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## A Commentary: Presidents Adams and Jefferson, with a Few Others, Discuss Health Reform with a Disabled Lawyer

Gary C. Norman

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# A COMMENTARY: PRESIDENTS ADAMS AND JEFFERSON, WITH A FEW OTHERS, DISCUSS HEALTH REFORM WITH A DISABLED LAWYER

GARY C. NORMAN\*

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## I. INTRODUCTION

Pondering two busts of Presidents Adams and Jefferson,<sup>1</sup> a Washington lawyer with a disability is suddenly interrupted from the reflection.<sup>2</sup> Long-time colleagues and passionate, if sometimes disgruntled, friends,<sup>3</sup> Presidents Adams and Jefferson

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<sup>1</sup> An argument has been posited that President Jefferson would be a member of the Tea Party. See, e.g., Ron Chernow, *The Founding Fathers Versus the Tea Party*, N.Y. TIMES (Sept. 23, 2010), available at <http://www.nytimes.com/2010/09/24/opinion/24chernow.html>.

<sup>2</sup> The vehicle through which the discussion about healthcare reform and the issues it may present for the “hot Washington lawyer” is derived from *Van Loon's Lives* by Hendrik Willem Van Loon. See, e.g., Max Arnott, *Guess Who Came to Dinner?*, VOEGELIN VIEW, <http://www.voegelinview.com/guess-who-came-to-dinner.html> (last visited Apr. 2, 2011). The volume contains a riveting discussion of the interaction of a Dutchman and his friend with famous characters from differing points along the space-time continuum of history. If this type of discussion were truly possible, this Author would be delighted to have, as a life-long historian, dinner with the two former Presidents. Compare DAVID McCULLOUGH, JOHN ADAMS, (Simon & Schuster 2001), with NOBLE E. CUNNINGHAM, IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON (Louisiana State Univ. Press 1987) (focusing on Jefferson's public career).

<sup>3</sup> Compare *The Inauguration of Thomas Jefferson: First Political Party Transition*, WHITE HOUSE HISTORICAL ASS'N, [http://www.whitehousehistory.org/whha\\_classroom/classroom\\_9-12-transitions-jefferson.html](http://www.whitehousehistory.org/whha_classroom/classroom_9-12-transitions-jefferson.html) (last visited Apr. 27, 2011), with *Foreword to Volume Six, Papers of Thomas Jefferson: Retirement Series*, THOMAS JEFFERSON'S MONTICELLO, <http://www.monticello.org/site/research-and-collections/foreword-to-volume-six-papers-thom-as-jefferson-retirement-series> (last visited Apr. 27, 2011).

request that they adjourn to a local tavern for dinner.<sup>4</sup> The Presidents propound an inquiry while imbibing a Fuller's London Porter.<sup>5</sup> What are the issues with which the American people are grappling? The size of, as well as the proper role of, government is as much an issue for the American people now as it was in the Presidents' time.<sup>6</sup> Specifically, Washington lawyers still constitute strategic actors within executive, legislative, and judicial forums. This Article discusses the interaction of Washington lawyers in these branches of government regarding healthcare law and policy.<sup>7</sup> The Article discusses how access to technology inhibits a disabled lawyer from equal involvement in the governmental process.<sup>8</sup> The Article

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<sup>4</sup> Taverns constituted an important place for the founding fathers to meet. *See, e.g.*, Anjus Chiedozie, *The History of Taverns*, EHOW.COM, [http://www.ehow.com/facts\\_5505461\\_history-taverns.html](http://www.ehow.com/facts_5505461_history-taverns.html) (last visited Apr. 30, 2011) ("A tavern is a public house where people can gather to buy and drink alcoholic beverages. The word 'tavern' comes from the Latin 'tavern'. . . [t]hey both mean 'shed' or 'workshop.'").

<sup>5</sup> *See* Ed Westemeier, *Founding Fathers, Early Colonials Enjoyed Their "Draught"*, CINCINNATI ENQUIRER (Feb. 19, 2003), available at [http://www.enquirer.com/editions/2003/02/19/tem\\_sips19.html](http://www.enquirer.com/editions/2003/02/19/tem_sips19.html).

<sup>6</sup> Federalism was heavily debated amongst politicians during and after President Adams' term. *See generally* Robert A. Schapiro, *Progressive Federalism Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y. REV. 33, 54 (2009). This Article discusses the encroachment of the federal courts on a robust new federalism that myriad states found helpful in advancing their own local policy agendas. *Id.* It also addresses the usage of the Commerce Clause to thwart federal and state policy initiatives:

[t]he Supreme Court's invocation of federalism to limit the authority of the national government constitutes one threat to blue state federalism. The Court's concomitant use of preemption doctrines and the dormant Commerce Clause to strike down state regulatory efforts pose a more serious danger. In a series of cases, the Court has invalidated state laws and even state law jury verdicts based on their supposed conflict with federal statutes or regulations. To give just a few instances, the Court has rejected state tort suits concerning automobile safety and medical devices and nullified state regulations concerning tobacco advertising, oil spills, and banking. In a related development, the Court also has aggressively invoked the dormant Commerce Clause to invalidate state laws that have an impact on interstate commerce. In addition to blocking state policies, the Court's application of the dormant Commerce Clause to state tax policies has [arguably] threatened the financial resources of states. State programs depend on the state treasury. By restricting the taxing policies of the states, the Court has limited the states' abilities to promote their initiatives. The Court's aggressive use of preemption and the dormant Commerce Clause has garnered much scholarly and popular attention. Some have insisted on a tension between the Court's preemption and dormant Commerce Clause doctrines and other aspects of its federalism framework.

