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THE TRILLION DOLLAR REVOLUTION

*How the Affordable Care Act
Transformed Politics, Law, and
Health Care in America*

EDITED BY

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EXECUTIVE POWER AND THE ACA

Nicholas Bagley

As with any law of its complexity and ambition, the Affordable Care Act (ACA) vests in the sitting president broad implementation discretion. The law is not a blank check: in many ways both large and small, the ACA shapes and constrains the exercise of executive power. But Congress has neither the institutional resources nor the attention span to micromanage the rollout of a massive health program. It has no choice but to delegate.

Naturally, both President Obama and President Trump have drawn on their authority to tailor the ACA to their policy preferences. Neither president, however, has been able to turn to Congress for more sweeping changes to the law. Stymied in Congress and buffeted by the partisan combat over Obamacare, they have come under enormous pressure to ignore legal constraints that stand in the way of their political objectives. The story of the ACA's implementation is thus a story of two presidents who have tested—and at times exceeded—the limits of their legal powers.

Yet Obama and Trump have committed very different legal sins. President Obama's lawbreaking reflected his efforts to cope with the ambiguities, omissions, and outright mistakes that are common in any massive law and were especially common in the ACA. To implement the bill in the face of congressional resistance, the Obama administration cut corners. President Trump, however, exploited his position as

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the head of the executive branch to mount an unconstitutional campaign to sabotage the very law he is charged with faithfully executing.

It would be comforting to treat these legal violations as aberrant responses to particular features of the ACA or to the intensity of debate over health reform. But they cannot be so easily dismissed. The ACA is the most assertive effort in 50 years to make good on the claim that health care is a right, not a privilege. That is another way of saying that the have-nots have a moral claim to the resources and privileges of the haves. The campaign against the law is the reactionary counter-mobilization of those who believe that the principles animating the ACA pose an incipient threat to the established order. No wonder that health reform provoked the most rancorous battle over a piece of domestic legislation since the adoption of the Civil Rights Act in 1964.

The fight over the ACA may therefore offer a disquieting preview of what may come if Congress moves to address the nation's other yawning inequalities. Like the ACA, future laws will delegate wide authority to the president. They too will contain unanticipated flaws. And they will also be subject to implementation by hostile presidents. Legal constraints on the executive branch buckled in the white-hot heat of the battle over the ACA. They could melt away altogether in the next war.

President Obama

In November 2010, a scant eight months after the ACA's adoption, Republicans took control of the House of Representatives. Spurred by a Tea Party that saw Obamacare as its principal grievance, the restive House majority committed itself to dismantling the law. Without Congress to help it iron out implementation difficulties, the Obama administration was on its own.

The Delays

In July 2013, Valerie Jarrett, a senior adviser to the president, announced that the administration would temporarily suspend enforcement of the so-called employer mandate. Technically, the name is a misnomer: the

law imposes no mandate but instead exacts a tax on larger firms that do not offer health insurance to their workers. That tax serves a dual purpose: it encourages employers to offer coverage and, failing that, generates revenue to offset the costs of the ACA's coverage expansion.

Under the law, the employer mandate was supposed to go into effect in 2014. But the administration, under intense pressure from business groups, said that it would not collect the tax that year. "In our ongoing discussions with businesses," Jarrett explained, "we have heard that you need the time to get this right. We are listening."¹ Later, the administration announced additional suspensions of the mandate for midsize firms.

These were not the only delays. In pressing for the ACA's adoption, President Obama repeatedly promised that "if you like your health care plan, you can keep it."² But that was not exactly true. The ACA imposed stringent new rules on privately sold insurance—including limits on out-of-pocket spending and a mandatory suite of benefits—that rendered most existing policies unlawful. (The law did include a grandfather clause, but it was too narrow to save most plans.) As 2013 came to a close, thousands of people began receiving cancellation notices in the mail.

