 5 minutes.

Mr. BUCSHON. Thank you. As a health care provider I just want to say I want every American to have access to quality, affordable health care, and that I think is a goal that we all share. But this was a bad law. It was passed in a bad way.

I would just remind everyone the law was a Senate bill that did not have the chance to go to conference because it would—any change to the law would have resulted in its failure to pass Congress after a change in the makeup of the U.S. Senate. We all know that. And when you do those type of things you end up with this.

I would also encourage everyone to look at our Better Way Web site, House Republicans and our proposal to replace the Affordable Care Act.

Mr. LAZARUS. Does the ends justify the means?

Mr. LAZARUS. Do the ends justify the means?

Mr. BUCSHON. Yes.

Mr. LAZARUS. No, they don't.

Mr. BUCSHON. OK, because essentially in your testimony that is what you have said.

Mr. LAZARUS. No, that is not what I—

Mr. BUCSHON. It is my time.

Mr. LAZARUS. With all respect that is not what—

Mr. BUCSHON. Here is what you said. You said because of what will happen if the district court decision is upheld, and our Democratic colleagues implied the same, that it should be overturned even if the Constitution is violated. That is essentially what you said.

Mr. LAZARUS. No. That is not what I said. What I said—

Mr. BUCSHON. Then what did you say?

Mr. LAZARUS. That the Administration has a different interpretation of its appropriation authority here; that the Administration's interpretation's perfectly sensible.

Mr. BUCSHON. Can you quote me in the Constitution where their interpretation is, or it says in the Constitution that the only people that can appropriate money is the Congress. Can you tell me in the

Constitution where it says that you can interpret that that the executive branch can appropriate money that Congress has not appropriated?

Mr. LAZARUS. The Administration's position is that Congress has appropriated the money. Your position is that it has not.

Mr. BUCSHON. Well, the district court disagrees with you, so—

Mr. LAZARUS. That's true.

Mr. BUCSHON. And the other thing is, is I want to just clear this up. And this could apply to any law, but in this case because the law's intent is to provide insurance to American citizens for health insurance, does it matter—the gist of your testimony is, is it doesn't matter what the law actually says because the intent of the law is to provide coverage.

Mr. LAZARUS. That is not true. That is not at all what I said.

Mr. BUCSHON. Because that is what you basically said.

Mr. LAZARUS. That's not what the Administration is arguing.

Mr. BUCSHON. And again this isn't a partisan issue. This is a legislative branch discussion versus an executive branch discussion, and it honestly in fairness has been a struggle for 240 years. But I agree with my colleagues that have said that unless the legislative branch in a bipartisan way reasserts its authority the future of the Constitution and this country is at risk.

Mr. LAZARUS. Well, I certainly agree that if you believe that the Administration's interpretation of its appropriations authority with respect to this program is incorrect, you should attempt to pass a law—

Mr. BUCSHON. OK, the other thing—

Mr. LAZARUS [continuing]. Or otherwise use your ample powers to change that result.

Mr. BUCSHON. Now let me just say this. You are a partisan in support of the Administration and you know as well as I do, and you can say that because you know the President would just veto anything related to the Affordable Care Act and we don't have the override vote. So it is pretty easy to say that, right? But I would like to know what you were saying back when Republicans had 60 votes in the Senate, the House, and the White House. I think your view would be a little different.

But the other thing I want to get at in this is does it matter if a law makes sense to make it enforceable? I mean obviously the constitutional provision of appropriations doesn't make sense to you in this case. But does that matter? Does it mean that we can't enforce it because it doesn't make sense to you?

Mr. LAZARUS. The constitutional provision about—

Mr. BUCSHON. You said in your testimony—well, that doesn't make any sense—

Mr. LAZARUS. It makes perfect sense.

Mr. BUCSHON [continuing]. Because people are going to lose their health insurance if we don't this. That is implying the end justifies the means. It implies that the Constitution doesn't matter. It implies that it doesn't matter why we opposed the Affordable Care Act or that in your interpretation that just doesn't make any sense. None of that matters, right? What matters is what the Constitution says about appropriating money.

And the district court at this point, I would argue that I don't think it is going to be overturned because historically Congress has been found to have standing in this, to sue the Administration based on our congressional appropriations and I would hold that we are going to win that. And I would also say that people on both sides of the aisle in the legislative branch should continue to argue that this is in the Constitution and it is our sole authority to appropriate money. It doesn't matter what it is for. It doesn't matter what law it pertains to. I yield back.

