

**Hearing on the Cost Sharing Reduction Program Investigation and the Executive
Branch's Constitutional Violations**

HEARING
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT
OF THE
COMMITTEE ON WAYS AND MEANS
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Hearing on the Cost Sharing Reduction Program Investigation and the Executive Branch's Constitutional Violations

U.S. House of Representatives,
Committee on Ways and Means,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:07 a.m., in Room 1100, Longworth House Office Building, Hon. Peter Roskam [chairman of the subcommittee] presiding.

Chairman Roskam. The committee will come to order. The Ways and Means Oversight Subcommittee hearing on the cost sharing and reduction investigation is under way. Welcome today. We are joined by the chairman of the Ways and Means Committee, Chairman Brady, and I am going to yield to Chairman Brady for an opening statement and then we will hear from Mr. Lewis.

Chairman Brady.

Chairman Brady. Thank you, Chairman Roskam for holding this important hearing.

Today we are releasing substantive findings from our 17-month investigation into the administration's unlawful funding of Obamacare's cost-sharing reduction program. The reason why our investigation took 17 months is because the administration obstructed the process and simply refused to give the facts to the American people.

So we are here today to fulfill our constitutional responsibility to conduct oversight and reinforce Congress' constitutional power of the purse. We are not here to litigate whether the administration acted unlawfully in funding Obamacare's cost-sharing reduction program. That was settled in May when the Federal judge ruled that the administration had no constitutional or statutory authority to fund this program.

As our Constitution makes clear in article I, section 9, clause 7, "No money shall be drawn from the Treasury but in consequence of appropriations made by law." This means the executive branch may not spend a single taxpayer dollar without an explicit appropriation by Congress. Our Founding Fathers entrusted Congress with the power of the purse, not the White House.

While current law authorizes the cost-sharing reduction program, Congress has never provided an appropriation for it. The administration knew this and they didn't care. They broke the law and spent the money anyway. This is stealing from the American people, plain and simple. To date, the administration has unlawfully spent \$7 billion of taxpayer funding that was never appropriated for the CSR program. Let me repeat that: The administration unlawfully spent \$7 billion, taxpayer dollars for this program.

So in February of 2015, our committee and the Energy and Commerce Committee initiated a joint investigation into how all this was put into motion. The administration has met us with unprecedented resistance at every turn. Numerous times we would call for agencies to turn over critical documents and numerous times we were denied.

We also asked administration personnel to come speak with us in person about how things transpired. Again, we were denied. At the beginning of the year, I finally said enough is enough. I issued subpoenas to compel the testimony of agency officials and legally require the administration to turn over requests to documentation. This was one of my first acts as Chairman. It was the first time in years our committee has subpoenaed the administration for information needed to fulfill our oversight responsibilities.

The lengths we have had to go, in this investigation, clearly underscore the unprecedented level of obstruction by this administration. In fact, all of the agencies represented here today still have not complied with our subpoenas to turn over relevant documents. But these lengths also demonstrate how seriously we take our duty to oversee the administration's actions. We will not be deterred by stonewalling.

Thanks in large part to the outstanding work of Chairman Roskam, Chairman Upton at Energy and Commerce, and the oversight teams, our two committees, we have uncovered critical information about the administration's unlawful actions. And it is because of this hard work that we now have a chance to deliver real findings to the American people.

This morning, along with the Energy and Commerce Committee, we released a comprehensive staff report on what we have uncovered thus far. The report, which can be found on our committee's website, details how the administration decided to fund the CSR program illegally, and it provides an in-depth look at their unprecedented obstruction of this investigation.

Our investigation in this matter is far from complete, but today represents a major step toward providing Americans with the transparency and accountability they deserve from their government.

Again, thank you to Chairman Roskam and all the members at the Oversight Subcommittee for your hard work and dedication. I yield back.

Chairman Roskam. Thank you, Chairman.

Mr. Lewis.

Mr. Lewis. Thank you, Mr. Chairman.

Let me just say good morning and welcome to the witnesses. I begin by thanking each and every one of you for being here. Thank you for your service.

In particular, I would like to thank the commissioner for joining us once again. The commissioner is an honorable man who has faithfully served his country. I would like to quote the former IRS chief risk officer who said it is not only a phenomenal leader but one of the best managers we ever had in government.

Mr. Chairman, I must tell you, I am upset. And I am very disappointed with today's hearing, with the topic. I am afraid it is nothing more than another attempt to roll back healthcare reform. Almost 2 years ago, House Republicans filed a lawsuit against the Obama administration over the funding of the cost-sharing reduction program, better known as CSR. This program simply helps low-income people afford medical costs.

Today, over 6 million Americans have been helped. Today, over 6 million have better access to care. To be clear, the lawsuit claims that this program needs annual funding from Congress. The administration argues that it does not. Mr. Chairman, this is a lawsuit between two branches of government. Both parties agree on the facts.

So I respectfully ask, what is the point of this hearing? Why are we placing public servants in the middle of an ongoing legal case? Some of you argue that we are here because the work of the committee is being blocked. This is not the case. This is not true. For the record, there are four government officials representing four different agencies here today. The administration has voluntarily provided 13 current and former officials for interviews on this matter. Thirteen. Not five, not six, not 10, but 13. The lawsuit is still pending in the courts. It is ongoing. Yet, here we are.

Mr. Chairman, there is real work to be done. There are real issues that need to be addressed. This is not it. This is not the one. There may be others. We should not waste the time and energy debating how to tear apart the good part of healthcare reform. We should not be trying to roll back what helps people make ends meet. We can and we must do better, and we can do better. We are called to be leaders, to be headlights and not tail lights.

Mr. Chairman, I deeply believe that this subcommittee can do good work on behalf of the American people. I am hopeful that we will return to that work very, very soon.

Thank you, and I yield back.

Chairman Roskam. Thank you, Mr. Lewis. Let me attempt to answer some of the questions that you have laid out.

And before I do that, I want to thank Chairman Brady and Chairman Upton for the work that they have done in driving this investigation and, from my point of view, that work has paid off.

The ranking member just a minute ago said there is real work to be done, and I agree with that. He gave us an admonition and the question was, what is the point of the hearing. Let me describe, I think, what the point of the hearing is. But there is also a notion that when you are doing good work -- and we all want to do it -- there have got to be clear lines, clear lines of authority.

We have all heard that phrase, "Good fences make good neighbors." And what we have seen going back and forth between the executive branch and the legislative branch are areas where the legislative branch, at least the majority in the House thinks so, feels encroached upon.

And it is not as if this is just a parochial thing. We are talking about these constitutional themes that this entire subcommittee believes matters. Now, how that manifests itself, I don't obviously speak for the minority, but these things do matter and it is not just esoteric.

So as we all learned, we have got this system of checks and balances. And there are three coequal branches of government, and they are meant to restrain one another. That was the nature of the architecture that the founders had, and they looked at these as essential safeguards to protect the American public from their own government.

In our hearing today, we are going to be looking at how this administration has run roughshod over two key authorities that the Constitution gave to Congress. Didn't give to the administration, didn't give it to the courts; the Constitution in article I gives it to Congress.

And as Chairman Brady discussed a minute ago, the first key authority is Congress' power of the purse. And as we all know, the Constitution says this: "No money shall be drawn from the Treasury but in consequence of appropriations made by law." That means that the government may not spend any taxpayer money unless Congress passes a law that says it can.

The American people elect Members of Congress. And here in the House, we are up for election every 2 years. And we are all too familiar with that process, and that is the process by which the American public adjusts the dials. They make the choices at the ballot box that is manifested in who is seated in this Congress, and the Constitution says those people, who are sent by those Representatives, get to choose how the money gets spent. Other people don't; Congress does.

And it also means that the President cannot take money from one program and spend it on another just because he wants to or just because he thinks it is a good idea. Money is specifically appropriated for individual programs, and it seems to me that this administration has ignored those constitutional restraints.

So if you set aside the, quote, "good intentions," by which the administration is cloaking itself and you begin to project out and think, well, what would a future administration be able to do if we allow this to stand? Can a future administration say they are going to do what they perceive to be a good idea regardless of what the Constitution says? And I would argue that that isn't a good thing.

The Affordable Care Act established many programs, one of them was the premium tax credit, which helps people pay for their insurance premiums. Congress wrote the Affordable Care Act to allow the administration to pay for that program from an account held by the Treasury Department. That account is paid for with a permanent appropriation so the tax credit account always has money. In this hearing, we might refer to that as section 1324 account, or the premium tax credit appropriation.

Okay. So far so good. Permanent appropriations are unusual though. Congress pays for most programs with annual appropriations, meaning each year the administration has to ask Congress for money to pay for those programs. Well, the ACA set up one of those programs that requires an annual appropriation. Let me repeat that: The ACA set up the program that requires an annual appropriation called the cost-sharing reduction program, or the CSR program.

Cost-sharing reduction program requires insurance companies to reduce copayments, deductibles, and other out-of-pocket costs for qualified people. Under the CSR program, the government is supposed to help offset the insurance company's cost. Let's get that clear. Who's the beneficiary here? It is the insurance companies.

The underlying statute says the insurance companies have an obligation. This program is a subsidy for insurance companies. It is not a subsidy that is going directly to poor people. It is a subsidy that is going to insurance companies to offset their costs for the CSR payments.

But unlike the premium tax credit program, Congress did not give any money in the ACA for the CSR program. Instead, each year the President's supposed to ask for money from Congress and the Congress can decide whether or not to give the executive branch that money. That is the architecture of the ACA. And in 2012, the Treasury Department wrote the President's Office of Management and Budget a memo saying exactly that.

In 2013, the President initially asked Congress for \$3.9 billion to pay the cost-sharing reduction payments to the insurance companies in his fiscal year 2014 budget request. But then something strange happened. In July of 2013, the HHS assistant secretary of financial services called the Senate Appropriations Committee staff and asked them to take that line out of the President's budget. How unusual.

Then in the fall of 2013, OMB created a memorandum explaining why the administration could use the money Congress appropriated to pay for the premium tax credit program, that permanent appropriation I was just talking about, to pay for the cost-sharing reduction program using a permanent account to pay for an annual expense.

OMB shared that memo with top officials in the administration to get their approval, including -- think about this. The level of granularity of this account is getting the attention of these people. The general counsels of Treasury and HHS, as well as the Attorney General Eric Holder, who all had to sign off on that plan.

Now, around that same time, the IRS's deputy chief financial officer was confirming that the administration was squared away to make these payments, which were set to start being paid in

January of 2014. At first, he was under the impression that the payments would be made from an annual appropriation to HHS, but then he learned HHS had withdrawn its request. HHS explained to him that the payments would come from the premium tax credit account.

The deputy CFO had two big concerns: First, how would HHS make payments from a Treasury account? He wanted to be sure that an audit trail would be in place to later trace the accuracy of the payments, but then it became concerned about a bigger problem. Were the funds in the premium tax credit account even available for these payments?

Because not only does the Constitution prohibit the administration from making payments unless they have an appropriation, there is a law called the Antideficiency Act, and of all things, it makes it a criminal violation for a Federal official to pay for a program if Congress has not appropriated funds for that program.

Helping the IRS avoid Antideficiency Act violations was one of the deputy CFO's primary responsibilities, and so he did the right thing. He raised red flags to the IRS's Chief Risk Officer, David Fisher, the IRS's chief counsel's office as well. His warning set off a chain of discussions at the IRS, and by early January of 2014, IRS chief counsel William Wilkins reached out to the OMB general counsel, Geovette Washington, to discuss these issues. She then set up a meeting at OMB for seven IRS officials to come to OMB and look at the memo they prepared about the CRS funding.