Republicans pounced. As the political heat rose, moderate Democrats in Congress began to clamor for legislation. The administration, however, feared that any law that could make it through a Republican-controlled House would damage the ACA on the eve of its implementation. President Obama called for an administrative fix, one that entailed another delay. In a letter, the Department of Health and Human Services (HHS) invited state insurance commissioners to waive, for one year, the ACA's new rules for existing plans.³ More than 30 states did, and four subsequent letters have extended the administrative fix through 2021.⁴

Was it legal for the Obama administration to delay parts of the ACA? In general, the executive branch has the discretion to choose when and how to enforce a particular law against particular offenders. As the Supreme Court has said, a federal agency knows best "whether agency resources are best spent on this violation or another."⁵ In the Obama administration's view, delaying the employer mandate and the

ACA's insurance rules amounted to a routine and temporary exercise of enforcement discretion.

The ACA delays were unusual, however, because they were not efforts to target limited enforcement resources at the worst offenders. Instead, they were blanket policies adopted for reasons of political expedience—in this case, the perceived need to mollify employers and Congress in an effort to minimize threats to a fledgling statute. The delays were also unusual in that they were announced publicly. The federal government usually keeps its enforcement policies secret because it wants people to comply with the law even if it does not wish to prioritize its enforcement. Here, however, the publicity was necessary to relieve employers and insurers of their legal obligations. As the courts have explained, “An agency’s pronouncement of a broad policy against enforcement poses special risks that it has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.”⁶

In short, President Obama lacked the power to prospectively license large groups of people to disregard one of Congress’s laws.⁷ Doing so violated his constitutional obligation to “take Care that the Laws be faithfully executed.”⁸ The delays may also embolden future presidents to delay laws that they dislike. Indeed, early in his presidency, President Trump toyed with suspending enforcement of the individual mandate—which, like the employer mandate, was also a tax.⁹

The Cost-Sharing Payments

To make individual health plans affordable, the ACA offers generous subsidies to cover the costs of monthly premiums. Those subsidies, however, do not cover out-of-pocket payments, which can be extravagantly large: deductibles for an exchange plan in 2019 averaged \$4,375.¹⁰

To address the problem, the ACA requires insurers to give their lowest-income customers a large discount on their out-of-pocket payments. In exchange, the ACA promises to pay insurers to make up for the lost revenue. Without those promised cost-sharing payments, premiums for health plans on the exchanges would skyrocket (or so the thinking ran at the time of the law’s adoption). With the payments, coverage would remain affordable.

There was a hitch, however. The Constitution says that “no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”¹¹ Although Congress specifically appropriated the money for premium subsidies, the ACA did not include an express appropriation for the cost-sharing payments. Its absence was apparently an oversight—one that would probably have been addressed had the ACA passed through a House-Senate conference committee for a final clean-up, as was the original plan. As detailed in Chapter 7, however, the death of Senator Ted Kennedy and Republican Scott Brown’s subsequent victory in the Massachusetts special election foreclosed that possibility.

In the normal course, Congress would have promptly appropriated the money necessary to make good on its promises. But the ACA was not a normal statute, and a Republican-controlled House of Representatives was unlikely to supply an appropriation to fund a law that it had voted dozens of times to repeal. As the 2014 date for fully implementing the law drew near, the Obama administration was in a bind. It could either adhere to the Constitution—and watch the ACA collapse—or it could find some way to make the payments anyhow.

The Obama administration took the latter approach, offering a paper-thin legal rationale for the claim that Congress had implicitly appropriated the money. In the administration’s view, the premium subsidies and the cost-sharing payments were both essential parts of a common scheme to defray the cost of health plans. Congress must therefore have wanted the appropriation for premium subsidies to do double-duty as an appropriation for the cost-sharing payments.