Mr. MURPHY. I just want to clarify that the Administration in 2014 asked for an appropriations for this. If what you are saying is true they didn't have to, that belies what they did. So in fact that is true. The second thing is the Department of the Treasury said there is currently no appropriation to Treasury or to anyone else for the purpose of cost sharing payments. I just want to say that is important, so I just wanted to clarify that for Dr. Bucshon.

Ms. DEGETTE. Mr. Chairman, if you are going to do that you should let him respond to your statement.

Mr. MURPHY. I will let him respond.

Mr. LAZARUS. Yes. I'm perfectly aware that the Administration did request an appropriation, but that has often, or at least it has sometimes happened that an Administration will request congressional action in an area where it's unclear whether or not the executive branch has authority to act on its own. It happens all the time. And the only question here is whether in fact the Administration's interpretation of its authority is correct or is not correct.

Mr. MURPHY. Well, along those lines, if you can get us examples of that and show me where, show this committee where in the Affordable Care Act it gives that. You just said it was unclear, but also the Treasury said it was not. Treasury said there is currently no appropriation of Treasury or anyone else for the purpose of the cost sharing payments.

So you are saying it was unclear to the Administration. They asked for the money. We are just saying for this committee if you could show us the lines in the Affordable Care Act what gave the automatic preauthorization for the future of this and also—or the appropriations—and if you could respond to the statement of the Treasury this committee would appreciate that.

Mr. LAZARUS. OK, just two points. The first point is it's hardly surprising that there was disagreement within the Administration over this issue. That often happens. But what matters now is whether or not the position that the Administration has finally and with careful attention taken whether that position is correct or not. Now the position is——

Mr. MURPHY. Wait, wait. I just want to make sure I understand. They took a position of whether or not that is correct. That is what you said.

Mr. LAZARUS. Yes, whether it's correct. I mean——

Mr. MURPHY. Well, that is what this committee is trying to find out, sir. You don't get to take a position and then retrospect——

Mr. LAZARUS. Well, you asked me——

Mr. MURPHY. OK.

Mr. LAZARUS [continuing]. Where in the Affordable Care Act does the authority to spend this money come from. The Administration's

interpretation is that within the integrated program that includes both the cost sharing reductions and the premium assistance tax credits, within this integrated program both portions of the advance payments to insurers to cover those two halves of the program are, quote, refunds due from Section 36(b) within the meaning of 31 U.S.C. Section 1324 because both are compensatory payments to the insurers made available through the application of Section 36(b) which sets forth conditions necessary to qualify for both of those subsidies.

But that's the Administration's textual interpretation and I think that it is a perfectly reasonable interpretation. You may disagree, but that's—

Mr. MURPHY. I need to let other members continue on. Mr. Tonko, you are recognized for 5 minutes.

Mr. TONKO. Thank you, Mr. Chair. I do thank our witnesses for being here today, but I regret that we are in a sense wasting your time to reexamine an issue that has been examined to death. This issue fundamentally comes down to a difference of opinion about what was intended by the Affordable Care Act with regard to the CSR program.

Yesterday the majority released a 150-page report with the Ways and Means Committee documenting in great detail their opinion of the legality of an appropriation for the CSR Program. So Mr. Lazarus, in your opinion, is it responsible to conclude that the ACA provides a permanent appropriation for the CSR Program?

Mr. LAZARUS. I believe that it's correct. I understand that there's an argument, a good argument for the opposite point of view and I respect that. But I believe that it is not only responsible but that it's legally correct.

Mr. TONKO. And my Republican colleagues also claim that the Administration has "overreached in executing the CSR provision of the Affordable Care Act." Mr. Lazarus, would you agree with that assessment?

Mr. LAZARUS. I not only would not agree, but I think that the constant din of charges coming from the President's political opponents that he's overreaching, violating laws is a very unfortunate distortion of the truth.

We must remember that prior to *King v. Burwell* last year we heard the same litany of charges that funding the premium assistance tax credits in federal exchange states was a gross violation of the law, and it turns out the Supreme Court didn't agree with that at all but we're still hearing it and we're hearing it over and over again. We heard it with respect to various delays in the effective dates of parts of the Affordable Care Act as the Administration implemented it.

But the truth is, when Part D of Medicare, the prescription drug benefit which was a President Bush program and it turns out a very good program—I can personally testify to that—when it was implemented there also were delays because it's very complicated implementing these very complicated laws. Secretary Leavitt, who was the secretary of HHS at the time said that the Obama administration's delays were "wise." So I think that this, these charges of overreach reflect a political strategy of demonizing this Administration rather than the facts.