So on January 13, 2014, IRS lawyers and chief risk officer and chief financial officer and several other officials went to OMB in the Old Executive Office Building. And there, these top IRS officials were escorted into an OMB conference room. Ms. Washington was at the meeting, along with several of her subordinates. The OMB lawyers passed out copies of the memo.

Ms. Washington told the IRS officials not to take notes on it or to take a copy with them. Think about that. No notes, no copies, which several participants, according to our investigation, found to be very strange indeed. The OMB lawyers left the room and let the IRS officials read the memo. Then the OMB lawyers come back in. Ms. Washington talked about how she was excited to have had a chance to brief Attorney General Eric Holder about this issue and that he had approved the memo.

Chief Risk Officer David Fisher and others raised concerns that the payments would violate the Antideficiency Act and the Constitution at that meeting. According to Mr. Fisher, OMB offered a weak explanation for why the payments would be okay. Back at the IRS, the officials briefed Commissioner Koskinen about the OMB meeting. Mr. Fisher told Commissioner Koskinen that he was worried about the Antideficiency Act violations.

Our investigation has revealed, however, by the time the officials met with Commissioner Koskinen the decision already had been made. At the meeting, the IRS officials saw copies of an action memorandum directing the IRS to make certain CRS payments from the premium tax credit memo. Secretary Lew had already signed off on that memo.

Administration officials who constructed this plan and moved ahead with it chose to fund the CRS payments from money that Congress designated for other programs. In other words, all of those individuals chose to hijack Congress' power of the purse and make those violations in violation of the Constitution and in violation of Federal law.

To this day, they have made more than \$7 billion in CSR payments without congressional authorization. That is the first thing. The second thing is this, that we will talk about here today, is Congress' power to oversee the executive branch, which is not mitigated, which is not restrained, which is not hampered by a pending lawsuit.

Congress' oversight authorities are critical to ensuring the administration is transparent to the American people. That is our job. Congress has run into unprecedented obstruction during the course of this investigation. It took the committees a year and a half to gather the facts surrounding the administration's decision to make these illegal payments. And even now, OMB, Treasury, and HHS are in violation of subpoenas issued by the Ways and Means Committee.

The administration has argued that because the House sued the administration to stop them from making these payments, the Ways and Means Committee and Energy and Commerce Committee shouldn't be investigating the facts surrounding the decision-making. The House's lawsuit only focuses on a narrow legal issue. The House and the administration have agreed that the court didn't need to do any of the fact finding to reach its decisions. That is why we need to do the fact finding here.

The committees want to know who, why, and how the administration decided to embark on this unconstitutional course. While, our oversight -- while the prerogative of the American people, as manifested through them adjusting the dials in their periodic elections has been run roughshod over, it is our responsibility to determine these facts. And the fact that there is pending litigation has no influence on our inquiry there. And we will stipulate further that it is going to be the courts that are going to make the ultimate constitutional decision but already the lower court has decided as I have described.

Instead of accountability and transparency, the administration threw up roadblock after roadblock. But despite those, and through persistent efforts, we have learned a great deal. We look forward to learning more from the administration, why they decided to make these payments, why they worked so hard to prevent Congress from learning these facts. And we are here to listen. We are here to learn. We are also here to defend the prerogative of the American public.

We will hear just from one panel. Our panel is the four witnesses, the Department of Health and Human Services Acting Deputy Secretary, Mary Wakefield; Treasury assistant secretary for tax policy, Mark Mazur; IRS Commissioner John Koskinen; and Office of Management and Budget senior advisor Michael Deich.

Commissioner, welcome. And you have got 5 minutes, and let's start with you. Thank you for coming.

STATEMENT OF JOHN KOSKINEN, COMMISSIONER, INTERNAL REVENUE SERVICE

Mr. Koskinen. Chairman Roskam, Ranking Member Lewis, and members of the subcommittee, as always, I appreciate the opportunity to appear before the subcommittee. This hearing marks the 35th time I have testified before the Congress.

During my 2 and-a-half years as IRS commissioner, I have developed a deep respect for this subcommittee and its primary role in overseeing the work of the IRS. We do not always agree, but you raise important questions and your requests and suggestions often lead to improvements in our service to American taxpayers.

I am scheduled to lead the IRS for another 16 months, but I serve obviously at the pleasure of the President and a new President can always ask me to step aside sooner. But as long as I am commissioner, I am committed to working with you in pursuit of our common goals and helping you fulfill your important oversight role.

The IRS has been charged with implementing the tax-related provisions of the Affordable Care Act. These efforts include supporting the integrated system of Federal subsidies that help millions of American families afford health insurance coverage purchased through the Federal and State health insurance marketplaces. This system consists of interrelated subsidies, the premium tax credit, and cost-sharing reduction payments.

The health insurance marketplaces, which are overseen by the Centers for Medicare and Medicaid Services, are responsible for determining whether an individual is eligible for APTC payments as well as the CSR payments. The IRS provides the marketplaces with data and computational services for use in their determinations about eligibility for financial assistance.

CMS certifies the payments using the information it receives from the marketplaces and notifies the Treasury Department's Bureau of Fiscal Services, which disperses the payments to insurers. The IRS role in this process involves providing administrative support to ensure proper funding of and accounting for the advance premium tax credit and the shared CSR payments.

The source of funding for these payments is a permanent and definite appropriation to the Secretary of the Treasury. The IRS manages and administers this appropriation on the Treasury's behalf for various types of payments, including CSR payments, premium tax credit refunds, and advance payments of the premium tax credit.

At the beginning of each fiscal year, the IRS ensures that sufficient funding has been transferred into an allocation account for CMS to use in obligating and disbursing payments, including those for CSR payments. The IRS manages unobligated funds in the account at the end of the fiscal year and performs financial reporting as the parent of the allocation account.

Because the payments are reflected on the IRS's financial statements, the IRS coordinates closely with CMS throughout the year to ensure that CMS has effective controls over the integrity of the payment process and amounts. The IRS continually monitors those controls to mitigate any risk

to financial reporting. This includes an independent third-party assessment performed at CMS for the IRS to share with the Government Accountability Office for the financial statement audit.

The IRS has received a clean audit opinion from the GAO on its accounting and financial reporting with regard to the cost-sharing reduction payment for the 2 years the program has been in operation. Before the first CSR payments were made in late January 2014, the Treasury Department determined that it would, through the IRS, administer cost-sharing reduction payments pursuant to the Affordable Care Act under the section 1324(b) appropriation. Thereafter, we proceeded with our activities to support implementation and operation of the CSR payments.

Chairman Roskam, Ranking Member Lewis, and members of the subcommittee, as well as Chairman Brady, this concludes my statement, and I would be happy to answer your questions.

Chairman Roskam. Thank you, commissioner.

Ms. Wakefield.

**STATEMENT OF MARY WAKEFIELD, ACTING DEPUTY SECRETARY,
DEPARTMENT OF HEALTH AND HUMAN SERVICES**

Ms. Wakefield. Chairman Roskam, Ranking Member Lewis --

Chairman Roskam. Turn on your mike.

Ms. Wakefield. Chairman Roskam, Ranking Member Lewis, and members of the committee, I appreciate this opportunity to testify on the Department of Health and Human Services' implementation of the Affordable Care Act, including the provisions of the Affordable Care Act that require the executive branch to make advance payments of premium tax credits and cost-sharing reductions that help to defray the cost of insurance coverage.

The Affordable Care Act is expanding access to care for millions of Americans who would otherwise be uninsured. It improves the quality of care for people no matter how they get their insurance while also slowing the growth in healthcare costs nationwide. Now, we have an estimated 20 million Americans that have gained coverage since the Affordable Care Act's coverage provisions have taken effect, and cost-sharing reductions are a key part of providing more Americans with access to quality healthcare that they can afford.

This financial assistance helps low-income Americans to see their doctor on a regular basis and also to afford their out-of-pocket healthcare expenses. The administration has faithfully implemented the Affordable Care Act, including provisions that require the executive branch to make advance payments of premium tax credits, as I indicated, and cost-sharing reductions that help to defray the cost of insurance coverage.

Both the advance payment of premium tax credits and cost-sharing reductions are fully funded by the Affordable Care Act through the appropriation provided under section 1324. As you know, the House has filed the lawsuit against HHS concerning the payment of cost-sharing reductions. This issue continues to be litigated, and for additional information, I would refer you to the briefs that have been filed in the case.

At HHS, we remain committed to cooperating with the committee to provide information that it needs to fulfill its legislative responsibilities while also taking into account the significant confidentiality interests of the executive branch. And we look forward to continuing to work with you and with your staff on important matters related to the implementation of the Affordable Care Act.

Thank you, Mr. Chairman.

Chairman Roskam. Thank you.

Mr. Mazur.

**STATEMENT OF MARK MAZUR, ASSISTANT SECRETARY FOR TAX POLICY,
DEPARTMENT OF TREASURY**

Mr. Mazur. Good morning. Chairman Roskam, Chairman Brady, Ranking Member Lewis, and members of the committee, I appreciate the opportunity to be here today to testify regarding the cost-sharing reduction program under the Affordable Care Act.

Since the enactment more than 6 years ago, the ACA has significantly reduced the number of Americans without healthcare coverage. Twenty million people have gained health insurance coverage because of the ACA. The uninsured rate is the lowest on record.

Moreover, the ACA is making health coverage more affordable and accessible for Americans across the country. About 85 percent of marketplace consumers benefit from tax credits to make their coverage more affordable and they pay an average premium of \$106 per month after tax credits. And since enactment of the ACA, we have seen the slowest growth in healthcare costs in 50 years. This reduced growth rate and cost benefits all of us.

For insured individuals and families, the total cost of health care covered by our plan consists of a combination of payments to insurers and direct or indirect payments to healthcare providers. The payments to insurers take the form of monthly premiums that the insurers charge. The payments to healthcare providers, collectively known as cost-sharing payments, reflect the fact that insurance plans typically do not pay the full cost of covered healthcare services. Rather, plans require insured individuals to pay a copayment or coinsurance for visits to healthcare providers.

Further, some plans require individuals to pay a specified amount out of pocket, known as a deductible. The principle goal of the ACA is to make health insurance more affordable for

low- and moderate-income Americans. To achieve that goal, the act established an integrated system of Federal subsidies that lower insurance premiums and reduce out-of-pocket costs for millions of eligible individuals through the premium tax credits and through the cost-sharing reductions.

Premium tax credits, as you know, subsidize monthly insurance premiums for eligible individuals. Those credits are available to eligible individuals with household incomes from 100 percent of the Federal poverty level, to 400 percent of the Federal poverty level, and that reduces the cost of insurance purchased through the ACA's marketplaces for low- and moderate-income households.

For individuals eligible for the premium tax credit and who have household income up to 250 percent of the Federal poverty level, the ACA also helps with cost-sharing expenses, such as copayments and deductibles for plans obtained through the marketplaces. The permanent appropriation in 31 U.S.C. section 1324 provides funding for all components of ACA's integrated system of subsidies for the purchase of health insurance, including both the premium tax credits and the cost-sharing reduction portions of the advanced payments.

Since January 2014, the executive branch has been making advance payments of premium tax credits and cost-sharing reductions to issuers of qualified health plans as provided for in the Affordable Care Act. I understand that some members of this committee disagree with, and will have questions about, the administration's legal conclusions that 31 U.S.C. section 1324 permanently appropriates funding for cost-sharing reduction payments.

The administration's conclusion about those payments are the subject of active litigation brought by the House of Representatives. So for further information on the legal justifications, I would refer you to briefs filed in that case.

We welcome the opportunity to continue our work with this committee and with all of Congress to achieve the objectives and goals of the Affordable Care Act. Thank you.

Chairman Roskam. Just to put a finer point on it, Mr. Mazur, your invitation was for further legal justification. We are going to stipulate that is not the nature of the inquiry. We are looking for the process justification. So thank you for the opportunity to inquire there.