The argument, however, does not hold together. To appropriate the money for premium subsidies, Congress amended a portion of the tax code allowing the IRS to return tax refunds to individuals. That made sense: the premium subsidies are, in fact, tax credits. Cost-sharing payments, in contrast, are direct payments to insurers. It is a big stretch to read an appropriation governing refunds for individual taxpayers to also cover payments that have nothing to do with the tax code. And federal law prohibits the executive branch from reading a law to appropriate money unless the law “specifically states that an appropriation is made.”¹²

An angry House of Representatives filed suit to challenge the payments. Two years later, it won its case in federal court in Washington, DC.¹³ Although the court put its opinion on hold to allow for an appeal, President Trump was elected before that appeal could be heard. As congressional Republicans moved to repeal the ACA, President Trump tried to force Democrats to the bargaining table by threatening the cessation of the cost-sharing payments. When repeal legislation stalled out, the president unceremoniously terminated the payments. Only a clever workaround (so-called silver loading, discussed in Chapter 10) has allowed the states to avoid the feared deterioration of their insurance markets.

In some respects the Obama administration's decision to ignore appropriations law was an understandable—if regrettable—response to the kind of statutory problem that arises when a complex bill passes through an unconventional legislative process in a sharply divided Congress. But the decision has unsettling implications. Will future presidents likewise misconstrue appropriations measures when necessary to achieve their policy objectives?

Again, the question is not hypothetical. When Congress refused to appropriate \$5 billion that Trump requested for the construction of a wall at the southern border, the administration declared a “national emergency” and interpreted an existing law to allow him to reprogram funds appropriated for military purposes.¹⁴ The statutory argument was weak, but no weaker than the argument President Obama advanced to make cost-sharing payments.

The point is not that one bad act leads to another. Trump would still have reprogrammed the wall funding even if Obama had been more scrupulous about appropriations law. The point, instead, is about presidential incentives. Confronted with an uncooperative Congress, both presidents broke the law, betting that the American public would not punish them for doing so in the next election. They were probably right about that: in a country riven by a stark partisan divide, elections are unlikely to turn on a president's adherence to the finer points of appropriations law. There is thus reason to worry that our next president will exercise even less self-restraint than either Presidents Obama or Trump.

President Trump

President Trump's first act as president was to sign an executive order telling his agencies to "take all actions consistent with law to minimize the unwarranted economic and regulatory burdens of the act."¹⁵ These were to be temporary measures, lasting only until the president secured the ACA's repeal. When the repeal effort faltered in Congress, however, Trump was put into the awkward position of implementing a law he hated.

Trump could have embraced his constitutional duty to "take care that the laws be faithfully executed." Instead, he has used his authority to sabotage the ACA at every turn. Inured as we are to the hardball of partisan politics, it would be easy to overlook just how irregular this is. A president is not obliged to exercise his discretion in a manner that his political opponents would prefer, but the Constitution places out of bounds actions that aim to undermine an act of Congress in order to pave the way for its elimination. Not since Reconstruction has a president worked so systematically to subvert a major congressional initiative.

The still-unfinished story of Trump's sabotage may set a template for what is to come. One party gains temporary control of Congress and the White House and adopts an ambitious new policy, only to watch a subsequent president from the other political party move to dismantle it through executive action. Guarding against that kind of abuse may prove difficult. The ACA, for example, contains more than 40 provisions contemplating rulemaking from federal agencies, which is not at all unusual for major legislation.¹⁶ Though Congress could try to bulletproof future laws by narrowing the discretion they afford to the executive branch, those laws might then be too rigid to achieve the legislature's goals. In any event, no law of any complexity can be implemented without the aid of the executive branch, meaning that every significant reform will be subject, to some degree or another, to presidential tampering. In this bitterly divided country, sabotage may become the new normal.

The Exchanges

Immediately after taking office, the Trump administration moved to destabilize the insurance exchanges. Its first act was to cut 90% of the \$100 million that Healthcare.gov had used for advertising in 2016. The

administration paired that cut with a 41% cut to the navigator program, which pays for in-person guides to help people buy insurance. Still deeper cuts to navigator funding were announced in July 2018. None of these cuts was likely to discourage sick people from enrolling; they would, however, depress enrollment by healthy people, unbalancing the risk pool and driving premiums higher.