Mr. TONKO. I thank you. In just a few minutes we have concluded that a difference of opinion exists, yet it is reasonable to believe that the executive branch acted appropriately in executing the law. Now my Republican colleagues have been examining this issue for 2 years without reaching that conclusion.

Today's hearing follows the filing of a lawsuit in federal court questioning the constitutionality of the CSR program. It follows 15 letters from the majority of this committee and from the Ways and Means Committee to Administration officials. It follows six subpoenas for documents to three different federal agencies. It follows interviews with 13 current and former government officials from four federal agencies, and it follows a hearing yesterday by the Ways and Means Committee with four federal witnesses.

So my question is, Congress clearly has a wealth of tools at its disposal, Mr. Lazarus, has Congress successfully used its legislative authority to review or to reverse or defund the Administration's implementation of the Cost Sharing Reduction Program?

Mr. LAZARUS. Well, I think that the fact that Congress, the Republicans have taken no steps to pass such legislation is an eloquent testimony to the fact that they're failing to use those weapons and instead running to court as a kind of diversionary tactic.

Mr. TONKO. I thank you for that assessment. And I would just state enough is enough. After 64 votes on the floor, dozens of hearings, and countless letters to the Administration, it is clear that there is no purpose to this aimless oversight. I call on my Republican colleagues to move on to other important topics that deserve our time and attention and certainly respond much more appropriately to the general public that we serve. With that I yield back.

Mr. MURPHY. The gentleman yields back. I now recognize Mr. Mullin for 5 minutes.

Mr. MULLIN. Thank you, Mr. Chairman. The Administration's position on the source of funding only changed after the sequestration report; is that correct, Mr. Lazarus?

Mr. LAZARUS. I believe that it is correct.

Mr. MULLIN. OK. Mr. Miller, would you mind explaining that a little bit more for us?

Mr. MILLER. Well, the timeline was first they requested the appropriation, then they also filed some information that basically confirmed that this would be subject to sequestration. They reversed direction on that because it would be subject to a sequestration, it was not a mandatory appropriation which was beyond just that single year and that would have reduced the cost sharing reduction payments.

Mr. MULLIN. And the insurance was only going to get 92.8 cents on a dollar?

Mr. MILLER. It was an across the board haircut for those funds that are subject to sequestration.

Mr. MULLIN. I think the position that we are trying to take is that the timing on this can't be—what is the word I am looking for here? The timing on this just seems a little odd for it, coincidental. There you go, thank you. The Oklahoma accent wasn't allowing it to be spit out. But it just seems odd to us, and the justification that is coming out behind this I have a hard time to believe it.

Mr. Lazarus, I appreciate your opinion on this but it sounds like you are trying to justify the actions. And all we are trying to do is not keep poking the eye in this Administration even though we do that quite often, but who is hurting here? It is the insurers. It is the people that this was supposed to protect. I mean, in Oklahoma alone the exchanges went up 49 percent this year alone. Insurance costs have skyrocketed through the roof. The same people that we were supposed to take by this law it is hurting. Don't take our word for it. Go out and see how much insurance is costing today versus what it cost in 2010, in 6 years.

Something is wrong here, and that is all we are trying to do is fix it. We all have constituents. We all, we don't want anybody to go out there without insurance, but yet there already is and with the cost rising the way that it is, why? It is just one piece of it. It is costing the taxpayers some dollars. We are the one holding the bucketful of dollars I guess, but yet this is just one piece of it.

And so Mr. Lazarus, I am not really trying to come after you on this one. I am just disappointed in hearing you trying to justify the Administration's actions and think for some reason it is political. It is not political at all.

Mr. Miller, would you like to respond a little bit more to what Mr. Lazarus was saying a while ago?

Mr. MILLER. Well, I could choose a lot of territory. Let me raise one that hasn't been talked about. It's kind of the arguments we try to have it both ways. We even hold this argument in the alternative in court. We've heard that people are going to be suffering because they won't be getting any cost sharing reduction subsidies. Well, actually we know that it will still be required to do it, but even if that was the case then the trying to have it both ways argument is to say, well, the insurance will just raise the premiums and the tax credits will be even larger for the premiums so they'll all be covered anyway. It's one of these migrating arguments where no matter what you do you end up in the same place.