Mr. Deich.

STATEMENT OF MICHAEL DEICH, SENIOR ADVISOR FOR BUDGE, OFFICE OF MANAGEMENT AND BUDGET

Mr. Deich. Chairman Roskam, Ranking Member Lewis, and members of the subcommittee, thank you for the opportunity to testify before you today.

Chairman Roskam. Turn on your mike. Can you pull it closer?

Mr. Deich. Better?

Chairman Roskam. Yes, sir. Thanks.

Mr. Deich. Great. I am Michael Deich, and I have had the privilege of working for the Office of Management and Budget twice over the last 20 years. In my first position from 1996 to 2001, I served as associate director for general government and finance.

Since returning to OMB last year, I have served as senior advisor to the director and have been delegated the duties of the deputy director. In this capacity, I advise the director on development of the President's budgets and an appropriations activity. Every day, I am reminded of the excellent work performed by OMB staff, and I am honored to be part of this agency and proud of the mission it performs.

The Office of Management and Budget assists the President in developing and executing --

Chairman Roskam. Mr. Deich, I am just getting some requests. If you can move a little bit closer to the mike or pull it closer to you, that would be helpful.

Mr. Deich. Good? Thank you.

Chairman Roskam. Thank you.

Mr. Deich. A core part of OMB's mission is working with every component of the executive branch to develop the President's budget proposals, submitting the President's budget to Congress, working towards enactment of the budget, and overseeing the executive branch's implementation of enacted appropriations.

OMB ensures agencies develop, express, and implement policies and practices in accordance with the President's priorities and with statutory direction. OMB is committed to improving the effectiveness and efficiency of government programs. As part of its mission, OMB works with other executive branch agencies to ensure the successful and ongoing implementation of the Affordable Care Act.

As my colleagues have noted, the ACA has expanded access to care for millions of Americans who otherwise would be uninsured. It has improved the quality of care for people no matter how they get their insurance, and it has slowed the growth in healthcare costs nationwide.

Cost-sharing reductions have helped improve the affordability of coverage options for eligible consumers. Moving forward, the administration will work to build on the progress that has been made to further reduce the number of uninsured Americans, improve health care, and slow healthcare cost growth.

OMB respects Congress' oversight role in examining the Affordable Care Act and will continue to work with the committee to respond to its requests for information. OMB has a long history

of working collaboratively to respond to congressional inquiries and will continue to work with this committee to accommodate its request for information.

Thank you again for the opportunity to testify today. I look forward to answering your questions.

Chairman Roskam. Thank you all, for your testimony.

Chairman Brady.

Chairman Brady. Chairman, first, let me ask unanimous consent that the staff report on this investigation be submitted for the record.

Chairman Roskam. Without objection, so ordered.

[The information follows: [The Honorable Kevin Brady](#)]

Chairman Brady. Secondly, Congress is always about distraction. And so let's knock down a couple of them right away. The distraction is that we can't be doing oversight because there is litigation involved. Our Founding Fathers didn't write in the Constitution the power of the purse for Congress unless a lawsuit is filed. Our Democratic colleagues did recognize that when they led this committee into oversight; and Republicans who, who lead this committee today, recognize that constitutional power of the purse and oversight trumps litigation every day of the week.

Secondly, this is not about health care. In my view, the Affordable Care Act is failing 2 years in advance, but that is not this issue. This is about whether any White House, not just this one, any White House can ignore repeatedly the explicit directions of Congress and no dollars will be spent on specified program. That is what is at the heart of this. And whether you are Republican or Democrat, you ought to be interested in this report and in this power because at that point there is no need for legislative branch. Any White House -- any White House can just pick or choose which programs to fund and which to ignore.

Finally, there is still this -- this investigation will continue until it gets to the complete truth. We have sent subpoenas for documents to every agency representative here today. Every one of your agencies are out of compliance with those subpoenas. You have not asserted a single legal privilege that protects these documents, so you have absolutely no reason not to hand them over.

So Mr. Mazur, beginning with you, Treasury is months overdue on document subpoenas. Yes or no, you do intend to comply with subpoenas by the end of next week?

Mr. Mazur. Mr. Brady, I understand that your staff and the staff of Treasury Department have been in contact to determine how best to respond to those subpoenas. I suspect those will be ongoing and hopefully they will be a success.

Chairman Brady. You know, we have been very patient and trying to be accommodative to it, but it is time to deliver those documents.

Ms. Wakefield, HHS is also months overdue on the document subpoenas. Does HHS intend to comply by the end of next week?

Ms. Wakefield. Sir, we have provided information and documents, and we will continue to work with the committee to review the committee's request.

Chairman Brady. Mr. Deich, OMB is also months overdue on the document subpoenas. We have only asked for one from you. One. One. It shouldn't be that hard. So does OMB intend to comply by the end of the week?

Mr. Deich. We are committed to providing the information sought by the committee, and we look forward to working with the committee to find a way to accommodate its interests.

Chairman Brady. I am going to take that all as a yes for each of the agencies.

In my view, the level of obstruction has been astonishing. This is a fairly direct issue. The administration should not be hiding the ball on this. And the sooner we get to this and to the public scrutiny of this, the better all around. And I would encourage you to do that.

With that, Chairman Roskam, I yield back.

Chairman Roskam. Thank you, Mr. Chairman.

Mr. Lewis.

Mr. Lewis. Thank you very much, Mr. Chairman.

Thank each of you for being here. Thank you for your testimony.

My question is for the panel. Please explain what for us the cost-sharing reduction program that was established by the Affordable Care Act?

Ms. Wakefield. Thank you for the question, sir.

The cost-sharing reduction program was established by the Affordable Care Act to help to defray the costs of healthcare coverage for individuals and families, particularly -- not particularly, but specifically for those that are low income up to about 250 percent of the Federal poverty level. And, in fact, what it does is it allows the defraying of costs that are out-of-pocket costs, so those costs that an individual would need to pay as part of a copay or a deductible, different from the advance premium tax credits that focuses explicitly on helping to offset the costs of premiums.

So this is the place, the cost-sharing reduction component, that for low-income people can have such a significant impact; that is, it can be the difference between a mom who feels comfortable taking their child to an urgent care center because they know in advance that the copay or the deductible is not going to be prohibitive in terms of their ability to pay.

So the point is that this provision in this statute is really designed to help individuals offset or defray their costs so that they can get access to doctors, nurse practitioners, when they need access to health care. It is a really important part of the Affordable Care Act, particularly for those populations that are lower income.

Mr. Lewis. Does this program benefit the average person, the average Joe?

Ms. Wakefield. Yes, as a matter of fact, the program benefits over 6 million individuals as of about March of this year. That is the data that we have, that there are millions of individuals that are able to access physicians and other healthcare providers without what has historically been a barrier to getting health care pre the Affordable Care Act. That is the out-of-pocket cost that people would have to pay. And so about 6.4 million people, about that number, are currently benefiting from this provision.

Mr. Lewis. That is the number that are participating in this program at this time?

Ms. Wakefield. Approximately 6.4 million individuals across the United States, and States, and congressional districts all over, that are benefiting from this program as of this year. And prior to the Affordable Care Act, it wouldn't be uncommon to see individuals having to choose between getting healthcare coverage or paying rent or being able to pay for food because of the associated costs of coinsurance of deductibles, as I mentioned, and copays.

So this removes that barrier for individuals that are often working families, but families that are low-income. It is a really important provision to help ensure that people have access to health care.

Mr. Lewis. Thank you very much.

Mr. Chairman, I yield back.

Chairman Roskam. Thank you, Mr. Lewis.

Dr. Wakefield, just for the point of clarification, you are conflating two issues: The premium tax credit directly benefits individuals; the cost-sharing reduction program benefits insurance carriers. That is the direct beneficiary.

I will yield to Mr. Meehan.

Mr. Meehan. I think that gets right to the issue, and this is the whole heart of what is disturbing about the way these representations are being made.

Let me just start with, Mr. Koskinen, could you please get exhibit 7. You will see it up on the screen right here. And I don't know if you are able to read from the screen, but you are able to read from the documents in front of you. Would you please read the yellow parts of the section 1324 that has been cited by just about everybody today in the testimony?

Mr. Koskinen. I cannot quite see that, but which --

Mr. Meehan. Let me read it for you then so we don't waste time. "Necessary amounts are appropriated to the secretary of the Treasury for refunding internal revenue collections as provided by law, including payments of" -- and then we go to 34(b), the section that is, "Disbursements may be made from the appropriations made by this section only for" -- and then it highlights number one, refunds for the limit of liability, but number two, refunds from the credit provisions of the Internal Revenue Code.

So that is the authority for the credit provision reimbursements. Is that not correct?

Mr. Koskinen. That is the authority, yes.

Mr. Meehan. So from that, you make those tax credit reimbursements. Are you able to choose to do anything else? Can you give any of the people there the ability to have other kinds of benefits? Let's say they all need cars to get to. Can you give them cars out of that account?

Mr. Koskinen. No. We basically rely on legal advice as to what is included --

Mr. Meehan. Well, no, you rely on the legal language, correct, of the statute?

Mr. Koskinen. Well, actually, the language, you know, there is a piece of litigation going on about what the language means. Our role --

Mr. Meehan. Well --

Mr. Koskinen. Our role is to administer the act. And we made, as you know --

Mr. Meehan. Where is there ambiguity here where -- because I am looking at the part that articulates tax credits as being specifically given. But where is the part in the appropriation that says that you are entitled to do cost sharing?

Mr. Koskinen. Well, as you know, we have not been involved directly in that discussion. We are not involved in the litigation. It is not --

Mr. Meehan. Then let me ask Ms. Wakefield, where is the language that allows you to do the cost sharing?

Mr. Koskinen. With all due deference, I am not in a position to enter into that legal debate about whether --

Mr. Meehan. No, I am not asking you, Mr. Koskinen. Thank you. I am asking Ms. Wakefield now. Thank you. You have told me the authority for what you are enabled to do. I am asking Ms. Wakefield where she believes she has the authority to do that now.

Mr. Koskinen. I have not done an analysis of what is included.

Mr. Meehan. Ms. Wakefield, did I address you with a question, please? Please answer my question.

Thank you, Mr. Koskinen.

Ms. Wakefield. It is our interpretation that the Affordable Care Act requires the executive branch through this section to make advance payments for the payments of premium tax credits --

Mr. Meehan. This is a process question. Can you point to me where you are entitled to do that?

Ms. Wakefield. Sir, I cannot. I am not an attorney or a lawyer. I can say that for the specific interpretation of that language, I would refer you to the briefs that have been filed by the Department of Justice.

Mr. Meehan. No. Ms. Wakefield, we are talking about a process here, not the briefs in a legal filing. You can't refer me to it because it doesn't exist. Where in that language does it say you are entitled to make payments for cost sharing? Read it.

Ms. Wakefield. What I can say is that our interpretation of that section --

Mr. Meehan. Interpretation of what? What are you interpreting? What is -- tell me -- Mr. Mazur, what are you interpreting? Show me the point that says cost sharing is entitled to be paid for. This is not a complex issue.

Mr. Mazur. Mr. Meehan, we are not trying to make this hard for you, but if you look at the Affordable Care Act as a whole, there are cost-sharing payments that are authorized in the program. They are an integrated part of the program with the premium tax credits. And the legal briefs, as has been pointed out, filed make that point of how the interpretation is done.

Mr. Meehan. Where do they point to the authority? This is a process -- no, no, no, Mr. Mazur, you are in front of me.

Mr. Mazur. Yeah, I refer you to the legal briefs to take a look at them. They are available.

Mr. Meehan. Well, why don't you refer to the legal briefs and tell me where they are.