In 2018 the Trump administration proposed two rules that would have much the same effect. The first offered a new definition of what the ACA calls “short-term, limited duration insurance.” Because short-term plans are meant to cover only brief gaps in coverage, they are exempt from most of the ACA’s rules. Short-term plans can reject unhealthy people, decline to cover preexisting conditions, and exclude benefits like maternity care or drug coverage. The only advantage of short-term plans is that they are cheap, at least for healthy people. But the ACA’s insurance exchanges will struggle to spread risk if too many healthy people buy short-term plans instead of conventional insurance.

Nonetheless, the Trump administration proposed defining short-term insurance to include plans that lasted 364 days in the year and could be renewed for up to three years. The interpretation is controversial: Is a health plan that covers you for 99.7% of the year really “short term”? Nonetheless, the administration has moved forward and hopes to make short-term plans a realistic long-term option for healthy people. Many of those same people will be in for a surprise when they discover just how stingy those short-term plans are.

The second rule relaxed restrictions on association health plans. Under federal law, small businesses are allowed to join together to buy insurance for their employees. When they do, the law treats them as large employers and exempts them from rules requiring insurers to sell health plans at much the same price to everyone. In the past, only businesses in the same line of work were allowed to create association health plans—all the bakeries in town, for example. The Trump administration, however, sought to relax that obligation and enable small businesses in any line of work—and even self-employed individuals—to form association health plans.

As with the rule governing short-term plans, the goal was to allow healthier-than-average people to flee the exchanges. Both rules would therefore drive up the costs of insurance for the sicker-than-average

people left behind. Among stakeholders, the rules were wildly unpopular: “More than 95% of health care groups that have commented on President Trump’s effort to weaken Obama-era health insurance rules criticized or outright opposed the proposals,” reported the *Los Angeles Times*.¹⁷ In the summer of 2018 the Trump administration finalized the rules anyway.

There is nothing unusual about an administration issuing rules to interpret an ambiguous law. What is unusual, however, is for an administration to adopt legally dubious interpretations in a deliberate effort to thwart the law altogether. Predictably, both rules have been challenged in court. In March 2019 one judge in Washington, DC, invalidated the rule governing association health plans because it “was intended and designed to end run the requirements of the ACA.”¹⁸ Not long after, a different judge on the same court upheld the rule governing short-term health plans, reasoning that Congress did not impose hard-and-fast limits on the length of plans and that the court “cannot simply ignore the legislature’s choice to use indefinite, flexible phraseology.”¹⁹ As of this writing, both cases have been appealed.

There is more. Under the ACA’s risk-adjustment program, insurers with relatively healthy enrollees are required to transfer some of the premiums they receive to health plans with relatively unhealthy enrollees. By balancing risk, the program is supposed to discourage insurers from competing with one another to attract the healthiest people. Risk adjustment is not controversial and is used in both Medicare Advantage and Medicare Part D. In February 2018, however, a court in New Mexico decided that the HHS rule governing the program was invalid because it had not been adequately explained.²⁰ The Trump administration could have issued a new rule to address the court’s concerns. Alternatively, it could have appealed and asked that the court’s decision be placed on hold. Instead, without warning, the Trump administration abruptly suspended risk-adjustment payments, sending shockwaves through the insurance industry.²¹ The political blowback was so intense that the administration quickly backtracked. But the signal was clear: the exchanges were in the crosshairs.

The latest blow to the exchanges came in a highly technical rule, released in April 2019, that increased the amount that the ACA requires people to pay toward their insurance. The details of the new rule are

less important than the bottom line: according to the Trump administration's own estimates, 100,000 people are expected to lose coverage on account of the price hike.²² Nothing in the ACA demanded the change, and leaked documents indicate that HHS recommended against it because it "would cause coverage losses, further premium increases, and market disruption."²³ But these were virtues, not vices, to a White House bent on sabotage.