Mr. MULLIN. Mr. Rosenberg, you are our congressional oversight expert, I mean, literally wrote the book on this. I know you have been asked what we could do. I think your response was pass legislation. We tried that. It doesn't work. We have this little guy that keeps holding us up.

What else could we do here in Congress to help hold this Administration accountable to keep things that we feel is completely outside their boundaries? Everybody says we control the purse strings, so in your opinion as the expert what is our next step?

Mr. ROSENBERG. Well, you've got to shore up your abilities to know what's going on, to know how decisions are made, who makes them. And what's clear in your investigation and it's been clear for the last 5 or 6 years in other investigations that the doors have been closed on you. Either slow walking getting information, that gives you the ability—

Mr. MULLIN. Deliberately slow walking.

Mr. MILLER. Deliberately slow walking and absolute refusals and when subpoenas are issued they are ignored. And when you try to go to what traditionally has been done for 200 years, either go for a criminal contempt to show that you mean what you say and we need what you're withholding from it, it's now impossible to do be-

cause what they're telling you is, well, if you want to do that go to court for a civil action.

And what that does is put everything on hold and we know that it takes up time, and time in good oversight is a necessity. It's timely getting the information so that it can be acted on so it would be effective is there.

Mr. MURPHY. Thank you. The gentleman's time is expired.

Mr. MULLIN. I am sorry. My time is expired. But thank you, Mr. Chairman, for allowing him to try to explain that.

Mr. MURPHY. Thank you very much. Ms. Schakowsky, you are recognized for 5 minutes.

Ms. SCHAKOWSKY. So I really apologize for missing. There are all these conflicting things. But I appreciate all of you being here and I do have a couple of questions for Mr. Lazarus.

But yesterday the Ways and Means Committee held a hearing on this very same topic, Cost Sharing Reductions. In front of representatives from HHS and Treasury and IRS and OMB, a member of that committee repeatedly declared, "this is not about poor people; this is about an insurance subsidy." I think this is simply disingenuous.

Just like the advance premium tax credit, the cost sharing reductions are a direct benefit to consumers. They simply flow through the insurance companies. The average consumer benefiting from these cost sharing reductions receives approximately \$500 per year, and suggesting that it is an insurance subsidy, I think, is a cynical and misleading attempt to distract people from the reality that House Republicans are trying to take health care benefits away from low and middle income families.

Mr. BUCSHON. Will the gentlelady yield?

Ms. SCHAKOWSKY. No.

Mr. BUCSHON. We are not.

Ms. SCHAKOWSKY. This tells us all we need to know about the Republican Party's priorities. This investigation is not a good faith effort to improve the Affordable Care Act and ensure that all of our constituents receive quality, affordable health care. This is just a partisan witch hunt.

Mr. Lazarus, the Affordable Care Act has now faced its fair share of challenges in the court. Does this lawsuit do anything to improve the quality of health care for the American people?

Mr. LAZARUS. Well, I think that the lawsuit is a very inappropriate lawsuit. I think that it's a political food fight between the executive branch and part of the Congress that doesn't belong in court. And I think that ultimately on appeal that that's the determination that the courts are going to make.

Ms. SCHAKOWSKY. This law was passed to make health care about people, not about insurance companies. The Affordable Care Act has provided 20 million Americans with affordable health insurance and offered millions more protections against discrimination for preexisting conditions, age, and gender. Of the approximately 11.1 million consumers who had effectuated enrollment at the end of March 2016, 57 percent or nearly 6.4 million individuals were benefiting from CSRs to make coverage more affordable.

Mr. Lazarus, what does the text of the law suggest about Congress' intent when the Affordable Care Act was passed? Is the way

the Administration has administered the cost sharing reductions provision consistent with the broader reforms to the individual insurance marketplace and the American health care system?

Mr. LAZARUS. Well, yes. In brief, the cost sharing subsidies are an absolutely essential component to the other mechanisms that the Affordable Care Act deploys in order to further its goal of getting as close as possible to universal insurance. And the statute is replete with references to those purposes with the specific components of the plan that are necessary to achieve them and it's replete with specific references to the importance of the cost sharing reductions to achieving those purposes.

Ms. SCHAKOWSKY. Thank you for that. And it is clear that in passing the law Congress' intent was to make it easier to access quality, affordable health coverage, and I believe the Republican's partisan investigation only takes us further from that goal. The comments made yesterday were misleading and they are disrespectful to the American people who are benefiting from the coverage provided through the law.