*Id.*

<sup>7</sup> *See generally* Medicareblogger, *Founding Fathers Mandated Government-Run Health Care*, TUCSONCITIZEN—THE VOICE TUCSON (Apr. 26, 2011), <http://tucsoncitizen.com/medicare/2011/04/26/founding-fathers-mandated-government-run-health-care/>.

<sup>8</sup> As William Shakespeare once wrote, "brevity is the soul of wit." WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* 122 (Philip Edwards ed., 1985). This article is a concise study of a range of issues, focusing on the interaction of the Washington lawyer with an issue that "played out" across all three branches of government: healthcare reform. This

also thematically presents the position Presidents Adam and Jefferson would likely harbor on healthcare reform. Public discourse must be more intellectual like that of the founding generation,<sup>9</sup> and it should be improved in its civility.<sup>10</sup>

## II. BACKGROUND

The United States spends, as a percentage of Gross Domestic Product, more on healthcare services than any other industrialized nation, with annual expenditures equaling \$1.6 trillion.<sup>11</sup> Since 2008 when President Obama campaigned on healthcare reform,<sup>12</sup> and since 2009 when he sought the enactment of healthcare

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Article's analysis contains mordant criticism that applies to all sides of the political aisle. Additionally, technology access is an issue inhibiting the ability of a Washington lawyer with a disability to be involved in government. A recent bi-annual conference hosted by Washington College of Law regarding law students with disabilities discussed technology issues. This author served on the panel, presenting the perspective of a lawyer and a postgraduate student enrolled in the Masters of Letters of Laws degree program. See Kenneth Hirsh et al., *Technology: Are You (And Your Vendors) Ahead of, Behind, or on the Curve?*, 19 AM. U. J. GENDER SOC. POLICY & L. 1189 (2011). The issue of the cost of the electoral process is also worthy of discussion, but will not be addressed in this Article.

<sup>9</sup> Correspondence with President Adams alone could demonstrate his intellectual predilections. Presidents Adams and Jefferson were amazing intellectuals—the best of any generation in history. For example, President Adams wrote in a letter to his wife, Abigail, “[a]midst your Ardor for Greek and Latin I hope you will not forget your mother Tongue. Read Somewhat in the English Poets every day . . . You will never be alone, with a Poet in your Pocket. You will never have an idle Hour.” Letter from John Adams to Abigail Adams (Apr. 26, 1779), available at <http://www.masshist.org/adams/quotes.cfm> (last visited Apr. 5, 2012).

<sup>10</sup> While both Republicans and Democrats are to blame, the level of sophistry and even crudity especially stems from “far right” media and even the right leaning politicians it supports. See, Brian Stelter, *Limbaugh Apologizes for Attack on Student in Birth Control Furor*, N.Y. TIMES BLOG (Mar. 3, 2012), <http://thecaucus.blogs.nytimes.com/2012/03/03/rush-limbaugh-apologizes-for-verbal-attack/>. As a life-long student of history, the comparison among current discourse and disagreement and that of the Mid-Nineteenth Century is captivating. The Civil War instructed that all citizens have a need to address public issues in a civil way, rather than resorting to a form of violence. An author of a blog editorial stated:

Sensible people on both sides, left and right, need to reaffirm right now that political violence, nor violent rhetoric, is acceptable behavior for anyone. To guns rights advocates with bumper stickers insinuating they’ll shoot anyone who tries to enforce gun laws on them—take them off. Anarchists who threaten the rich with confiscation of their wealth or even “kill the rich”—wake up, and bring something constructive to the table.

*Civil Politics, Not Civil War*, CONSTRUCTIVE DEBATE BLOG (May 26, 2011), <http://www.constructivedebateblog.com/> (last visited Apr. 3, 2012).

<sup>11</sup> See JOHN C. GOODMAN ET AL., LIVES AT RISK: SINGLE PAYER NATIONAL HEALTH INSURANCE AROUND THE WORLD 6 (2004).

<sup>12</sup> See, e.g., Lisa S. Bressman & Robert B. Thompson, *Articles, The Future of Agency Independence*, 63 VAND. L. REV. 599, 659 (2010) (“Healthcare was a key issue during the Democratic primaries in 2008 and remained a central goal of the new Administration, even as the financial crash and political obstacles pushed back the timetable.”).

reform,<sup>13</sup> health law and policy, namely healthcare reform, has been the subject of copious debate.<sup>14</sup> President Obama signed healthcare reform into law on March 23, 2010, now in its second anniversary.<sup>15</sup>

The Patient Protection and Affordable Care Act,<sup>16</sup> as amended by the Health Care and Education Reconciliation Act of 2010,<sup>17</sup> (hereinafter “healthcare reform” or “the Act,” respectively) has been the subject of regulatory or litigious action and conflict within the three branches of government.<sup>18</sup> Healthcare reform has the affect of attempting to address issues of quality, access, and cost.<sup>19</sup> The purpose of the complex omnibus statute is to address flaws with health insurance, including the many millions of “uninsured Americans and the escalating costs they impose on the health care system.”<sup>20</sup> Healthcare reform imposes myriad new mandates on individuals, states, and the private sector, providing for or attempting to provide for: (1) expanded health insurance to the uninsured; (2) reduced spending in such federal health insurance programs as Medicare; and (3) substantive and extensive changes in the private health insurance industry.<sup>21</sup> By 2019, when all of the healthcare-reform provisions will be in effect, an additional 32 million people will purportedly have health insurance coverage.<sup>22</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> Cynthia M. Conner et al., *American Health Lawyers Association 2008-09 Year in Review*, 3 J. HEALTH & LIFE SCI. L. 1 (2009).