Mr. Mazur. Because I don't have the legal briefs in front of me at the moment, sir.

Mr. Meehan. Why did you come not prepared to answer the very question that relates to the point that each and every one of you made relying on this specific provision and yet completely unprepared when I pointed out the specific language that does not give you that authority?

Mr. Mazur. Sir --

Mr. Meehan. Could you speak to the issue that it does? You have each used it as the basis upon which you have justified this decision. It clearly does not exist in statute, and arguably, Mr. Koskinen, you appreciate. People could be criminally prosecuted for spending money they are not authorized to spend. I am not suggesting we go there. Where does this authority emanate from?

Mr. Mazur. Sir --

Chairman Roskam. Mr. Crowley.

Mr. Crowley. Mr. Chairman, thank you.

First of all, I just want to clarify a point that the chairman and Mr. Koskinen made, that the CSR program benefits insurers that it is misleading. That is what he alluded to, that it somehow doesn't benefit the insurers. CSR directly benefits the patients by reducing out-of-pocket costs at the point of care.

To make an analogy, I know my Republican colleagues love the Medicare Advantage program. The Federal Treasury pays the insurance company. Is that correct, Ms. Wakefield?

Ms. Wakefield. Yes.

Mr. Crowley. Not the patient, correct, in a similar way in which the CSR is operated as well? Is that correct?

Ms. Wakefield. Yes.

Mr. Crowley. But no one would say -- I don't think my Republican colleagues would say that the Medicare Advantage program doesn't benefit patients. So I think you really have to be under a rock not to understand that the 6 million people who are getting a benefit today that they didn't have before the Affordable Care Act, and they are getting that benefit because of that subsidy of the cost-sharing reduction program that helps them afford that coverage. Is that not correct, Ms. Wakefield?

Ms. Wakefield. Yes, that is correct, and it does so using a sliding-fee scale. That is correct.

Mr. Crowley. Just, I think it is a shame we are here today. And a shame and sham are very closely related. I think it is a sham as well. The majority claims today's hearing is somehow needed to, quote, "investigate" the implementation of a program that helps people with healthcare costs. But their minds were made up well before they embarked on this fool's errand

to find wrongdoing where none existed. They started out believing that what was happening was illegal. They made that determination and then they filled in the blanks.

I have been wondering why this hearing was needed, since after all, our Republican colleagues are engaged simultaneously and are in the middle of a lawsuit on this very matter, which I know Mr. Mazur and others have alluded to. But the majority kept insisting that this hearing is needed to hear from all of you today, taking you away from important work.

And then this morning, hours before the hearing even started, the majority issued their own partisan, biased report, full of, in my opinion, false conclusions. And, in fact, we were asked not to -- my understanding is when the report was given to the committee minority side we were asked not to -- the ranking member was asked not to share that report with anyone in terms of open process. I guess they were so eager to hear from the witnesses they couldn't even wait for you all to testify before they came to the conclusion and claimed the wrongdoing.

So it's clear to me this hearing today is only about attacking the Affordable Care Act and in many respects embarrassing the witnesses and the administration and interfere with the public servants, you all, who are helping to implement this act.

But let's take this opportunity to clear some things up. I am troubled by the charges the majority has thrown around that the administration has somehow not cooperated with the investigation. As my colleague, Mr. Lewis, has referred to, the administration has made available 13 former and current employees to talk about the implementation of the health reform laws cost-share program.

I also understand the administration has made these individuals available despite being sued right now by the House Republicans over the very same subject matter that they are engaged in, and now are simultaneously holding this so-called investigation.

Let me just ask a couple of questions, Ms. Wakefield, if we could. Are you aware of the fact that not a single Republican on this committee supported the Affordable Care Act?

Ms. Wakefield. No, I wasn't aware of that.

Mr. Crowley. Would you be surprised if I told you that not a single member of the Republican caucus supported the Affordable Care Act? Would you be surprised if I told you that? You don't have to answer that.

Would you be surprised if I told you that the Republican caucus has tried 60 times to overturn the Affordable Care Act?

Ms. Wakefield. No, I wouldn't be surprised of that.

Mr. Crowley. Do you know that they actually have attempted 60 times to overturn the Affordable Care Act? You know that. Is that correct?

So I think I have an understanding where they are coming from here in terms of this morning. They had a predetermined outcome. They determined what you did was wrong and then they just filled in the blanks in this report. I think a first grader could do that, but they would probably get an F from the teacher for trying to do something just like that. And I think the American people understand what this is. It is a sham.

And with that, I yield back the balance of my time.

Chairman Roskam. Just for the point of clarification, the administration stipulated in the lawsuit that has been frequently cited here that notwithstanding the cost-sharing reduction program, it is the insurance carriers that are on the hook. So my declaration earlier is without repute.

Mr. Holding.

Mr. Holding. Thank you, Mr. Chairman.

Mr. Mazur and Commissioner Koskinen, in preparing for this hearing, discuss the issues, I am going to assume that you have talked with people at IRS and Treasury who have been involved in funding the cost-sharing reduction program. Correct?

Mr. Koskinen. No, I have not talked to anybody at the Treasury Department about it. As noted earlier, David Fisher's deposition discusses the time we had a discussion about this. I had been at the IRS about a month, and going to Congressman Meehan's point, the question was raised in terms of what was the authority, did we have the authority to administer the plan.

Mr. Holding. Well, let me ask a little bit more specifically. So, Commissioner, do you know Charles Messing?

Mr. Koskinen. Pardon?

Mr. Holding. Charles Messing.

Mr. Koskinen. Charles?

Mr. Holding. Messing.

Mr. Koskinen. I do not know.

Mr. Holding. He is the former IRS CFO.

Mr. Koskinen. I am not aware of him.

Mr. Holding. You don't know him? So Mr. Messing, who is the former IRS CFO, gave this document here. I think it is exhibit 1, if we could put it on the screen. If you all could turn in your binders to exhibit 1. Each of you has it in front of you, and each of you will need to look at

it. So Mr. Messing, the former IRS CFO, gave the document, which is exhibit 1, to the Treasury inspector general when they asked for information about the premium tax credit program.

Mr. Mazur, do you know who Michael Briskin is?

Mr. Koskinen. I do not.

Mr. Crowley. Mr. Mazur.

Mr. Koskinen. Oh, sorry.

Mr. Mazur. It is Mr. Mazur.

Mr. Holdings. Mazur, excuse me.

Mr. Mazur. Yes, I do know who Michael Briskin is.

Mr. Holdings. He is the Treasury special counsel to the assistant general counsel for general law ethics and regulation. And the metadata of the document that we are looking at show that he was the last person to edit this document.

Now, the document shows that Mr. Briskin, a Treasury counsel, was the last person to edit the document. And the Treasury wrote this memo on July 2012 to OMB. And it talks about whether HHS could use a Treasury allocation account to make the advance premium credit payments.

So if you are taking a look at the highlighted passage there in the document, this passage is contrasting the funding the appropriation Congress gave for the premium tax credit program to the lack of funding for the cost sharing program.

Mr. Mazur, would you read the highlighted passage, please.

Mr. Mazur. It is not possible for me read that highlighted passage.

Mr. Holdings. You have it in your document there.

Mr. Mazur. Is it highlighted in there as well?

Mr. Holdings. It is the last paragraph, exhibit 1.

Mr. Mazur. The last paragraph of the memo?

Mr. Holdings. Yeah, exhibit 1.

Mr. Mazur. Sure? It says -- the memo as written says, "Such a reading, of course, would not be applicable to the largely parallel language in section 1324(c)(3); there is currently no appropriation, to Treasury or anyone else, for purposes of the cost-sharing payments to be made

under that section. However, this does not suggest that section 1412(c)(2)(A) should be read to require certification of payments by Treasury; such a reading would be equally inapplicable to section 1412(c)(3)."

Mr. Holding. All right. I will stop you there.

Mr. Mazur, are you aware that in July of 2012 Treasury's legal department wrote this memorandum stating that the account the administration currently is using to make the cost-sharing reduction payments was not available to make those payments and that there was no appropriation for the CSR payments? Were you aware of that in July? Were you aware of that?

Mr. Mazur. Sir, I was not aware of this memorandum until today, until you brought it up. I have been in my current job since August 2012, when the Senate confirmed me.

Mr. Holding. Okay. Mr. Deich, do you know who received this memo at OMB that is exhibit 1?

Mr. Deich. I do not.

Mr. Holding. Do you know who would know who received that memo at OMB?

Mr. Deich. I do not. I arrived at OMB last year.

Mr. Holding. Would you be able to find that out for us and report back to the committee?

Mr. Deich. I will take that back, yes.

Mr. Holding. Thank you.

Mr. Holding. So based on this memo, OMB was aware that Treasury believed that there was no appropriation for CSRs in 2012. Would you consider that to be accurate, having looked at this memo and what we have read here, Mr. Mazur?

Mr. Deich. I don't know. I don't know who at OMB received or read the memo.

Mr. Holding. Mr. Mazur.

Mr. Mazur. So I look at this at one input into a decision process not dispositive by itself, and I haven't seen this memo before today.

Mr. Holding. Thank you, Mr. Chairman.

Chairman Roskam. Thank you.

Mr. Rangel.

Mr. Rangel. Thank you. Thank you, Mr. Chairman.

I didn't follow that line of questioning, but is there any question that the four of you believe that you are following constitutionally the letter of the law as relates to the Affordable Care Act? Have you any problem with it that you are trying to follow the law?

And in the course of reaching a conclusion of how the law should be enforced, from time to time there are disagreements, I assume, among lawyers; and that is what lawyers are for, to make certain this agreement so that we can get paid. So the fact that there is not unanimity in memos does not distract from the unanimity of your testimony today. Does it in any way?

Mr. Mazur. Correct.

Mr. Rangel. Do you have any doubts at all about the positions you have taken as it relates to the constitutionality and legality of the Affordable Care Act and how we are funding it right now?

Mr. Mazur. I have none.

Mr. Rangel. And, obviously, the court is a separate branch of government. And you, I, and Republicans and whoever will be relying on them to determine who is right and who is wrong.

What I don't understand and I hope some of my political friends on the other side of this aisle can explain is that -- and I hope I don't get in trouble with Reverend Lewis, but it just seems like --

Mr. Lewis. Well, it will be good trouble.

Mr. Rangel. -- every moral concept that civilized countries have is you are supposed to take care of the darn sick -- is you have a commitment to take care of the sick. And there is no reason for me to believe that Members of Congress don't have that same compassion.

And I do believe, before the Affordable Care Act, that you received calls from people saying that my dear relative has cancer and the insurance company claimed they had a precondition and they are not going to pay it. And I always was successful to say, you don't mean to tell me that the premiums weren't paid so you are not going to give the service. And we had all hoped that the Federal Government could take that responsibility off of us legislatively and have a program that a sick person can either get care or prevent themselves from getting sick.

Now, what are we talking about? We are talking about how a person is eligible for care. And if they say that you need insurance to do it, you are talking about how they get the resources to pay for the insurance; but if they don't have it, they can die. They can absolutely die if they don't have the money to pay for care.

I can see how you can disagree with Obama and Democratic majorities, but for God's sake, if you think we are doing it wrong, you should have an alternative to do it right. But you just can't say that people are not entitled because you don't like the method in which it is being funded.

So I just hope that, as we go through these things, that the voters would recognize that somebody cares for how they are being treated, in terms of their need for health care. And if they don't like the way we are doing it, they certainly should come up with a plan to say, "We can do it better." I don't think that is asking too much since our offices know how many people, because of the inability to pay these doctors and hospitals, die because they can't do it.

So I want to thank all of you for doing your job. We write the laws, you interpret it, and they take us to court. I wish somebody would say, if you don't do it this way, at least show us how these people can get health care.