Let me just say too, over the years since the passage of the Affordable Care Act, which was a very big and I think powerful and important law, we have attempted to sit down with the Republicans to come up with the kinds of fixes that on a bipartisan basis we could do. What I have seen is that all the bad has been embraced, and there are so many times when I have felt like, give me the name of that constituent and we will take care of it in our constituent service office to try and make it work.

I think we need to be serious about working together, stop these frivolous lawsuits, and get down to making this law the great law that it could be. Thank you. I yield back.

Mr. MURPHY. The gentlelady yields back. Now Mr. Collins is recognized for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman. I am hearing a lot of passion by the Democrats on the other side about why we are holding what they call a partisan hearing. I guess I have three children and I have three grandchildren with a fourth on the way. That is why I am here. That is why I think this hearing and others like it are important. It is about our children. It is about our grandchildren and the fact that every dollar of deficit that we spend today are dollars that my children, the other children in America, and the grandchildren are going to have to repay.

We are not living within our means. I go back to that every single time I cast a vote. Seems as though the Democrats, whether it is Zika funding or anything else, their solution is always the same. Borrow more money that my children and grandchildren have to pay back. You talk about disrespectful, now that is disrespectful. If we can't pay our way now, what are we doing in borrowing on the backs of our children and grandchildren? It is just fundamentally immoral.

So here we are, Affordable Care Act. Talk about bait and switch. Talk about false advertising. America, here is this great plan and here is what it is going to cost. Well, it is costing billions if not trillions more than it was supposed to cost.

And so, when we get into a hearing like this where the Administration has inappropriately put \$7 billion—and I would like to re-

mind the Democrats on the other side where that would go. That would fully fund Zika and rebuild 5,000 bridges in America that have fallen apart at a million dollar a bridge. Seven billion dollars would fully fund Zika. Seven billion dollars on top of that would rebuild 5,000 bridges in America. That is why this hearing matters, to remind the Americans that dollars matter.

So Mr. Miller, here is kind of a rhetorical question for you. If the \$7 billion hadn't flowed into the insurance companies in what we would say was beyond the constitutional authority of the Administration, what would have happened to premiums across the ACA?

Mr. MILLER. There are a lot of moving parts on that front. If you follow one line of argument that the insurers would still be required to provide these subsidies those premiums would be higher. But you've got a lot of moving parts but not at the same time.

Mr. COLLINS. Well, but if we stop there, because the CSR is part of the ACA so they would have to continue to provide them and if there is not funding you could argue one way or the other. Premiums go up and maybe the federal government then would have to——

Mr. MILLER. The broader answer is by making Congress responsible as it should be for deciding how to sort that out there would be a lot of cross pressures.

Mr. COLLINS. Sure.

Mr. MILLER. And we don't know how Congress might decide to subsidize low income individuals differently.

Mr. COLLINS. And in those cost pressures we may decide to change some things. We may decide to prioritize our children's future. We may decide to prioritize our grandchildren's future. We may decide to prioritize Zika funding. We may decide to prioritize infrastructure repairs.

But this Administration, in what we would say is an unconstitutional overreach, decided they would set the priorities, and the President said he had the phone and a pen. I don't know if he ever calls anybody but he sure uses the pen all the time. And so I think that is where this oversight hearing is absolutely proper.

And I will just bring up another point, and maybe this is a nuance but we should do it anyway. There is something called the Antideficiency Act and under the Antideficiency Act Congress can sue an individual, an individual who misappropriates government funding without an appropriation request. It has got to be an individual. And this Administration has continued to refuse to put anyone's name on the line that was involved in what we would say was an illegal decision making, and would just ask you, sir, if that is a proper interpretation. If we don't have a name we can't sue someone under the Antideficiency Act that misappropriated money.

Mr. MILLER. That's correct. Because of the way it applies you have to have an accountable official, and that is a little bit of a mysterious effort right now.

Mr. COLLINS. And we have been attempting to get some names. We can't get names, so I guess we will hold hearings. We will invite the secretary in. She refuses to come in. I guess that is her right. I don't know, maybe we can get her in here another way. But those are those little nuances that do matter. I believe they matter quite a lot.

But I will go back and just say this is about my children and grandchildren. It is about respecting the taxpayers. That is why this hearing is occurring. We respect the taxpayers of the United States of America and future generations who will be robbed of the opportunity to live the American dream that we grew up in because they are going to be so saddled with debt the debate will become the debate we are seeing today in Venezuela, in Greece, and Puerto Rico. And I yield back the balance of my time.