All told, the Trump administration's actions are estimated to have increased annual premiums on the exchanges by an average of \$580.²⁴ So far, however, the exchanges have survived, mainly because of how the ACA structures its premium subsidies. For people earning less than four times the federal poverty level (just under \$50,000 for an individual in 2019), the ACA caps their premiums at just less than 10% of their income. No matter how high premiums go, most people will pay the same. The biggest losers, instead, are people earning more than four times the poverty level who need to cover every dollar of those increased premiums.

Republicans may come to rue their support for the Trump administration's sabotage campaign. The exchanges are the types of public-private partnerships that they have long endorsed as an alternative to bloated government bureaucracies. The more dysfunctional the exchanges become, the less defensible these sorts of partnerships appear. It is no accident that the Trump administration's attacks on the exchanges have coincided with an increase in support for reforms like Medicare for All that do not depend on private insurance. Such programs may also be less vulnerable to tampering by an unfriendly executive branch.

Medicaid

As Chapters 10, 12, and 18 explained, the ACA transformed Medicaid from a welfare program for the "deserving" poor into a social-service program for *all* the poor. The Trump administration, however, has tried to use its executive power to undo that transformation—most significantly, by granting waivers allowing nine states to impose work requirements on the expansion population. Nine more requests are pending.

A number of lawsuits have been filed challenging the waivers. As of this writing, a district court in Washington, DC, has struck

down work requirements in three states: Arkansas, Kentucky, and New Hampshire.²⁵ The court's reasoning is straightforward. By law, any waivers must be "likely to assist in promoting the objectives" of the Medicaid program. And Medicaid's central objective, the judge found, is to extend medical care to needy people. The Trump administration never adequately explained how waivers that would force tens of thousands of people off Medicaid could possibly be consistent with that objective.

In so doing, the court brushed aside the Trump administration's argument that the point of Medicaid is not just to provide medical care but also to improve *health*. "Were that the case," the court reasoned, "nothing would prevent the Secretary from conditioning coverage on a special diet or certain exercise regime."²⁶ Even if work requirements might promote health for some people, the administration never weighed those health benefits against the harms arising from the loss of coverage. The court found that such a failure of explanation made the waivers arbitrary and capricious.

Taken together, the court's rulings reflect the view that the Trump administration cannot use work requirements to thwart the ACA's changes to Medicaid. Whether those rulings hold up on appeal is another question. In the past, the courts have generally not been moved by the argument that Medicaid waivers cannot be used to make fundamental changes to Medicaid.

Texas v. United States

Perhaps the Trump administration's most audacious move against the ACA has been its support of a lawsuit seeking to invalidate it altogether. As discussed in Chapters 8 and 9, Republican attorneys general from 20 states brought a case in February 2018 claiming that the individual mandate—the same mandate that the Supreme Court had previously sustained as a proper exercise of Congress's power to tax—is now unconstitutional, and that the entire ACA must fall with it.

In late 2017, after several failed attempts to repeal and replace the entire ACA, Congress passed the Tax Cuts and Jobs Act, which included what President Trump characterized as "the Repeal of the highly unpopular Individual Mandate."²⁷ The Republican attorneys general, however, noticed that Congress did not formally repeal the ACA's

command to buy insurance. Instead, Congress zeroed out the penalty for going without coverage. Functionally, it was a distinction without a difference: only the penalty gave the mandate any force and effect. Without a penalty, the mandate was defunct.

The attorneys general, however, seized on the formal distinction. When it upheld the individual mandate as a tax, the Supreme Court had also reasoned that it would exceed Congress's powers under the Commerce Clause to order people to buy coverage. Now that the tax penalty had been repealed, the attorneys general argued, the naked mandate that remained on the books could not be defended as a tax. It was simply a command and must therefore be unconstitutional.

From that premise—that the zero-dollar mandate is unconstitutional—the attorneys general built the astonishing argument that the entire ACA must fall. When Congress passed the ACA in 2010, Congress adopted findings saying that the individual mandate was essential. Because those findings remain on the books, Congress in 2017 must still have thought that the mandate was essential—even a mandate backed by no penalty. And because this mandate is so intertwined with the law as a whole, the entire law must be invalidated.