<sup>15</sup> See, e.g., Scott Nance, *Happy Birthday, Health Reform: Supporters Laud Law's First Anniversary*, DEMOCRATIC DAILY (Mar. 25, 2011, 2:30 PM), <http://thedemocraticdaily.com/2011/03/25/happy-birthday-health-reform-supporters-laud-laws-first-anniversary/> (“President Obama signed the law a year ago, which Congress approved after more than a year of acrimonious debate. It remains one of his signature achievements in office, while Republicans have pushed for its repeal.”).

<sup>16</sup> See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>17</sup> See Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). The Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Acts are together referred to as “healthcare reform.” Each Act will be codified Title 42 of the United States Code.

<sup>18</sup> Despite the sometimes vitriolic disagreement about healthcare reform, the founding fathers’ intentions for the three branches to serve as co-equal checks and balances on each other is vibrantly in existence.

<sup>19</sup> See Dana S. Kellis and Jill S. Rumberger, *Healthcare Reform and the Hospital Industry: What Can We Expect?*, J. HEALTHCARE MGMT. (2010), available at <http://www.thefreelibrary.com/Healthcare+reform+and+the+hospital+industry%3A+what+can+we+expect%3F-a0234418412>.

<sup>20</sup> See, e.g., Thomas More Law Center v. Obama, 720 F. Supp. 2d 882, 886 (E.D. Mich. 2010).

<sup>21</sup> See, e.g., DENNIS M. BARRY ET AL., THE IMPACT OF HEALTHCARE REFORM LEGISLATION ON MEDICARE, MEDICAID, AND CHIP, HEALTH L. PRAC. GUIDE HRS § 3:1 (2d ed. 2010).

<sup>22</sup> See generally LAWRENCE E. SINGER, HEALTH REFORM LEGISLATION, 22 ILL. PRAC., THE LAW OF MEDICAL PRACTICE IN ILLINOIS § 38:25 (3d ed. 2011).

The Individual Mandate, a principle integral to healthcare reform,<sup>23</sup> requires all citizens and legal residents to carry health insurance.<sup>24</sup> Beginning after 2013, if an individual violates this requirement, he or she must pay a monthly penalty of \$7.91 per family member (not to exceed \$285 per family).<sup>25</sup> Starting in 2014, individuals who are required to have insurance can either keep employer-based health insurance or benefit from new state exchanges that will be established by each state or by a regional coalition of states.<sup>26</sup> “Health insurance Exchanges are [the Act’s] attempt to address historical flaws in the individual and small-group health insurance markets.”<sup>27</sup> State operated exchanges will be systems through which private insurers provide plans.<sup>28</sup>

Not all individuals are eligible for the exchanges.<sup>29</sup> The self-employed, those who work for employers with less than 100 employees, and individuals who are retired but not eligible for federal insurance programs, can participate in the state exchanges.<sup>30</sup> Health insurance plans will be funneled through these exchanges, allowing for more regulation of health insurance plans, the benefits offered, the cost of the plans, and the extent that private insurers operating in the state exchange can discriminate.<sup>31</sup> States cannot establish the premiums charged to individuals.<sup>32</sup> “The federal government retains authority to establish the certification criteria for the state-based Exchanges, while states are responsible for the actual certification of plans and administration of the Exchanges.”<sup>33</sup> In addition to reforming the health insurance industry through the state exchanges,<sup>34</sup> healthcare reform imposes

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<sup>23</sup> See, e.g., *Federal Judge Rules Against Reform’s Individual Mandate*, 18 No. 4 EMPLOYER’S GUIDE TO SELF-INSURING HEALTH BENEFITS NEWSLETTER 17 (2011).

<sup>24</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1501 124 Stat. 119 (2010). The applicable dollar amount increases to \$350 in 2015, and \$750 in 2016. *Id.* Any such penalty “shall not exceed an amount equal to 300 percent of the applicable dollar amount for the calendar year.” *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., *What a Way to Run Health Care “Reform”, a Complex Series of Mandates Goes in Search of the Relevant Facts*, CHARLESTON DAILY MAIL (Mar. 29, 2011), <http://www.dailymail.com/Opinion/Editorials/2011/03281575>.

<sup>27</sup> See Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Descent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 145 (2011).

<sup>28</sup> See, e.g., Miranda, *Health Care Reform: How Will State Insurance Exchanges Work?*, PERSONAL DIVIDENDS (Mar. 25, 2010), <http://personaldividends.com/money/miranda/health-care-reform-how-will-state-insurance-exchanges-work>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Leonard, *supra* note 27, at 146.