Mr. MURPHY. The gentleman yields back. I recognize Mr. Flores for 5 minutes.

Mr. FLORES. Well, thank you, Mr. Chairman. I want to thank the panel for joining us today. I want to tell the truth to offset some of the claims we have heard from the other side about how great the Affordable Care Act has been. The architect of the plan has said publicly that if they could fool Americans into this that they would eventually like it. Well, Americans still don't like it.

Americans were promised they could keep their doctor. That turned out to be a lie. They were promised they could keep their insurance plan, another lie. They were promised that premiums would go lower, a third lie. And it goes on and on and on. And I want to remind everybody what the Constitution simply says, and it says that—well, let me come back to that in a minute.

Also one of the claims from one of the folks on the other side was that this was a frivolous lawsuit. Mr. Lazarus admitted the validity of the lawsuit. The courts have upheld the validity of the lawsuit. If it was a frivolous lawsuit they would have thrown it out originally, so just so that we have a clear context for where we are going.

Now Article 1, Section 9, paragraph 7 says no money shall be drawn from the Treasury but in consequence of appropriations made by law. It doesn't say if the Administration deems it to be that way or if it reads the law a particular way. So my questions are this, we have had unprecedented levels of obstruction from this Administration and that indicates that they have got something to hide. If they didn't have anything to hide they would send us the documents. They would send us every document we ask for. They would send the witnesses. They wouldn't tamper with the witnesses. They would let the witnesses answer the questions. If they didn't have anything to hide they would do that.

But nonetheless, even though they have attempted to cover this up and then cover up their illegal actions, we have learned a lot about the Administration's decision to unconstitutionally fund this program and we are going to continue to pursue the facts.

We have another problem here though. As Congress continues to carry out its constitutional obligation to conduct congressional oversight of the executive branch, which is a necessary part, a constitutional part of our checks and balances, the Administration sinks to new depths to withhold information from Congress and this is unacceptable.

So Mr. Rosenberg, I have a couple of questions. There have been executive claims of confidential—or the Administration has sort of tried to claim privileges. One is called confidentiality claims and the other one is called heightened sensitivities. Are you aware of

any such privilege that the executive branch has to withhold information?

Mr. ROSENBERG. Not with regard to that no.

Mr. FLORES. The Administration has clearly obstructed congressional investigation here. Do you agree with that Mr. Rosenberg?

Mr. ROSENBERG. I'm sorry?

Mr. FLORES. The Administration has clearly obstructed Congress trying to pursue this matter. Do you agree with that?

Mr. ROSENBERG. Yes. From what I've been reading and what I know, yes.

Mr. FLORES. One of the things, the direction that Mr. Mullin was headed is that he was asking what could Congress be doing to ensure that it has the access it needs to conduct oversight to help Congress pass legislation. What additional steps do we need to take?

Mr. ROSENBERG. You need to shore up your ability to enforce your subpoenas.

Mr. FLORES. OK.

Mr. ROSENBERG. And there are two ways to do it. Traditionally you had a criminal contempt process, but the Administration has come out with a dicta that says we can block that. That we don't have to go to court to do it and you can't because it's unconstitutional. It interferes with the Presidential prerogatives. You used to have and still have another course. It's called inherent contempt where you can bring a recalcitrant officer before the bar of the House, question him and hold him in contempt and even jail him at that particular point. That's been deemed unseemly and also unconstitutional by the Justice Department.

What you need to do is do two things. One, you have to make the inherent contempt process seemly. That is, don't make it appear draconian. That you go out, you arrest, detain, try, and then can put them in jail for it. What you want is to get information and you need leverage to do it. If you bring someone in, have an adjudicatory proceeding in which the facts about the obstruction are looked at and determined by a committee with a recommendation that there be a trial before the House, have the person brought in, testify, and as a result there would be a fine. Not imprisonment but a fine that went against the salary of the particular person. That would have an effect. After it was upheld—it will be challenged of course. After it's upheld, a finding of inherent contempt would trigger a point of order with regard to salaries. And that will get out and that will bring attention.

Mr. MURPHY. Thank you.

Mr. ROSENBERG. Everything you can do——

Mr. MURPHY. Sir, we are way out of time and we have votes coming up in a couple of minutes, if you would be so kind as to submit other recommendations for the record.

