

Fall 2013

## Faculty Views: The Legality of Delaying Obamacare's Employer Mandate

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### Recommended Citation

Nicholas Bagley, *Faculty Views: The Legality of Delaying Obamacare's Employer Mandate*, 56 *Law Quadrangle (formerly Law Quad Notes)* - (2013).

Available at: <https://repository.law.umich.edu/lqnotes/vol56/iss2/9>

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## The Legality of Delaying Obamacare's Employer Mandate

By Nicholas Bagley



In early July, the Obama administration announced that it would delay for one year the "employer mandate," a tax that the Affordable Care Act (ACA) imposes on employers who don't provide affordable health insurance to their employees. At any other time, this sort of dull, technical decision would have passed without mention. In the super-heated political environment surrounding health-care reform, however, the delay was front-page news. Characterized by *The New York Times* as "a significant setback for President Obama's signature domestic initiative," conservative critics pointed to the delay as evidence that health-care reform was unwise in principle and unworkable in practice.

The delay of the employer mandate was especially controversial among lawyers. The ACA says that the mandate "shall apply to months beginning after December 31, 2013." Given that unambiguous directive, what authority could the administration possibly have for delaying the mandate until 2015? In the words of Michael McConnell, a Stanford law professor and former Tenth Circuit judge, the delay of the employer mandate "may be welcome relief to businesses affected by this provision, but it raises grave concerns about [the president's] understanding of the role of the executive in our system of government."

The full legal picture, however, is more complicated than McConnell makes it out to be. Shortly after announcing the delay, the administration in fact offered a legal justification for delaying the employer mandate. It's just that no one noticed. In a letter to Congress and in congressional testimony, the administration invoked a general statutory provision authorizing the IRS to "prescribe all needful rules and regulations" for enforcing the tax code. That rulemaking power, in the administration's view, allowed it to delay the effective dates of tax statutes in narrow circumstances.

For support, the administration pointed to a practice dating back to at least 2000 of providing "transition relief" for new tax legislation "when [its] immediate application would have subjected taxpayers to unreasonable administrative burdens or costs." For example, Congress in 2007 strengthened a statute imposing penalties on unscrupulous tax preparers. Although the statute set an effective date for those penalties, the IRS provided six months of "transitional relief" to address implementation questions. (No legal justification was offered.) The administration has identified at least 10 different cases where the IRS has similarly postponed a tax statute.

In pointing to past practice, administration officials are tacitly arguing that it may act consistently with that practice until either Congress or the courts say otherwise. This is the kind of argument the executive branch makes all the time. In its view, the IRS has been saying, "Hey, Congress, we think you've given us the power to temporarily delay tax statutes where implementing them is really hard. Let us know if we're wrong." In declining to clip the IRS's wings, Congress has acceded to that view. (My kids often make this kind of argument. When I tell my son to stop jumping on the couch, he's apt to say that he's jumped on it before. For him, my earlier failure to tell him to stop means that there's no rule against jumping on the couch.)

So, yes, the administration has a legal argument to support its delay of the mandate. But is it any good? Well, maybe not. Just because Congress hasn't taken the IRS to task doesn't mean that it agrees with the agency. Maybe Congress never caught wind of the practice of affording transition relief. ("I didn't see you jumping on the couch.") Maybe it heard about the practice but didn't think it was worth intervening. ("You're going to bed in five minutes anyhow.") Maybe it was just busy. ("I'm on the phone.") Congressional acquiescence arguments are tricky because Congress has so many reasons not to act. It's probably safer to take Congress at its (statutory) word.

That said, the executive branch has an established tradition of giving weight to past practice when it comes to ascertaining the boundaries of an agency's open-ended authority. Precedent matters in the executive branch, much as it does in the courts. Almost a dozen examples spread across thirteen years and three administrations, both Democratic and Republican, provide a plausible legal basis for delaying the employer mandate. ("But I always jump on the couch, and so does my sister.") Without question, it's aggressive for the administration to assert this authority in the teeth of effective dates inscribed in statutes. Arguably, however, the power to provide transition relief is just a modest, well-established adjunct to the power to craft "all needful rules" in administering a complicated tax code.

There's a broader point here. So far as I know, no one has bothered yet to refute the argument the administration has made. The argument may not convince you. I'm not sure it convinces me. But the critics have to grapple with it before accusing the president of ignoring the law.

Still, if the administration's position is that the tax code gives it the authority to delay the employer mandate, what then should we make of President Obama's statements at an August press conference?

[I]n a normal political environment, it would have been easier for me to simply call up the Speaker and say, you know what, this is a tweak that doesn't go to the essence of the law. . . . That would be the normal thing that I would prefer to do. But we're not in a normal atmosphere around here when it comes to "Obamacare." We did have the executive authority to do so, and we did so.

In an editorial, the *Wall Street Journal* presented this as tantamount to a confession of illegality. "[W]hy did he say he would normally ask for a legislative 'tweak,'" the editorial wondered. "Either the fix requires legislation or it doesn't." Further indulging the premise that the president broke the law, the editorial opined that the president's statement was "certainly revealing about his attitudes on Presidential power and the constraints of the U.S. Constitution."

But the *Wall Street Journal* didn't catch the president in a contradiction. As it happens, laws are often unclear about the scope of the authority they confer upon the executive branch. Hard questions crop up all the time. How much latitude, for example, does the IRS have when it goes about issuing all "needful rules"? It's not inconsistent for President Obama (or, really, his lawyers) to conclude both that the administration has the authority to delay the mandate and that the question is sufficiently close that, all else being equal, it'd be better if Congress explicitly blessed it.

The trouble is that all else is not equal. Having resolved that it had the legal authority to delay the mandate, the Obama administration faced a dilemma. It could either seek a legislative fix from a hostile Congress or invoke a contestable interpretation of its statutory authority. That's not much of a choice. As a general matter, legislative intransigence—not just Republican intransigence during a Democratic administration, but also Democratic intransigence during a Republican administration—predictably increases the pressure on the president to construe his statutory authority broadly.

None of this, however, implies that the president broke the law. What it implies is that partisan stalemate of the sort with which we have become depressingly familiar will encourage aggressive interpretations of statutory authority and, over time, augment the president's power at Congress's expense. Whether you think that's good or bad shouldn't depend on whether you dislike President Obama or health-care reform. It should depend on your views about the proper dispersal of authority in our constitutional system. That's a much bigger—and much harder—question.

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