Thank you, Mr. Chairman.

Chairman Roskam. Thank you, Mr. Rangel.

Let me accept your invitation, as I look over to recognize the next Member, and the explanation to explain it from one of your political friends -- and we are political friends, and I am on the other side of the aisle. It goes like this. Here goes the thinking:

Number one, you used a great phrase, "you don't mean to tell me." And so we have the same thing going on. You don't mean to tell me that you have to violate the Constitution in order to get this done. You don't mean to tell me that you are going to come before Congress and say one thing and go to a Federal court and say another thing, come to Congress and say this is about poor people -- and that is the representation here. And that is what has gotten your attention. And I respect that.

But let's be really clear. The administration, in the lawsuit, stipulated that the insurance companies are going to do this regardless. They are going to get the money regardless. In other words, this is a subsidy for insurance companies. And so that is the scandal.

And if this is such a great idea, then, to go back to Chairman Brady's point, come clean and say: Here, here is how we came to this information, here are these witnesses.

And to characterize this group of people, frankly, as being helpful and forthcoming? They are coming up with new legal standards here that don't even exist in the law. Heightened interest in confidentiality, something like that? That is a complete fiction. That is made up. That is nonsense.

So that is the part that animates me, and I am inviting you to be animated by that, as well. Because when it all comes down to it, your point is, look, people need help. Our argument and what we are trying to drive today is, "Yeah, and there is a way to do it."

And don't tell me that you are telling a Federal judge one thing and you are coming before the Ways and Means to hear another thing.

Let me yield to Mr. Smith.

Mr. Rangel. I just want to join with you. If you are going to sue somebody, sue the insurance company. I will join in with that suit and encourage the Democratic leadership. But you don't take away the right and the ability of a sick person to get well. That is wrong --

Chairman Roskam. Great point.

Mr. Rangel. -- morally wrong.

Chairman Roskam. And, Mr. Rangel, they have admitted in court that the insurance company is on the hook.

I yield to Mr. Smith.

Mr. Smith. Thank you, Mr. Chairman.

I want to follow after that conversation.

Mr. Deich, when Congress writes an appropriations law, what does that law have to say in order to legally give money to that program?

Mr. Deich. I am not a lawyer. My understanding is that an appropriation has two components. One is directing that a payment be made, and the other, designating the source of funds that are used.

Mr. Smith. That is exactly how I think most Members of Congress believe, that when you do appropriations that is what is necessary.

And, Ms. Wakefield, does HHS ever decide to take money from one program and give it to another for convenience?

Ms. Wakefield. No, sir. Sir, we follow the expectation --

Mr. Smith. Wait, was your answer "no, sir" at the beginning? The mike wasn't on.

Ms. Wakefield. Yes.

Mr. Smith. Okay.

Ms. Wakefield. That was my answer.

We follow the expectations that are laid out in the statutes that are associated with the programs that HHS has responsibility for implementing. And so our actions derive from our interpretation of the statutes, and that is the basis for our implementation of our programs.

Mr. Smith. Your actions rely on the statutes.

Ms. Wakefield. That is correct, on our interpretation --

Mr. Smith. And based on the appropriations, that is how you distribute money. And if you distributed money any other way, that would be against the law, correct?

Ms. Wakefield. So our actions are based on our interpretation of the statute, and that is associated with authorizing language as well as with appropriations language.

Mr. Smith. So if appropriations are passed saying money will be disbursed out of this fund for this purpose, if you disburse it any other way, that would be a violation of that appropriations, correct? Yes or no.

Ms. Wakefield. We interpret the statutes --

Mr. Smith. It is a yes-or-no answer. Is it yes or no?

Ms. Wakefield. Well, sir, we interpret the statutes --

Mr. Smith. So it depends is what you are telling us? Just yes or no or depends, one of the three.

Ms. Wakefield. Our responsibility is to --

Mr. Smith. Okay.

Let me read this letter, okay? In a letter, Senators Cruz and Lee -- this was a letter to Senator Cruz and to Senator Lee from Secretary Burwell.

And it says, "To improve the efficiency and the administration of the subsidy payments made pursuant to the ACA for insurers as well as the Federal Government, the cost-sharing subsidy payments are being made through the Advance Payments Program and will be paid out of the same account from which the premium tax credit portion of the advance payments for that program are paid."

Secretary Burwell did not give a statutory basis for using the account. She just said it was for efficiency.

Mr. Deich, have you ever seen any other situation in which the executive branch used money appropriated for one program to pay for a different program and justified it solely because of the convenience or for efficiency?

Mr. Deich. Congressman, thank you for your question.

In the present instance, the administration made the payments based on the existence of an appropriation.

Mr. Smith. Have you ever seen Congress make an appropriation determined based on the efficiency or based on their convenience?

Mr. Deich. I am sorry, I didn't hear the question. Say it again.

Mr. Smith. Let me repeat the question again, because you didn't answer it.

Mr. Deich, have you ever seen any situation in which the executive branch used money appropriated for one program to pay for a different program and justified it solely because of convenience or efficiency?

Mr. Deich. I have not. And, as I mentioned earlier, in the present instance, it is our belief --

Mr. Smith. Today you have.

Thank you, Mr. Chairman.

Chairman Roskam. Mr. Davis.

Mr. Davis. Thank you, Mr. Chairman.

I am going to read from a letter to the editor of Newsweek from the Cook County president, Toni Preckwinkle, as she responds to Newsweek magazine's March 4, 2014, article, "How Obamacare May Lower the Prison Population More Than Any Reform in a Generation."

And she says, "Cook County, home to 130 municipalities, including the city of Chicago, is the second-largest county in the United States. As president of Cook County's Board of Commissioners, I am charged with overseeing an overburdened criminal justice system, which includes one of the Nation's largest jails. I commend Newsweek for recognizing the vital connection between Obamacare and safer communities."

How Obamacare May Lower the Prison Population More Than Any Reform in a Generation, March 4, 2014.

"In November 2012, Cook County was granted a Medicaid waiver that has already allowed us to provide health insurance to over 86,000 low-income residents, including 2,600 formerly detained individuals. For the first time, many of these people are now receiving mental health and substance abuse treatment, supported by preventive physical health care in their communities.

"These efforts mean those with criminal records are less likely to return to our jail, while others will never make the first trip into detention. When a young person struggling with depression gets treatment instead of access to street drugs, it puts him or her on the path to a productive life. We can realize lower rates of incarceration and recidivism in 2014 by seizing the opportunity Obamacare has created."

Deputy Secretary, do these individuals receive the benefit from shared cost reductions?

Ms. Wakefield. Thank you for the question.

Individuals with an income between 100 and 250 percent of the Federal poverty level are eligible for the benefits associated with the cost-sharing reduction provisions of the statute. And it is a provision that is really important for low-income individuals and families, because it helps to offset and defray the costs that are out-of-pocket costs when individuals access healthcare services.

So, certainly, no doubt, some of the individuals in the population you have just described, sir, would be probably eligible for that particular benefit.

Mr. Davis. And if we did not provide care for them, would they have any other recourse, any other place, any other source, or any other way to do anything except, as Representative Rangel suggested, die?

Ms. Wakefield. So those out-of-pocket costs can be a barrier to individuals getting access to health care services. Individual families will make decisions on occasion about whether or not the money they have available would be used to pay for a deductible, for example, or a copay to see a doctor to have their child taken care of, for example, or that that money would be stipulated in that family's budget for use for some other purpose.

So choices would, historically, before the Affordable Care Act, for families, many families, would have needed to have been made, especially those families that are -- well, the families that are lower-income families. So those were tough choices that impacted individuals.

And I can tell you, as a nurse, as a registered nurse, it is really important, from my vantage point, that people are able to access care when they need it. And this provision helps to remove what has been a barrier for many individuals to access health care when they need it because of their low-income status and limited funds that they have to pay for healthcare services versus some other choice.

Mr. Davis. Thank you very much.

I yield back, Mr. Chairman.

Chairman Roskam. Thank you, Mr. Davis.

Mr. Reed.

Mr. Reed. Thank you, Mr. Chairman.

Deputy Secretary, I want to focus in on some of the decision-making processes that happen at the Department of Health with this issue.

Are you aware that in fiscal year 2014 there was an appropriations request made to the Senate for reimbursement of the cost-sharing payment?

Ms. Wakefield. It is my understanding that in the fiscal year 2014 budget there was a request for appropriations to fund the cost-sharing reduction provisions.

Mr. Reed. So that request was made by the administration to the appropriations process, to have it funded through the discretionary appropriations process that we deal with here in Congress, correct?

Ms. Wakefield. I believe that is correct --

Mr. Reed. I think you are accurate.

Ms. Wakefield. -- I believe.

Mr. Reed. Then, 2015, that appropriations request did not seek reimbursement for the cost-sharing reduction payment. Isn't that correct?

Ms. Wakefield. I believe that for fiscal year 2015, in the President's budget, that the conclusion was made that the executive branch was required to make cost-sharing reduction payments using permanent appropriations and to fund CSR.

Mr. Reed. So isn't it fair to say, then, 2014, the administration requested an appropriations request for this cost-sharing payment; 2015, they did not make that request for the appropriations payment and they went a different route, they went down this mandatory spending, this provision that we are relying upon that is in the lawsuit? That is where we are at, correct?

Ms. Wakefield. As I said, the conclusion that was drawn for fiscal year -- the conclusion that was made, it is my understanding, for fiscal year 2015's President's budget was that the executive branch was required to make appropriations available to fund the cost-sharing reduction provisions of the law.

Mr. Reed. Because the appropriation was denied in 2014.

The other question I have then for you is, you have in your testimony asked us to look at the briefs, to get to some of the details here. And are you aware that in the briefs the court asked the question of the administration lawyers, what caused you to withdraw that appropriations request from 2014 to 2015? Are you aware of the court asking that in the litigation?

Ms. Wakefield. No, I am not aware of that.

Mr. Reed. They did. They did.

And then the administration's lawyers responded to that request of the court and said, "The reference of withdrawal is to OMB's submission of the fiscal year 2015 budget, which did not request a similar item. Defendant's counsel did not intend to suggest that there was a separate formal withdrawal document and apologizes for being unclear on that point." That was the representation of the administration to the court.

Now, are you aware of an Ellen Murray?

Ms. Wakefield. Yes. She is the Assistant Secretary for Financial Resources at the U.S. Department of Health and Human Services.

Mr. Reed. And are you aware she made a phone call to the Senate Appropriations Committee asking them to withdraw or to not provide that cost-sharing payment?

Ms. Wakefield. I was not in the position that I am currently in, as the Acting Deputy Secretary, during the fiscal year 2014-fiscal year 2015 budget process that you described --

Mr. Reed. So you weren't there.

Ms. Wakefield. I wasn't there, so I can't speak to conversations.

Mr. Reed. I anticipated you saying that. But the question is -- the record is very clear. Ms. Murray made that phone call. She made that phone call to the Senate Appropriations Committee to withdraw that request. I think that is going to be -- that is undisputed, as to what happened there.

The question I am going to ask you is -- I am going to give you an opportunity to come clean. Do you know who directed her to make that call?

Ms. Wakefield. Sir, I wasn't in my current position at that time. I was the Administrator for the Health Resources and Services Administration. I have no knowledge of a call that was made or -- I have no knowledge of a call that was made.

Mr. Reed. Have you ever had any conversations with anybody at the Department of Health about Ellen Murray's phone call to the Appropriations Committee?

Ms. Wakefield. I have no knowledge of a call that was made by Ellen Murray.

Mr. Reed. Have you talked to anybody at the Department of Health about that phone call?

Ms. Wakefield. No. I have no knowledge of that call.