<sup>34</sup> Michael Booth, *Health Exchange in the Works: What Will the Choices Be, and Who Will Shape Them? Much Is Yet to Be Decided in Colorado*, DENVER POST (Dec. 24, 2010, 6:15 AM), available at [http://www.denverpost.com/news/ci\\_16933880](http://www.denverpost.com/news/ci_16933880).

numerous changes to the federal-health-insurance-entitlement programs of Medicare and Medicaid.<sup>35</sup>

In representing the people, the legislative branch, under the influence of the President, ought to cautiously construct and pass legislation. Healthcare reform is the broadest piece of Congressional legislation intended to achieve a sweeping social policy agenda since the Great Society.<sup>36</sup> The Act is “thousands of pages, requiring thousands more regulations written under the authority of Kathleen Sebelius . . . .”<sup>37</sup> The Act is clearly a complex omnibus statutory scheme implicating profound constitutional questions.

Providing a brief sense of other facets of the Act might be helpful in demonstrating the Act’s complexity.<sup>38</sup> The Act focuses general health and welfare of the populous, including, persons with disabilities. To address the epidemic of obesity,<sup>39</sup> the Act imposes national menu-labeling requirements, including, but not limited to, a mandate that nutritional information be conspicuously furnished by establishments that have twenty or more locations.<sup>40</sup> The Act imposes a mandate that the Secretary capture data on health disparities, including as to persons with disabilities.<sup>41</sup> Additionally, the Act exhibits policy experts’ goal in addressing disparities of people with disabilities within the healthcare system by requiring the United States Access Board to develop and then issue, within two years of enactment, guidelines governing the accessibility of medical diagnostic equipment.<sup>42</sup>

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<sup>35</sup> See generally BARRY ET AL., *supra* note 21.

<sup>36</sup> President Jefferson is pleased to learn that, in the mid to late 20th Century, seven Presidents were from the South or the West; the Presidents include, but not limited to, Presidents Johnson and Clinton, who were from states in the old Confederate States of America. President Johnson, a conservative Democrat, would be responsible for advancing comprehensive legislation in a scale not observed since the New Deal: the so-called Great Society. By 1964, President Johnson would call his attempts to have civil rights, as well as general health and welfare measures, passed by this moniker. See U.S. Department of State, *Lyndon Johnson and the Great Society*, UNITED STATES HISTORY, <http://countrystudies.us/united-states/history-121.htm> (last visited Apr. 3, 2012). Because President Johnson had a poor childhood in Texas and served as a teacher for a short while, he knew the difficulty in rising to prominence in American life. His goal through the program would be eliminating poverty. See Joseph A. Califano, *What Obama Can Learn From LBJ*, WASH. POST (Dec. 8, 2011), [http://www.washingtonpost.com/opinions/what-obama-can-learn-from-lbj/2011/12/02/gIQABQfZgO\\_story.html](http://www.washingtonpost.com/opinions/what-obama-can-learn-from-lbj/2011/12/02/gIQABQfZgO_story.html).

<sup>37</sup> Stacey Singer, *One Year Later: Health Battle Boils as Changes Simmer*, PALM BEACH POST, Mar. 23, 2011, at 1A.

<sup>38</sup> See, Byrne *infra* note 155.

<sup>39</sup> While a bookish individual, President Jefferson adhered to the beliefs of the ancient Greeks and Romans of the mind being balanced by the physical exercise of the body. The President encouraged and enjoyed walking and equestrianism. See John R. Bumgarner, *The Health of the Presidents: The 41 United States President Through 1993 from A Physician’s Point of View*, (McFarland & Co. 1994), available at <http://www.doctorzebra.com/prez/g03.htm> (last visited Apr. 3, 2012).

<sup>40</sup> Patient Protection and Affordable Care Act, § 4205(b), 124 Stat. 119, 573-74.

<sup>41</sup> Patient Protection and Affordable Care Act, § 4203, § 3101, 124 Stat. 119, 578-79.

<sup>42</sup> U.S. Architectural and Compliance Board, *Board to Set Standards for Medical Diagnostic Equipment*, 16 No. 2 Access Currents 1 (Mar.-Apr. 2010).

Congress passed, as part of the Act, the Elder Justice Act and the Patient Safety and Abuse Act, both of which are statutory attempts to expand efforts to prevent abuse, neglect, and exploitation of older adults.<sup>43</sup> Because of its omnibus nature, the Act has myriad facets that seek to affect overall healthcare policy.

In 1965, pursuant to its Spending Clause authority, Congress added Title XIX to the Social Security Act, thereby establishing a key component of the Great Society,<sup>44</sup> the Medicaid program.<sup>45</sup> The Medicaid program, also known as medical assistance, constitutes a federal insurance program in which states accept significant funding (to be matched or otherwise supplemented by such states) with the intent of expanding access for the poor to private and public providers. In addition to its role in providing insurance, the government applied the Medicaid program as a means of addressing larger societal concerns, such as reducing infant and maternal mortality. State membership in the Medicaid program is voluntary; each state must submit a state Medicaid plan to the Secretary of the United States Department of Health and Human Services, operating in compliance with that plan as well as the regulatory framework governing Medicaid.<sup>46</sup> If a State does not withdraw from the Medicaid program, while failing to comply with Federal requirements, the Federal Government can impose sanctions, terminate participation, or withhold all or part of a State's Medicaid grant.<sup>47</sup> Since 1965, Congress has frequently amended Medicaid; each time, Congress anticipated that States participating in the program would cooperate with the changes. Likewise, the Act will increase mandates on the states; after January 1, 2014, states are required to provide minimal essential coverage to individuals up to 130% of the poverty level.<sup>48</sup>

Thus, healthcare reform implicates a larger and long-held debate about the proper role of government, including but not limited to, the proper role of governmental regulation.<sup>49</sup> The liberal perspective of the political spectrum, including President Obama, argues that governmental regulation is the logical response to any failure or alleged failure in the private marketplace.<sup>50</sup> The Secretary of the Department of

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<sup>43</sup> *Obama Signs Elder-Abuse Legislation*, 12 No. 21 WEST L. NURSING HOME J. 1 (Apr. 9, 2010).