In fact, I would like to thank all the witnesses that participated at today's hearing and remind members they have 10 business days to submit questions for the record. And ask the witness——

Ms. DEGETTE. Mr. Chairman, can I——

Mr. MURPHY. If you would like to make a——

Ms. DEGETTE. I just want to say one thing briefly, which is I really don't question the motives of the majority here. I think it is

in the congressional prerogative to file a lawsuit if Congress believes that the Administration has overstepped its constitutional bounds. But, I do think based on what Mr. Lazarus has said today and what the Administration filed in their brief there may be an honest disagreement here. We believe that the Administration had the constitutional ability to establish——

Mr. MURPHY. Would the gentlelady yield?

Ms. DEGETTE [continuing]. No, I won't—to establish the CSR and also to implement it. But be that as it may, I feel what the Democrats are trying to say here today is that we are trying to say that even if there is a general disagreement on the constitutional authority this problem could be easily resolved by Congress by passing legislation to clarify it. And the thing we are concerned about is that the——

Mr. BUCSHON. Mr. Chairman, can I get a——

Ms. DEGETTE. If this CSR fund——

Mr. BUCSHON. Is this out of order?

Mr. MURPHY. Yes, but——

Ms. DEGETTE. If this CSR fund is struck down by the court then 6.4 million people will lose their subsidies.

Mr. BUCSHON. Not true. That is not true.

Ms. DEGETTE. Mr. Chairman. And so the result is we really hope that what we are trying to say is there has been no effort to fix this, and irrespective of what happens in the court case, we need to work together to try to make sure these people can get affordable insurance. That is all I am trying to say and I yield back.

Mr. MURPHY. Just to the other members, it has been our tradition in the subcommittee that I give the ranking member and myself just a wrap-up moment. And I would say I disagree. I would ask members to read the joint congressional investigative report in the source of funding of the ACA's cost sharing program where we outline a lot of these things.

This committee is dedicated to try to find some solutions for health care. We are not abandoning those who are in need. There is a constitutional question here. I fundamentally disagree with a lot of what Mr. Lazarus says that good intentions don't automatically mean good results. And we need to pull together on this. I do agree we need to find some solutions here. None of us want to leave people who are of low income out on the lurch with regard to health care, but simply declaring that because I intend it we can make it so, is not a constitutional answer and we will continue to uphold that.

I thank all the members for this. And I would suggest, if other members have other questions to submit to this panel, please get them to us.

Mr. FLORES. Mr. Chairman, I would suggest that if the Administration would provide the documents it might make this a little easier.

Mr. MURPHY. Yes.

Mr. FLORES. They have covered up.

Mr. MURPHY. I want to say that we have asked for a lot of those documents, and we are going to continue to do that. But with all this, I now adjourn this subcommittee.

[Whereupon, at 11:29 a.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]



U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE

July 6, 2016

TO: Members, Subcommittee on Oversight and Investigations

FROM: Committee Majority Staff

RE: Hearing entitled "The ACA's Cost Sharing Reduction Program: Ramifications of the Administration's Decision on the Source of Funding for the CSR Program."

On July 8, 2016, at 9:15 a.m. 2322 Rayburn House Office Building, the Subcommittee on Oversight and Investigations will hold a hearing entitled "The ACA's Cost Sharing Reduction Program: Ramifications of the Administration's Decision on the Source of Funding for the CSR Program." The Subcommittee will hear testimony about the ramifications of the Administration's decision to fund the cost sharing reduction (CSR) program of the Patient Protection and Affordable Care Act (PPACA) through the permanent appropriation for tax refunds and credits.

I. WITNESSES

Panel One (invited)

- The Honorable Sylvia Burwell, Secretary, U.S. Department of Health and Human Services.

The Department has declined to provide a witness for this hearing

Panel Two

- Doug Badger, Senior Fellow, Galen Institute;
- Tom Miller, Resident Fellow, American Enterprise Institute;
- Morton Rosenberg, Fellow, The Constitution Project; and,
- Simon Lazarus, Senior Counsel, The Constitutional Accountability Center

II. BACKGROUND

A. The Cost Sharing Reduction Program

The Patient Protection and Affordable Care Act provides two subsidies to individuals who purchase coverage through health insurance exchanges:

1. Premium Tax Credits (PTC): A refundable tax credit available for eligible taxpayers who purchase a qualified health plan (QHP) on the health insurance exchanges created by the PPACA.¹ The government can pay this credit to insurance companies in advance to offset an individual's monthly premium (in which case it is known as an Advanced Premium Tax Credit (APTC)), or a taxpayer may claim it as a credit on a tax return.
2. Cost Sharing Reductions (CSR): The law requires insurance companies to reduce copayments, deductibles, and other expenses paid by eligible beneficiaries. The law authorizes the federal government to offset the cost of these reductions by making payments to the insurance companies.²

The PPACA also established a process to determine an applicant's eligibility for PTCs and CSRs in advance, which allows individuals to have PTCs applied to their monthly premiums and qualify for cost sharing reductions.³

Section 1401 of the PPACA added Section 36B to the Internal Revenue Code, establishing the PTC. This credit is available to taxpayers with incomes between 100 and 400 percent of the federal poverty level (FPL). The PTC amount is based on the taxpayer's income, family size, and the price of a benchmark health plan.⁴ For eligible individuals, the government can pay the credit in advance to the insurance companies so that the insurance companies reduce those individuals' premiums--these payments are the APTCs.⁵

Section 1402 of the PPACA created the CSR program. The statute requires insurers to reduce co-payments, deductibles, and other out-of-pocket costs for eligible insured individuals. These individuals must have an income between 100 and 250 percent of the FPL, must be eligible for PTCs, and must have purchased a specific type of QHP on the exchange.⁶

Congress both authorized and funded the PTC program in the PPACA. Section 1401 of the PPACA added Section 36B to the Internal Revenue Code, which authorizes the PTC program,⁷ amended an existing permanent appropriation—31 U.S.C. § 1324—and designated the permanent appropriation as the source of funding for the PTC program.⁸ The appropriation's

¹ 26 U.S.C. § 36B.

² 42 U.S.C. § 18071.

³ 42 U.S.C. § 18081 and 18082.

⁴ 26 U.S.C. § 36B(b)(2)(B)(i).

⁵ 42 U.S.C. § 18082(c)(2).

⁶ 42 U.S.C. § 18071(b)(1).

⁷ Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119 (2010).

⁸ *Id.* (amending 31 U.S.C. § 1324 by adding "36B" to the list of tax credits available to be paid from the permanent appropriation).

statutory language also limits payments from the appropriation to only tax refunds and specific credit provisions within Internal Revenue Code, including the PTC provision, Section 36B.⁹

With respect to the CSR program, however, Congress provided only an authorization, and not an appropriation, in the ACA. The CSR program is not a tax provision and not codified within the Internal Revenue Code. Further, there is no language in the ACA or anywhere else tying the CSR program to the 31 U.S.C. § 1324 appropriation.¹⁰

Indicating that the CSR program requires an annual appropriation, on April 10, 2013, the Administration requested an annual appropriation for the program in the President's FY 2014 budget request.¹¹ On July 11, 2013, the Senate Committee on Appropriations expressly denied the request in its committee report.¹² In January 2014, despite this denial and without an annual appropriation, the Administration began making CSR payments through the permanent appropriation for tax refunds and credits, codified at 31 U.S.C. § 1324—the same source of funding as the premium tax credit program.

B. The Committees' Investigation

For more than a year, the Committee on Energy and Commerce, along with the Committee on Ways and Means, have been investigating the facts surrounding the Administration's decision to fund the Cost Sharing Reduction program through the permanent appropriation for tax refunds and credits. From the outset, the committees have clearly stated the purpose of their investigation: to fully understand the facts surrounding the Administration's decisions to fund the cost sharing reduction program from the permanent appropriation for tax refunds and credits. In the course of this investigation, the committees have sent fifteen letters, issued six subpoenas for documents, and conducted twelve transcribed interviews of current and former Administration officials involved in decisions regarding the source of funding for the CSR program. The Administration, however, has not cooperated with the committees' requests.

III. ISSUES

The following issues are expected to be examined at the hearing:

- The ramifications of the Administration's decision to fund the CSR program through the permanent appropriation for tax refunds and credits;
- The importance of the appropriations power to the Congress; and
- The need for robust congressional oversight of the Executive Branch.

⁹ 31 U.S.C. § 1324.

¹⁰ Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119 (2010).

¹¹ Office of Mgmt. and Budget, *The Budget for the U.S. Government Fiscal Year 2014*, Appendix at 448 (Apr. 10, 2013).

¹² S. Comm. on Appropriations, *Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Bill, 2014*, 113th Cong. (S. Rept. 113-71).

IV. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Jessica Donlon or Jen Barblan of the Committee staff at (202) 225-2927.