Mr. Reed. Okay. So this is the first time you have ever had a conversation about Ellen Murray's phone call, with me here today.

Ms. Wakefield. I have no knowledge of that call, Congressman. I have --

Mr. Reed. No, no, no, not that you don't have knowledge. Have you had a conversation? Other than our conversation right here today, have you had a conversation in the Department of Health about Ellen Murray's phone call to the Appropriations Committee to withdraw the request?

Ms. Wakefield. In coming into the committee today, Congressman, I was informed that there was the possibility of a call. Somebody mentioned in passing to me, Congressman, that there was a conversation that had -- I am sorry, I am trying to catch it exactly correctly.

I was, I think, informed that a conversation had been made by Ellen Murray with an Appropriations staffer. I have no knowledge of --

Mr. Reed. Who did you have that conversation with?

Ms. Wakefield. -- the details of that call.

Mr. Reed. Who told you that? Who told you that?

Ms. Wakefield. Oof.

Mr. Reed. In preparation for your committee testimony today --

Ms. Wakefield. Yes, that is right. So this was in preparation for the committee.

Mr. Reed. Who told you that?

Ms. Wakefield. I am trying to remember.

Mr. Reed. You don't even remember who told you that in preparation for the committee?

Ms. Wakefield. Congressman, we do a lot of prep with different individuals coming into the --

Mr. Reed. So who did you prepare with in preparation for today's testimony?

Ms. Wakefield. Sure. So I prepared --

Mr. Reed. Give me names.

Ms. Wakefield. Excuse me?

Mr. Reed. Give me names.

Ms. Wakefield. Yes. So I prepared with individuals from different parts of the --

Mr. Reed. Names.

Ms. Wakefield. Well, the individuals that I prepared with included Kevin Barstow -- bear with me, please, because this is over the course of the last few days -- Hannah Bumsted. Let's see --

Mr. Lewis. Mr. Chairman, I am going to object. The member's time is over. I don't think he should be harassing --

Mr. Reed. This isn't harassment, Mr. Lewis.

Chairman Roskam. I mean, I was just letting her complete her statement, and then I was going to interrupt.

Ms. Wakefield. Yeah. And sorry, there are just a number of individuals. So, in preparation for this meeting -- Congressman, I am not trying to obfuscate. I am actually trying to remember the names of the individuals. There --

Mr. Reed. That is the problem.

Ms. Wakefield. -- are a number of them.

Mr. Reed. You obfuscated to the court, and you are not being truthful here today.

Chairman Roskam. The gentleman's time --

Mr. Lewis. Mr. Chairman?

Chairman Roskam. I got it. I got it.

The gentleman's time has expired.

Dr. McDermott.

Mr. McDermott. Thank you, Mr. Chairman.

I always like to come to a session of the theater of the absurd. It is an old period in the theater in which things are very strange on the stage.

What I find interesting in the theater of the absurd today is that we have Mr. Koskinen here as a witness. Now, he is the guy that this committee and this Congress, on the Republican side, is trying to get rid of or dismiss as the IRS head, but he is good enough to come here and testify here.

So I am glad to see you here, Mr. Koskinen. I appreciate your public service.

Now, what is the theater of the absurd here is that he sits as an administrator in which people argue in front of him about what decision he should make, about how money should be spent, or how money should be spent in a particular program that is in law, and there are disputes.

I sat in a deposition and listened to some employee of the department say that there was a big dispute. And then he went on to say that Mr. Koskinen made the decision that 99 percent of the people would make -- that is, to pay out these payments.

The witch hunt that is going on here is really about discrediting the IRS. Because the Speaker himself has said we care about poverty, we really care, we Republicans are really worried about poverty. This was a program to help poor people get health care. It was to give them the ability to buy and deal with some of the problems that come up for folks that don't make \$170,000 a year like we do. Everybody on this dais does not have problems with healthcare payments, but there are a lot of people out there in the world who do.

And we put a program together, and instead of coming in here to fix it -- if it was an appropriation, then fix it. That would be a simple bill, almost a consent calendar bill, if people were serious about fixing it. But this is not about fixing it. This is about a witch hunt for somebody in the IRS who sent a letter or made a phone call or did something.

Now, I find it very hard to see how a public administrator -- have you ever had any decision, Mr. Koskinen, before you that did not have people on both sides of it?

Mr. Koskinen. As a general matter, the only decisions that come to me are where there are close questions or arguments on both sides of the question.

Mr. McDermott. And what is the process you go through in dealing with those kinds of things?

Mr. Koskinen. Well, as Mr. Fisher noted in his deposition, from the day I started -- and the meetings involved here were in my first month -- I have always said that at any meeting everyone in the meeting should feel comfortable and, in fact, obligated to raise any questions or concerns they have.

And, in fact, Mr. Fisher and I were setting up an enterprise risk management program, where my goal was to have every IRS employee view themselves as a risk manager who not only should feel comfortable raising concerns or issues but really has an obligation to let us know.

So my way of running meetings is everybody in the meeting should feel comfortable -- if they have a question or an issue to be raised, they should be comfortable raising it, and, in fact, it is their obligation to raise it.

Mr. McDermott. And then, when that process is done, you have listened to all of them, you make a decision.

Mr. Koskinen. That is correct.

Mr. McDermott. And the buck stops at your desk, more or less, is how it would be put in Harry Truman's terms, huh?

Mr. Koskinen. That is correct.

Mr. McDermott. Now, has there ever been a decision you made where you think, well, I could have gone the other way, but -- maybe I should have gone the other way? Have you ever questioned yourself afterward?

Mr. Koskinen. Well, if you run meetings the way I have been running them for my 45-year career and you see all of the issues before you, as a general matter, I have not then felt that I had to make second choices or a concern about that, because I have heard from very smart and able people on both sides of the issue. There is usually a consensus that develops.

And that is what happened in this meeting, as Mr. Fisher noted. By the time we got through analyzing it and looking at the legal advice we had, the consensus was the IRS was authorized to go forward with its administrative responsibilities, which we did.

Mr. McDermott. Thank you for your service as the director of the IRS.

Mr. Koskinen. Thank you.

Mr. McDermott. I yield back the balance of my time.

Chairman Roskam. Thank you.

Part of the challenge in coming into act three of the theater is that you missed the two previous acts. The point I made in my opening statement was that this decision was largely made at the time the Commissioner showed up at the IRS. So this was basically a done deal.

Let me also point out that the Commissioner is the only person who accepted our invitation to be here. He was invited, he accepted the invitation, and here he is as a witness. The other three witnesses are here basically by threat of subpoena, and it was like passing a kidney stone to get these people to come here. So the Commissioner is in very much a different posture, and that was very clear in my opening statement.

Let me yield to Mr. Rice.

Mr. Rice. Thank you, Mr. Chairman.

And I am going to follow up on Mr. Reed's questions to Mrs. Wakefield.

Did you know that the administration's lawyers in the ongoing litigation regarding this matter wrote that the administration did not withdraw its request for the appropriation, but later on, in the process of preparing for this, in our investigation, Ellen Murray in fact said that she was directed by somebody -- that is unclear, who that was -- to call Senate Appropriations and say that we no longer needed the money, the administration no longer needed the money? Were you aware of that?

Ms. Wakefield. No, sir. I have no knowledge of the circumstances that you just described. I do not.

Mr. Rice. Okay. Well, so if the administration's lawyers in the course of this litigation said that there was no withdrawal but, in fact, Mrs. Murray did actually call Senate Appropriations and withdraw, that would be somewhat of a misrepresentation to the court, wouldn't it?

Ms. Wakefield. I am unaware of the context or the specific circumstances that you have just described. Sorry. I was not in my position at the time of --

Mr. Rice. Thank you, Mrs. Wakefield.

I want to talk to you, Mr. Mazur. You know, we work for the same people, the American people. And President Obama promised the American people the most transparent administration in modern history. But experience has proved exactly the opposite.

With a string of lies and scandals and cover-ups in the IRS and in other areas of government, from Lois Lerner and Jonathan Gruber, to things that you said to this Congress, Commissioner Koskinen, to Susan Rice, to Hillary Clinton, Eric Holder, James Clapper -- it goes on and on -- it is just not surprising that the American people have lost faith in our government.

Mr. Mazur, I am trying to understand -- I am looking at your memo of January 15, 2014, which I assume you have in front of you, and I am trying to understand your justification for using 1324(b). What I don't understand is why you can't clearly answer that question, why it has to be confused, duck and cover. I want to know -- this memo, you prepared it, right? Your name is on it.

Mr. Mazur. Correct.

Mr. Rice. How many memos do you do, action memorandums, for Secretary Lew? How often do you do that?

Mr. Mazur. I have probably written hundreds of memorandums to Secretary Lew over the time that I have been there.

Mr. Rice. Whose initials is that where it says "approved" there?

Mr. Mazur. Excuse me?

Mr. Rice. The initials where it says "approved" on the memo, is that Secretary Lew's?

Mr. Mazur. Those would be Secretary Lew's initials, yes.

Mr. Rice. That is Secretary Lew's? All right.

When it gets down to the part of justifying why you believe that the payments are appropriate under section 1324(b), that entire paragraph is redacted. Why would that be redacted?

Mr. Mazur. Really, that is --

Mr. Rice. Is there some privilege that you want to assert? Is this a top-secret matter of national security? Why would that be redacted? Why wouldn't you share that with the Congress and the American people?

We both work for the same people. All we are asking for is what President Obama promised, and that is transparency. Why would that be redacted?

Mr. Mazur. Sir, I agree we all work for the same American people. I also think that the Treasury Department has been working with your committee to give you the information you need --

Mr. Rice. Oh, really? So here we sit, a year and a half later, and we still don't know the justification in this memorandum for why you believe these cash payments should be taken out of 1324(b).

You say you have been working with us, but yet you redact the very crux of it in this memorandum. The most important paragraph is taken out of this memo. Why would you hide that from us? Why is it a constant, constant stream of scandals and cover-ups and obfuscation? Why is that?

Mr. Mazur. Sir, first, I am going to respectfully disagree with you on the scandals part. I don't think there has been a set of scandals in this administration.

Mr. Rice. Well, I mean, the Congress had to take the unprecedented action of suing the administration to get to the bottom of this because of continued ducking, covering, hiding, obfuscation. Why do we have to go to the courts to get these answers?

Why are we sitting here today, a year and a half into this investigation, and you still won't lay out the specifics of your memorandum of January 15, 2014, which -- the public has the right to know this information. Why is it that we continuously are faced with these lies and cover-ups?

Mr. Mazur. Sir, the House of Representatives has taken the unprecedented action of suing the administration over this political disagreement. And that is where it stands right now. It --

Mr. Rice. Political disagreement? We don't even know what we are disagreeing about because you won't even tell us your position.

Chairman Roskam. Mr. Marchant.

Mr. Marchant. Thank you, Mr. Chairman.

I would like to ask the panel today if any of you consider the tax refund account a slush fund.

Mr. Mazur. Sir, no. It is used for appropriate purposes.

Mr. Marchant. Okay. So is there any precedent, is there any other time in history where the tax refund account -- and, Mr. Koskinen, Mr. Commissioner, you certainly don't view that tax refund account as a slush fund that can be tapped for political reasons.

Mr. Koskinen. Absolutely not. We would only --

Mr. Marchant. I think --

Mr. Koskinen. We only run a program with --

Mr. Marchant. I think that every member of the panel can agree that that is not the intent of that fund. And all of you should be concerned that that is the way it was actually, in effect, used.

The administration had a real clear choice to come to the Congress and ask for that money. It is in the legislation. It allows the administration, or Health and Human Services, to come to the Congress, get that appropriation so that they can make those payments to the insurance company. Is that correct? Yet they chose not to do it this year. Why?