<sup>44</sup> *See generally supra* note 36.

<sup>45</sup> Social Security Act Amendments of 1965, Pub. L. 89-97, § 121(a), 79 Stat. 286, 343-52.

<sup>46</sup> 42 U.S.C. § 1396a(b).

<sup>47</sup> *See* 42 U.S.C. § 1396c.

<sup>48</sup> *See* Patient Protection and Affordable Care Act, § 2001.

<sup>49</sup> *See, e.g.,* Tamara Lytle, *Health Reform Fuels Fight Over Government's Role*, AOLNEWS (Mar. 31, 2010, 10:44 AM), <http://www.aolnews.com/2010/03/31/health-reform-fuels-fight-over-governments-role/>.

<sup>50</sup> *See, e.g.,* Richard A. Epstein, *Obama's Constitution: The Passive Virtues Writ Large*, 26 CONST. COMMENT. 183, 184 (2010). Some argue that President Obama is:

... in favor of market liberalization on issues like medical marijuana and stem cell research, but otherwise his mindset is quite clear. The defects that we have in the current situation all stem from too little government regulation not from too much. He sees the health care system as one in which private insurance markets have failed; the global warming issue as one in which massive restrictions on emissions are needed; the labor markets as suffering from declining real income because of a want of



Health and Human Services, Kathleen Sebelius, posited that the federal government plays a key role in regulating “the healthcare arena.”<sup>51</sup> Republicans increasingly oppose legislation they perceive as “liberal,” arguing that government has no place to regulate social and commercial relationships.<sup>52</sup> Healthcare reform caused the positive consequence of initiating afresh the study of the United States Constitution by the American public and its leaders.<sup>53</sup> Healthcare reform is notable for its encapsulation of a new progressive federalism, in which power for issues that concomitantly affect the federal government and state government is centralized in the regulatory state.<sup>54</sup> The Act resulted in a continued discussion about the balance of power among the federal government and the states; namely, whether a state can, sometimes based on what has been called an orchestrated “battering ram strategy” by federal leaders within the Tea Party, nullify the directives of the federal government.<sup>55</sup>

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effective union organization; financial markets as failing because of greedy bankers and weak and divided oversight. And so on down the line.

*Id.*

<sup>51</sup> Stacey Singer, *Fight Over Health Act Resumes at Low Boil*, PALM BEACH POST, Jan. 14, 2011, at 1A.

<sup>52</sup> By comparison to the Republicans of today, President Nixon favorably signed sweeping environmental legislation, the National Environmental Protection Act. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2012). Before President Nixon, a larger than life Republican, third-party candidate President Theodore Roosevelt utilized the government to “break up trusts” and to protect the environment. *Theodore Roosevelt*, WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/theodoreroosevelt> (last visited Jan. 31, 2012). By comparison, Chairman Paul Ryan (R-Wis.) has proposed, as part of his 2012 budget plan, to reform Medicare into a block grant voucher program. Dana Bash and Deirdre Walsh, *House GOP Budget to Call for Big Changes to Medicare, Medicaid*, CNN (Apr. 2, 2011), [http://articles.cnn.com/2011-04-02/politics/house.gop.budget\\_1\\_house-gop-budget-medicare-program-voucher-program?\\_s=PM:POLITICS](http://articles.cnn.com/2011-04-02/politics/house.gop.budget_1_house-gop-budget-medicare-program-voucher-program?_s=PM:POLITICS). The Chairman argues that his plan will: protect the longevity of Medicare, a key component of the social safety net; and empower informed-consumers to acquire healthcare services, with some limited role of government, while not bankrupting the United States based on woeful entitlements. *Id.*

<sup>53</sup> See, e.g., Cindy Saine, *New Congress Reads U.S. Constitution, Cuts Its Own Budget*, VOA NEWS (Jan. 6, 2011), <http://www.voanews.com/english/news/usa/-New-Congress-Reads-US-Constitution-Cuts-Its-Own-Budget-113035664.html>. Healthcare Reform is such a novel concept that Congressional representatives actually read and studied the originating compact with the people, the U.S. Constitution. *Id.* Any member of Congress, such as former Speaker Pelosi, who believes that exercise was pointless, should be recalled. *Id.*; see also Leonard, *supra* note 27, at 134.

<sup>54</sup> See, e.g., *Impact of Health Care Overhaul on Medicaid and the States: Hearing Before the H. Energy and Commerce Comm.*, 112th Cong. 1 (2011) (statement of Rep. Fred Upton, Chairman, H. Energy and Commerce Comm.).