The consensus among legal scholars on both sides of the aisle is that the argument is frivolous. Congressional Republicans had a chance after Trump's election to repeal the ACA. They did not have the votes. Zeroing out the mandate penalty was a consolation prize. As such, there is no need to speculate on whether Congress preferred the ACA without a mandate to no ACA at all. It made that choice by repealing the only mechanism for enforcing the mandate while leaving the rest of the law intact. The very same Congress did not harbor the secret belief that a zero-dollar mandate was vital to the law's continued operation.

The Trump administration saw a chance, however, to achieve in court what it could not achieve in Congress. The Justice Department has a long tradition, adhered to across Republican and Democratic administrations, of defending acts of Congress if any reasonable argument can be made on their behalf.²⁸ Otherwise, the Justice Department could pick and choose which laws remained on the books by declining to defend when a lawsuit is brought challenging a law it dislikes. Refusing to defend can thus do violence to the principle that Congress makes the law, not the president.

Nevertheless, the Trump administration's Justice Department threw its support behind the lawsuit. Initially, it argued that the individual mandate's supposed constitutional defect required invalidation of those portions of the ACA requiring insurers to sell to all comers at more or less the same price—in other words, the protections for people with preexisting conditions. But it has since decided that the entire Act must fall and is now pressing that view in the federal courts.

By filing suit in Fort Worth, Texas, the challengers were able to channel their case to one of the most conservative judges in the country, one who had already invalidated prior Obama-era rules implementing the ACA. In December 2018 the judge declared the individual mandate unconstitutional and the entire ACA invalid.²⁹ On appeal, a conservative panel of the US Court of Appeals for the 5th Circuit agreed that the mandate could not be sustained. But it asked the judge to reconsider whether there might be some portions of the law that could be salvaged.

As of this writing, most close observers believed the lawsuit is unlikely to succeed. Nothing is certain, however, especially where the ACA is concerned. And the sheer irresponsibility of the lawsuit is breathtaking. The ACA is now part of the plumbing of the US health care system and ripping it out would inflict untold damage on the economy. Yet the Trump administration has publicly committed itself to a legal position that would do just that.

More worrisome still, the duty to defend is a close cousin to the president's constitutional duty to faithfully execute the law. If the ACA really is so unconstitutional that the Trump administration can make no argument in its defense, the law's continued implementation must likewise violate the Constitution. It is not hard to see that as an incipient justification for refusing to enforce any law that the president believes to be unconstitutional, however preposterous or partisan that belief might be.

Conclusion

One president broke the law to save it. The next abused his power to savage it. Each in his own way violated his constitutional duty of faithful execution.

It is tempting but wrong to chalk up the legal violations to these presidents' particular psychologies: an arrogant Obama, an unprincipled Trump. The truth is bleaker. In high-stakes battles where partisan lines have been drawn, the incentives to adhere to the law—the fear of political fallout, concerns about judicial review, some ingrained sense of morality—may not be robust enough to keep the president within bounds.

After all, the public's ability to censure a lawbreaking president depends on knowing when censure is warranted. But the legal experts who might object to illegal executive actions are not immune from partisan tribalism. Few lawyers who support the ACA criticized Obama when he broke the law. Those who complained loudest about Obama's lawbreaking have mostly fallen silent under Trump. As claims of lawbreaking come to be seen as partisan gripes, the American public grows numb to arguments that the president is flouting the law.

And so the rule of law decays. All major statutes—the ACA included—assign vast responsibilities to the executive branch; indeed, broad delegations are an ineradicable feature of the modern administrative state. But that makes any substantial legislative reform vulnerable to abuse from the very executive branch charged with overseeing it. If we are indeed entering an era marked by the steady erosion of legal constraints on the president, Congress's authority to chart the country's course will diminish over time—a development with consequences for American governance that are hard to predict but likely pernicious.

The adoption of the ACA marked a progressive victory. The story of its implementation, however, offers a cautionary tale.