Well, I can tell you. Back in my district, Obamacare is one of the most unpopular programs the Federal Government has ever printed. And it is my opinion that the administration knew that if it came to Congress for that appropriation it was going to have trouble getting it.

So, Ms. Wakefield, if those insurance companies don't get that amount of money, what do they do to recoup the money?

Ms. Wakefield. Congressman, it is our intent that, through the litigation, that the --

Mr. Marchant. No, not the litigation. Just from a practical aspect, don't the insurance companies have to raise their premiums if they do not get that reimbursement?

Ms. Wakefield. Sir, it is our view that the administration will prevail in the position that we have taken in litigation --

Mr. Marchant. No. I am talking about, just from a practical standpoint, if those insurance companies don't get that amount of money, they are going to have to raise their premiums to recoup their costs so they don't go broke.

So my opinion is that there was no appropriation sought. The money was available in this fund. It was readily available through a -- looks like a very complicated process. They got everybody on the same page and got this money, tapped this money, and sent it to the insurance companies, primarily so that the insurance companies would not have to go up on their premiums so that the program would not be -- it would not be disclosed earlier than it is being disclosed this year and next year, where in Texas I think Blue Cross-Blue Shield has said that in some areas they are going to have to go up as much as 60 percent on the premiums just so they don't go broke.

So this was all political. This was all done for political expediency, to keep the insurance companies from going up on the premiums so that the Obamacare program would not appear to be insolvent and not working and going broke.

So is there any precedent in government for these kinds of funds, this fund particularly, being used this way? Do any of you know of another instance in your career where the tax refund account was used for this purpose?

Mr. Mazur. Sir, the administration's position is that it is an integrated system of the premium tax credits and the cost-sharing payments, and it is appropriate to make them out of the permanent appropriation. That is what the law -- the law is very clear that these payments shall be made. And so, interpreting that statute, that is the conclusion that we came to.

Mr. Marchant. And of all the thousands of Federal programs out there, has the administration -- has any administration ever reached the conclusion that the tax refund account was the place to go to fund a program that it did not want to go to Congress and get its appropriation for?

Mr. Mazur. Sir, again, this is an integrated system of payments that are made to the insurance companies on behalf of individuals, and the administration believes it is appropriate they come out of the same account.

Mr. Marchant. So, as a public policy moving forward, I would just challenge the witnesses from your standpoint and the positions that you hold. We consider, Congress considers this a breach of faith, not just an illegal, unconstitutional act, but a breach of faith of what your duties are.

And I would urge you, if you are ever presented with this situation again, whether the courts rule one way or the other, take this kind of action very seriously.

Thank you.

Chairman Roskam. Mrs. Black.

Mrs. Black. Thank you, Mr. Chairman.

Mr. Mazur, so let's just establish, first of all, you are the Treasury Assistant Secretary for Tax Policy, correct?

Mr. Mazur. That is correct.

Mrs. Black. Okay. And is it fair to say that you are familiar with how tax credits and refunds work?

Mr. Mazur. I am familiar with a lot of parts of the tax law, yes.

Mrs. Black. Okay. So the ACA premium tax credit is paid out of a permanent appropriation given to the Treasury at 31 U.S.C. 1324, right?

Mr. Mazur. I believe that is correct.

Mrs. Black. Okay. And that appropriation is set up to pay for other tax refunds and credits, as well. Is that correct?

Mr. Mazur. I believe it is a permanent appropriation to do so, yes.

Mrs. Black. Okay.

Are cost-sharing reductions a tax credit?

Mr. Mazur. Ma'am, again, you need to go back to the Affordable Care Act as a whole and look at the cost-sharing payments and the premium tax credits as an integrated set of payments that are made.

Mrs. Black. Can you show me in the bill, in section 1402, where the cost-sharing reductions or tax credits are -- excuse me? In CSR, in 1402, is where the cost-sharing is actually talked about. Can you show me in there -- because you keep using this word "integrated," and that is an assumption, because I have read that section over? And I would like to know -- maybe I am not reading it correctly -- can you show me in there where it actually says that that is a cost-sharing reduction that goes back to a tax credit?

Mr. Mazur. Ms. Black, I don't have that in front of me right now, so I really can't point to the language.

Mrs. Black. But if you keep on saying it is integrated, then you have to be able to report -- you have to somewhere show me that there is not an assumption made here. Because you keep using this word, "integrated." I can't find the word "integrated" anywhere in this section. So you keep using that word, "integrated," when it is not in the law. Do you not have to abide by the law?

Mr. Mazur. Ma'am, we are looking at the Affordable Care Act, and the intent of the law is that these payments are made to insurance companies, much like the premium tax credits are made.

Mrs. Black. Yes. The intent is that the insurance companies would reduce the cost. That is the cost-sharing reduction piece of this. It does not say in here -- and, again, I want you to point somewhere in this section that actually says that. Because if that doesn't say that and it is not clear, then what it does say is that it should be an annual appropriation and not an appropriation that is a mandatory appropriation. Is that not --

Mr. Mazur. Congresswoman Black, I mean, I think you can look at this in a somewhat different way. If Congress doesn't want the moneys appropriated, they could pass a law that specifically said, do not appropriate the moneys from that account.

Mrs. Black. That is not my understanding, sir. And you are an expert in this area. So what you are saying is, if it is left without direction, that it can just be made a mandatory? Is that what you are telling me?

Mr. Mazur. I am saying that the Affordable Care Act -- and I think the legal piece that we referred to goes to this. The Affordable Care Act directs the executive branch to make these cost-sharing reduction payments. And these payments are of a piece with the same payments that are made to the insurance companies under the premium tax credit. And that is the justification for using the same account.

Mrs. Black. So the justification comes because the administration then decides that that is the way they want to do it, even though it is not stipulated in the law.

Mr. Mazur. And, frankly, if you would like to make the law clearer, you could pass an appropriation law that said, do not make them.

Mr. Meehan. Would the gentlewoman yield for 1 second?

Mrs. Black. I would yield.

Mr. Meehan. Mr. Mazur, we discussed this point. It clearly articulates, "Disbursements may be made from the appropriations made by this section only for refunds due from credit provisions in the Internal Revenue Code." That is section 1324. What is ambiguous about that?

Mr. Mazur. Again, sir, as we were talking about earlier, the legal interpretation of the administration is that section 1324 of 31 U.S. Code allows for these cost-sharing payments to be made.

Mr. Meehan. "Only for." And it points out, you asked Congress to give you direction. Congress gave you direction. And it said "only for" and then told you what you could spend it on.

Mr. Mazur. Sir, Congress gave --

Mr. Meehan. And then you went beyond and spent it, because you determined that you could spend it in an area that was not authorized by Congress.

Mr. Mazur. Sir, Congress gave direction to the executive branch in the Affordable Care Act to make these cost-sharing reduction payments --

Mrs. Black. I am reclaiming my time.

Mr. Mazur. -- to help low-income individuals pay for their healthcare insurance.

Mrs. Black. And reclaiming my time, can you -- and I know we are going to be out of time, but can you specifically show me where that authority is? Because I don't see that authority in this bill.

Mr. Mazur. Congresswoman Black, I don't have that in front of me, but I can take that back and get back to you.

Mrs. Black. Thank you.

Chairman Roskam. Mr. Renacci.

Mr. Renacci. Thank you, Mr. Chairman. I want to thank you for holding this hearing and allowing me to attend and participate. I do believe one of Congress' most important roles is oversight and that it is important we have this hearing.

I am trying to get a timetable here, and I am noticing that, in going back to some of the testimony, that HHS had actually requested almost \$4 billion in funds at some point in time early 2013 as part of the budget process. So it looks like they were looking to fund these dollars through the appropriations process.

But, at some point in time, OMB released a report -- actually, it was the 2014 sequestration report -- that said that these funds would be subject to sequestration.

And then I noticed that HHS Assistant Secretary for Financial Resources Ellen Murray testified that she withdrew the request before the Senate Appropriations Committee released its appropriations bill in July of 2013.

So, at some point in time, the administration was looking for money. At some point in time, the administration realized it couldn't get the money they needed through the appropriations process so it would be through sequestration. So then, all of a sudden, at some point in time, the administration decided to look elsewhere. And it also appears, then, late in 2013 is when they started looking toward the premium credit account.

The committee also heard testimony that the IRS Deputy CFO raised red flags about the administration's plan to make the cost-sharing reduction payments from the premium tax credit account in late fall. So there were red flags going up in late 2014.

Mr. Mazur, did you personally know that the people at the IRS were concerned about this plan in the fall of 2013?

Mr. Mazur. Not at that time, no.

Mr. Renacci. You found out later?

Mr. Mazur. I am aware -- you have gone through the timeline right now.

Mr. Renacci. Okay. Was anybody else in the Treasury aware of it at that time? Because, again, the IRS was throwing up red flags.

Mr. Mazur. I can't speak for other people at the Treasury Department, sir.

Mr. Renacci. We also understand that the former Chief Risk Officer was also concerned. He was worried the payments would violate the Constitution -- wow, violate the Constitution -- and

the Antideficiency Act. You all know the Antideficiency Act is a criminal law that prohibits government officials from making payments without an appropriation. So people were getting concerned.

So the IRS General Counsel and OMB General Counsel arranged for seven IRS officials to come to OMB and view the memo. The OMB General Counsel told them that they were not allowed to take notes or take the memo with them.

Mr. Deich, is this common, to have meetings like this where, you know, you can't take notes and you can't take the memo? It just seems unusual. Red flags were flying, we are going to have this meeting, can't take any notes, don't take the memo. Is this normal?

Mr. Deich. I wasn't here at the time, and I can't speak to the specifics of the circumstance. But, as a general matter, I don't think it would be highly unusual for issues that are still under discussion to be considered by sharing the information in a memo but not allowing materials to be brought --

Chairman Roskam. Mr. Deich, just -- I didn't hear. Did you say "highly usual" or "highly unusual"?

Mr. Deich. It would not be highly unusual to share information in this way.

Mr. Renacci. You are right, it wouldn't be highly unusual, because it was an issue that was concerning people. You had red flags all over the place. The IRS was concerned.

We have testimony the IRS officials got back to the IRS; the Chief Risk Officer and others still worried about the payments violating the Constitution. Keep going back to "violating the Constitution," which is really important about this hearing. So they asked to speak with Commissioner Koskinen.

Commissioner, do you remember that meeting?

Mr. Koskinen. I do.

Mr. Renacci. Do you remember the IRS officials at that meeting told you that they thought the payments may violate the Constitution and the Antideficiency Act?

Mr. Koskinen. We had a full discussion of concerns about the appropriation, the appropriate appropriations act, as well as our ability to monitor the payments and ensure there was an appropriate audit trail. The CFO's concern was as much about, if we had the authority, how would we make sure that there would be a sufficient audit trail.

And all those issues were vetted. Chief Counsel reported on the meeting at OMB -- I did not realize that David Fisher had gone to that meeting -- and that we had legal advice from OMB and we had just received authorization and, in effect, a directive from Treasury to go forward.

Our job is to administer the Tax Code, and we felt that, on balance, when we got through with the discussion, that we had the appropriate authority to proceed.

Mr. Renacci. So, at that meeting, there was also this action memorandum put in that I know one of my colleagues talked about, the memorandum between Mr. Mazur and Mr. Lew.

And I am not sure I got the answer from you --

Mr. Koskinen. I would just note that that memorandum was not at the meeting. It had just been issued. The Chief Counsel reflected that he had received the memo. But I have never seen the memo until today.

Mr. Renacci. Okay.

So, getting back to what my -- so, Mr. Mazur, you authored this, and then you approved using these funds -- based on this memo, you approved using these funds then, correct?