<sup>55</sup> Compare Barak Y. Orbach, et al., *Arming States’ Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 ARIZ. L. REV. 1161, 1161 (2010), with Leonard, *supra* note 27, at 113-15.

## III. EXECUTIVE BRANCH

The President is a crafty Prince.<sup>56</sup> President Obama has proven to be pugilistic<sup>57</sup> and pragmatic.<sup>58</sup> The vacillation between the “two Obamas” is often frustrating to his progressive base.<sup>59</sup> Republicans may perceive that, if they nudge sufficiently, President Obama will capitulate.<sup>60</sup> Arguably, they do so at their peril.

An administration has an array of tools to strategically utilize to both shaping and defending its policy agenda. In the age of mass telecommunications, an important tool is the “bully pulpit” of the Executive Office of the President.<sup>61</sup> An important statutory framework that influences the way the regulatory state makes an opaque enactment of Congress into reality is the Administrative Procedure Act.<sup>62</sup> The President can closely monitor<sup>63</sup> and influence the instrumentalities of the federal

<sup>56</sup> See, e.g., Joe Gandelman, *Will the Real Barack Obama Please Stand Up?*, MODERATE VOICE (Apr. 12, 2011), <http://themoderatevoice.com/106481/will-the-real-barack-obama-please-stand-up/>.

<sup>57</sup> See, e.g., Office of the Press Secretary, *Remarks By the President in a Backyard Discussion on Health Care Reform and the Patient’s Bill of Rights*, WHITE HOUSE (Sept. 22, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/09/22/remarks-president-a-backyard-discussion-health-care-reform-and-patients-> (“Well, first of all, I want to see them come and talk to Gail or talk to Dawn or talk to any of you who now have more security as a consequence of this act, and I want them to look you in the eye and say, sorry, Gail, you can’t buy health insurance; or, sorry, little Wes, he’s going to be excluded when it comes to an eye operation that he might have to get in the future. I don’t think that’s what this country stands for. But what they’re also going to have to explain is why would you want to repeal something that Congressional Budget Office says is going to save us a trillion dollars if you’re serious about the deficit? It doesn’t make sense. I mean, it makes sense in terms of politics. It doesn’t—and polls. It doesn’t make sense in terms of actually making people’s lives better.”).

<sup>58</sup> See, e.g., Jane Cowan et al., *Obama Calls for Job-Creating “Sputnik Moment”* (Jan. 26, 2011), <http://www.radioaustralia.net.au/international/2011-01-26/obama-calls-for-jobcreating-sputnik-moment/229742>.

<sup>59</sup> Joe Gandelman, *Quote of the Day on Barack Obama’s Political Tightrope Act*, THE MODERATE VOICE (Apr. 11, 2011), <http://themoderatevoice.com/106390/quote-of-the-day-on-barack-obamas-political-tightrope-act/>.

<sup>60</sup> *Id.*

<sup>61</sup> *American Experience General Article: Did You Know?*, PBS.ORG, <http://www.pbs.org/wgbh/americanexperience/features/general-article/tr-know/> (last visited May 1, 2011).

<sup>62</sup> See generally Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2012).

<sup>63</sup> U.S. CONST. art. II, § 2, cl. 2. President Obama, or any President for that fact, can influence agencies that are subject to the Administrative Procedure Act, through, among other means, the Appointments Clause, Office of Management and Budget that has the ability to review significant rules, and ex parte contacts during informal rulemaking. The text of the Constitution states that the president:

by and with the advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

government in furtherance of his social policy agenda.<sup>64</sup> Another important tool is the Appointments Clause of the United States Constitution.<sup>65</sup> President Obama utilized these tools with varied levels of success in shaping and in defending his social policy agenda.

In November 2010, a new political movement propelled the Republicans into power in the House of Representatives and assisted Republicans to acquire five seats in the United States Senate.<sup>66</sup> Since the “Goldwater revolution” in the early 1960s, which matured with the election of President Reagan, the Republicans shifted dramatically to the right of the political spectrum.<sup>67</sup> Since the New Deal, Democrats have become more liberal. The newfound political movement on the political spectrum’s far right is called the Tea Party.<sup>68</sup>

The movement also has a caucus in Congress.<sup>69</sup> Michelle Bachman is the founder of the House Tea Party caucus, a Republican from Minnesota, and a prior 2012 Presidential candidate.<sup>70</sup> By July 2010, there were twenty-eight members of the caucus—all Republican.<sup>71</sup> The caucus has an anti-government perspective that: (1) government has a limited purview with reduced, even perhaps non-existent, regulation;<sup>72</sup> (2) public employees and their unions are to be eschewed;<sup>73</sup> and (3) the

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*Id.*

<sup>64</sup> Bressman & Thompson, *supra* note 12, at 660.

<sup>65</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>66</sup> Orbach, *supra* note 55, at 1195.

<sup>67</sup> Compare No, *Obama’s Policies Aren’t Those of a Moderate Republican*, ROOTED COSMOPOLITAN.COM, <http://rootedcosmopolitan.wordpress.com/2011/04/26/no-obamas-policies-arent-those-of-a-moderate-republican/> (last visited May 3, 2011), with *American President: A Reference Resource*, MILLERCENTER.ORG, <http://millercenter.org/president/reagan/essays/biography/8> (last visited May 3, 2011).

<sup>68</sup> See *History of the Society of the Cincinnati*, HEREDITARY.US, [http://www.hereditary.us/cin\\_history.htm](http://www.hereditary.us/cin_history.htm) (last visited Apr. 26, 2011). The Order of the Society of the Cincinnati existed during Presidents Adams and Johnson’s time and was a controversial private or public-interest organization. Secretary Knox led the charter of the organization in 1783. *Id.* They inform that the organization would be established as a mechanism for cultivating continued fellowship by the officers of the Continental Army of the United States. *Id.* The Society would also serve as a voice for retired officers in the post-war government, advocating on behalf of members with regard to pensions. *Id.* The Society would be controversial because opinion flourished that its true intent was creating an American aristocracy.

<sup>69</sup> See J.C. Watts, Op-Ed., *Why Is the Tea Party on a Roll?*, LAS VEGAS REV. J., Oct. 3, 2010, available at <http://www.lvrj.com/opinion/why-is-the-tea-party-on-a-roll--104232134.html>. (“Yet, keep in mind that the Tea Party is not Republican, although its supporters will be voting for a large number of GOP candidates this fall. It is an independent, small-government, constitutional movement. Its adherents sincerely believe that all too many elected officials in Washington have evolved from being ‘representatives’ of the people to our dictatorial rulers.”).

<sup>70</sup> See Alex Pareene, *Michelle Bachmann Creates “Tea Party Caucus”*, SALON.COM (Jul. 16, 2010), [http://www.salon.com/2010/07/16/michele\\_bachmann\\_tea\\_party\\_caucus/](http://www.salon.com/2010/07/16/michele_bachmann_tea_party_caucus/).

<sup>71</sup> Orbach, *supra* note 55, at 1195.

<sup>72</sup> Watts, *supra* note 69.

burden of taxes must be reduced, if there is to be renewed economic prosperity.<sup>74</sup> The size of government and the indebtedness of the federal government are chief concerns of the movement and of the caucus.<sup>75</sup> The caucus served as a thorn in President Obama's side, requiring the President to maneuver his agenda in a strategic manner.

While dining, the former Presidents discuss the Tea Party. From what the former Presidents understand, at rallies, organizers disseminate pocket copies of the Constitution; in the fashion of a carnival, people dress in colonial garb; and, speakers demand a return to the Constitution.<sup>76</sup> The Tea Party posits states that it is the guardian of the U.S. Constitution and argues that any piece of legislation passed by Congress, as well as any action of the federal government, must be linked to an authorizing provision.<sup>77</sup> Arguably, it is presumptuous for Tea Party Republicans to crown themselves as the legacy of a controversial event intended at expressing our disgust with the monarchy.<sup>78</sup>

There is a visible difference before the mid-term elections, and afterwards, in President Obama's oratory and willingness for negotiation.<sup>79</sup> Before the election, the administration would aggressively market its achievement, arguing that the average American will benefit from reform.<sup>80</sup> At a backyard event in Northern Virginia, President Obama purposely indicated that the Bush administration, from 2001 to 2009, failed to address the escalating cost of healthcare at the same time that real

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<sup>73</sup> Mona Charen, *Lessons for the U.S. in Greece's National Meltdown*, NAT'L REVIEW ONLINE (May 7, 2010, 12:00 AM), <http://www.nationalreview.com/articles/229705/lessons-u-s-greeces-national-meltdown/mona-charen>.

<sup>74</sup> See Charen, *supra* note 73; see also Watts, *supra* note 69.

<sup>75</sup> Charen, *supra* note 73.

<sup>76</sup> Jared A. Goldstein, Article, *The Tea Party's Constitution*, in symposium, *Popular Constitutionalism*, 88 DENV. U. L. REV. 559, 559 (citing Kate Zernike, *With Tax Day as Theme, Tea Party Groups Demonstrate*, N.Y. Times, Apr. 16, 2010, at A17).

<sup>77</sup> See Chernow, *supra* note 1.

<sup>78</sup> Craig Fehrman, *The Party of Antihistory*, THE BOSTON GLOBE (Oct. 31, 2010), [http://www.boston.com/bostonglobe/ideas/articles/2010/10/31/the\\_party\\_of\\_antihistory/](http://www.boston.com/bostonglobe/ideas/articles/2010/10/31/the_party_of_antihistory/) (providing a critical, but legitimate, view of the erroneous usurpation of history by the Tea Party). "The Tea Party simplifies the Founding Fathers—it turns them into an orderly (and angelic) choir when, in fact, they were a confusing and contradictory group. And Lepore sees this as an error not just of historical fact, but also of historical method." *Id.* Many of the Tea-Party-influenced Republicans, and even Democrats, should recall that public officials and policy movers can disagree without being pugnacious. A common position of the Tea Party is that the President is, somehow, not American or has the devious scheme—even a Marxist scheme—of ruining the United States.

<sup>79</sup> Despite these kind of comments, the Act is arguably not without its flaws. Then again, it is simplistic to fail to recognize its positives. The Presidents do, propound why the Congressional Democrats did not enact law that would not need to be improved.

<sup>79</sup> See Macon Phillips, *What's in the Health Care Bill?*, THE WHITE HOUSE BLOG (Mar. 23, 2010), available at <http://www.whitehouse.gov/blog/2010/03/23/whats-health-care-bill>.