Mr. Mazur. If you read the text of the memorandum, I recommended that that account be used for those funds. Yes, that is true.

Mr. Renacci. So who made the final decision? Who approved --

Mr. Mazur. Again, if you look at the memorandum, which you are holding in your hand, you can see that Secretary Lew approved the course of action.

Mr. Renacci. So, Mr. Deich, you said earlier you are familiar with the Antideficiency Act. If someone approves an authorized expenditure of funds without appropriation, is that person in violation of the Antideficiency Act?

A pretty simple question. Yes or no?

If somebody -- I am going to ask --

Mr. Deich. The administration believes that there --

Mr. Renacci. -- it one more time.

Mr. Deich. -- is an appropriation for this --

Mr. Renacci. If someone approves and authorizes the expenditures of funds without the appropriation, is that person in violation of the Antideficiency Act, yes or no?

Mr. Deich. I am not a lawyer, but it is my understanding that an appropriation is needed in order to make payments, and, in the absence of the appropriation, it would be a violation of the act.

Mr. Renacci. Thank you.

I yield back.

Chairman Roskam. Thank you all.

Let's do a little bit of cleanup. I would like to talk a little bit about the legal justification -- that is, the 2013 memo.

And you have sort of put us in a trick bag, in a way, in that you have talked about the totality of a system, an integrated system -- I think that was your word, Mr. Mazur, I am not sure, but a holistic theme, basically. And yet you have said we have all this, it is all written down, and it is all in a memo; we are just not going to share this integration, this revelation, this legal theory that came to us.

Do you understand, sort of, the nature of the trick bag that you are putting the Congress and the American people in because you have not disclosed that information?

Mr. Mazur. Sir, which 2013 memo are you talking about?

Chairman Roskam. I am talking about the OMB memo.

Mr. Mazur. I am not aware of that memo.

Chairman Roskam. All right. How about your memo? Let's go to the one that you were just talking about, the January 2015 memo. What is in the redacted part?

Mr. Mazur. I don't recall what is under the redacted part, sir.

Chairman Roskam. Come on. You don't recall that?

Mr. Mazur. Come on. I write hundreds of memos.

Chairman Roskam. Okay.

Well, yesterday, you were on full display before the Senate Finance Committee and the House Ways and Means Committee, Mr. Mazur. And, in that committee, I was very impressed by your independent recollection of section 385, your ability to wax eloquent on chapter and verse and this and that. "We have done this, Congressman. We have done that, Mr. Chairman. We have taken on this responsibility." You had details of process that were very, very impressive.

And now, on an issue that is absolutely pivotal, that is a fulcrum between the executive and the legislative branch, you say in this memo "I don't remember"? Is that your testimony today?

Mr. Mazur. That is correct, sir.

Chairman Roskam. Is there anything that would refresh your recollection?

Mr. Mazur. Not that I could think of, sir.

Chairman Roskam. Did you prepare in any way for this hearing?

Mr. Mazur. Sir, as you know --

Chairman Roskam. Did you prepare in any way for this hearing?

Mr. Mazur. Yes, I had some brief preparation.

Chairman Roskam. What was the nature of your preparation, brief as it was?

Mr. Mazur. I reviewed this memorandum.

Chairman Roskam. You reviewed the memorandum?

Mr. Mazur. With the redacted portion, the one --

Chairman Roskam. Oh, so that is all you did? Tell me what else you did.

Mr. Mazur. -- the one that was provided to your committee. I also reviewed the 10-page --

Chairman Roskam. When is the last time you saw the memorandum as you wrote it?

Mr. Mazur. I really can't remember, but it probably would have been 2014.

Chairman Roskam. So there has been nothing in 2 years that has prompted your recollection about your reasoning about the ability to move forward on a program that brought a great deal of consternation and anxiety all throughout the administration. Based on your own testimony, based on the red flags, based on one thing after another, there is nothing that you have done to refresh your recollection about that in the past 2 years. Is that right?

Mr. Mazur. That is correct, sir.

Chairman Roskam. Wow. That is remarkable. And that is in stark contrast to the hard work you have been doing on section 385, where you had independent recollections. Is that right?

Mr. Mazur. Sir, section 385 regulations are proposed regulations. That is something that is ongoing. This is something that was done 2-plus years ago.

Chairman Roskam. How delightful to be able to move from one work product to another so quickly and so effortlessly.

Let me turn everyone's attention, just so we are clear, on section 1402, following up on what Mrs. Black was focusing in on. This is the exact language. So let's knock down this straw-man argument that this is about poor people. This is not about poor people. This is about an

insurance subsidy. And this is an insurance subsidy that the administration argued before the Federal court.

Here is the plain language, section 1402. In this section, the Secretary shall notify the insurer of the plan of such eligibility. And the issuer -- that is, the insurance carrier -- shall reduce the cost-sharing under the plan at the level of the amount specified in subsection C, period, paragraph, end of letter.

What that tells us is this is not about poor people; this is about making sure an insurance carrier gets a subsidy. So let's debunk the straw-man argument. You can make a poor-person argument as it relates to premium tax credit. You cannot with any credibility couch this, cloak this, masquerade this in some way as it relates to poor people on cost-sharing reduction. It is an absurdity.

Mr. Deich, let me ask you a couple of questions. OMB wrote a memo to try and justify making the cost-sharing reduction payments from the premium tax credit appropriation. That is right, isn't it?

Mr. Deich. That is my understanding, yes.

Chairman Roskam. And you are aware that the committee has subpoenaed that memo. Isn't that right?

Mr. Deich. I am.

Chairman Roskam. And you are aware that OMB has not produced that. Isn't that right?

Mr. Deich. I am.

Chairman Roskam. And you are also aware -- tell me you are aware of this, restore my hope that you are aware of this -- that OMB has not given any legal justification for withholding the memo. You are aware of that, aren't you?

Mr. Deich. My understanding is that OMB continues to look for ways to provide the committee --

Chairman Roskam. No, no. That is not my question. And let's just -- listen, I will be here all day. So let's just get right to the point.

There has not been a legal justification that has been articulated by the Office of Management and Budget based on a legitimate subpoena from the United States Congress. There has been no privilege asserted. Is that right?

Mr. Deich. There has been no executive privilege asserted, that is correct.

Chairman Roskam. So there is no legal justification, based on your own admission, for withholding that information. Isn't that right?

Mr. Deich. I am not a lawyer, and I can't address --

Chairman Roskam. I am not asking you to be a lawyer.

And, by the way, you are here, you are representing -- so this "I am not a lawyer" laminated hall pass that people want to use today? Completely ridiculous. Then send a lawyer. Then send somebody who is equipped to answer these questions. These are not questions that are unanticipated, Mr. Deich. It is the nature of the conflict that is between us.

So do you have any other information today about the nature of the assertion that you are making? In other words, is there something that you know that is a legitimate reason as to why this information should be denied to the American people through their elected representatives in Congress? You got anything new?

Mr. Deich. OMB is committed to providing the information that the committee --

Chairman Roskam. Your commitment is waning and underperforming. Good grief.

Mr. Deich. There are many instances in which the Congress and the executive branch --

Chairman Roskam. There is one memo. There is one memo, Mr. Deich. There is one memo. It can't be that hard to find. And it seems to me you got either of two choices. Either you say, "Here is the memo," or you say, "We are not going to give it to you, and here is why we are not going to give it to you. Because you don't have the legal justification to do it."

You are being passive-aggressive. You are being an obstructionist agency. And it is outrageous.

Do you know who wrote the memo?

Mr. Deich. I do not.

Chairman Roskam. You didn't prepare to even understand who authored a memo? And you are here today representing OMB?

Mr. Deich. That is correct.

Chairman Roskam. Are you aware that the Attorney General signed off on the memo?

Mr. Deich. I am not.

Chairman Roskam. Mr. Mazur, what happens at Treasury when you receive a document request from Congress?

Mr. Mazur. I believe it goes to our Office of Legislative Affairs and then to our General Counsel's Office to respond.

Chairman Roskam. Is that the same thing that happens when you receive a subpoena, or is a subpoena treated differently?

Mr. Mazur. I am not aware. I think it is the same treatment, but I am not aware of the exact --

Chairman Roskam. Do you recognize the distinction between a letter, let's say, that Mr. Lewis and I would write together to the Department making an information request and a subpoena that is formally issued? Do you understand a legal distinction or appreciate the distinction between those two?

Mr. Mazur. I believe there is a distinction, yes.

Chairman Roskam. What is the distinction?

Mr. Mazur. I believe the subpoena is more of a compelling document.

Chairman Roskam. What is your understanding of what the Department's obligation is upon the receipt of a subpoena?

Mr. Mazur. Sir, I understand that our staff has been working with your staff on these issues to try and give you information you need.

Chairman Roskam. If what you are hearing from your staff is that your staff is doing a good job, your staff is misrepresenting what is happening. Because what we are hearing from our staff is that your staff is not doing a good job, because you have not met a single deadline that the subpoena has put forward.

And these are not unreasonable deadlines. I mean, let's be real. These are requests for documents, they are requests that the Congress is entitled to, and they are requests that you are denying. Isn't that right?

Mr. Mazur. Sir, we have provided you with numerous pages of documents and --

Chairman Roskam. Numerous pages is not zip.

Mr. Mazur. -- made many people available for transcribed --

Chairman Roskam. Numerous pages is meaningless. You know that, and I know that.

What is your commitment today to comply with -- in other words, you have an opportunity to give a resounding "yes" to Chairman Brady on his request? Are you prepared to do that?

Mr. Mazur. No.

Chairman Roskam. And you are not willing to do that.

Mr. Mazur. No. I will take back the request to the Department.

Chairman Roskam. You will take it back. To the same staff, presumably, that has been representing what a great job they are doing? Is that who you are going to take it back to?

Mr. Mazur. I will take it back to the relevant staff who is responsible, sir.

Chairman Roskam. Let me just make one final point.

Mr. Lewis. Mr. Chairman?

Chairman Roskam. Yeah, I will come to you. I will make one final point.

Mr. Lewis. We have been here for a while --

Chairman Roskam. Listen --

Mr. Lewis. -- and you are going over.

Chairman Roskam. We are going to be here for a while. So --

Mr. Lewis. Mr. Chairman, I don't plan to stay here, and I don't --

Chairman Roskam. Listen, you don't have to stay here.

Mr. Lewis. -- and I don't think it is fair for the witness to stay here.

You want to subpoena all of them? You want to hold them in contempt?

Chairman Roskam. Listen, I want to get answers; you want to get answers; everybody wants to get answers. So let me just make one final point.

There has been a lot of discussion at a high level today about the nature of the Constitution and what it means. And, look, there are complicated issues that we are all dealing with and we are all walking through.

But there is a real danger that I perceive that is being on full display here. And the danger is a level of presumption that says, we will not be limited by the plain language of a statute, as Mr. Meehan was pointing out and as Mrs. Black was pointing out.

The limitation, when we were invited by Mr. Mazur to correct the statute, Mr. Meehan pointed out, look, it says "only." "Only" means "only." There is not more than one way to interpret "only."

Chairman Roskam. And there is this feeling, and I think it is on full bloom and full display today, and the feeling is this: that it is okay to cut down laws, it is okay to cut through things in cloaking ourselves in good intentions.

It is a dangerous game. Because if we accept this, then mark my words, there will come a day when there is going to be a different administration or a different disposition or a different attitude and we are going to say, "Where were the people who should have stood up for these things at the time?"

My friends on the other side of the aisle, God bless them, the ACA is now orthodoxy, and it is jarring to them when it is challenged. This is not about the ACA. This is about a constitutional responsibility.

The committee stands adjourned.

[Whereupon, at 12:08 p.m., the subcommittee was adjourned.]

[Member Questions for the Record](#)