<sup>80</sup> *Id.*

salaries were reduced exponentially by corporations.<sup>81</sup> Utilizing such forums as the State of the Union Address, President Obama strategically heralded himself as the leader willing to negotiate.<sup>82</sup> President Obama stated that government is a “shared responsibility” by both political parties.<sup>83</sup> He also expressed on several occasions that the Act is not perfect, but he is willing to accept ideas and suggestions about a reasonable amendment.<sup>84</sup> Because President Obama seems to believe that healthcare reform is an economic engine for future growth,<sup>85</sup> he will not tolerate its repeal or delayed implementation. While President Obama may demonstrate a conciliatory tone, a Washington lawyer would be imprudent to translate that into the Obama administration shifting away from implementation.<sup>86</sup>

The Presidents agree with the statements of commentator George Will that “[t]he American Revolution was a political, not a social, revolution; it was emancipating individuals for the pursuit of happiness, not about the state allocating wealth and opportunity.”<sup>87</sup> George Will also commented, “[h]ence our exceptional Constitution, which says not what government must do for American but what it cannot do to them.”<sup>88</sup> Implementing healthcare reform is the task of the Department of Health and Human Services and its sub agency, the Centers for Medicare and Medicaid Services (hereinafter HHS and CMS, respectively), all of which are outrageous instrumentalities of government in the caucus’s mind.<sup>89</sup>

In seeking to usurp the Republicans’ position, a range of tools is at the administration’s disposal, including the regulatory process and Executive Orders.<sup>90</sup> A facet of President Obama’s health policy initiative to reimburse for end-of-life planning discussions among providers and beneficiaries, while ultimately withdrawn from the legislative package due to the furor created by Republican legislators and Republican Vice-Presidential candidate Sarah Palin about “death panels,”<sup>91</sup> would be

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<sup>81</sup> See Office of the Press Secretary, *supra* note 57.

<sup>82</sup> COWAN, *supra* note 58.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See Office of the Press Secretary, *supra* note 57.

<sup>86</sup> See generally Bressman & Thompson, *supra* note 12, at 660.

<sup>87</sup> George F. Will, *George Will: 112th Congress Must Restore Legislative Branch’s True Role*, SUN SENTINEL (Jan. 20, 2011), [http://articles.sun-sentinel.com/2011-01-20/news/fl-gwco-l-congress-constitution-will-020110120-14\\_1\\_wariness-of-executive-power-reaction-against-executive-aggrandizement-true-role](http://articles.sun-sentinel.com/2011-01-20/news/fl-gwco-l-congress-constitution-will-020110120-14_1_wariness-of-executive-power-reaction-against-executive-aggrandizement-true-role).

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., Thomas W. Elwood, *Healthcare Reform and Its Aftermath*, 39 J. ALLIED HEALTH 65 (2010).

<sup>90</sup> See generally Ed Hornick, *Abortion Issue Seen as Key to Health Care Reform Package*, CNN.COM (Mar. 22, 2010), [http://articles.cnn.com/2010-03-22/politics/abortion.health.care.vote\\_1\\_offer-abortions-anti-abortion-abortion-issue?\\_s=PM:POLITICS](http://articles.cnn.com/2010-03-22/politics/abortion.health.care.vote_1_offer-abortions-anti-abortion-abortion-issue?_s=PM:POLITICS). For example, there is a concern that healthcare reform would federally fund abortions.

<sup>91</sup> See, e.g., Robert Lowes, *Reimbursement for End-of-Life Counseling Supported by Physicians*, MEDSCAPE NEWS (Dec. 29, 2010), <http://www.medscape.com/viewarticle/734949>; Medicare Program, Amendment to Payment Policies Under the Physician Fee Schedule and

included within regulations promulgated by CMS.<sup>92</sup> Hospice Providers, such as the National Hospice and Palliative Care Association, favorably support the policy.<sup>93</sup> The regulation listed voluntary advance care planning as one of the services that could be offered in the annual wellness visit for Medicare beneficiaries.<sup>94</sup> Furthermore, President Obama signed an Executive Order keeping Hyde restrictions on federal funding of abortions shortly after the enactment of healthcare reform.<sup>95</sup> President Obama signed an Executive Order, in arguable response to the results of the midterm election, requiring “all executive agencies to review ‘rules already on the books to remove outdated regulations that stifle job creation . . .’”<sup>96</sup>

Additionally, healthcare reform provides for the establishment, by no later than January 1, 2012, of a program to promote organizational arrangements called Accountable Care Organizations.<sup>97</sup> The goal is to incentivize providers to improve clinical performance, while controlling cost.<sup>98</sup> The Secretary will, without surprise, have broad discretion to create the regulatory framework for this experiment in healthcare reimbursement based on certain quality measures and a focus towards coordination and continuity of care.<sup>99</sup> Agencies are subject to the Administrative Procedure Act and are consequently often outside of the scope of “dictatorial control” of the Executive Office of the President.<sup>100</sup>

Administrations, including but not limited to President Obama, encountered difficulty in implementing its policy agenda.<sup>101</sup> In *Cohen v. Rice*, the court observed that the President does not constitute an agency for purposes of the Administrative

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Other Revisions to Part B for CY 2011, 76 Fed. Reg. 1366-01 (Jan. 10, 2011) (to be codified at 42 C.F.R. pt. 410).

<sup>92</sup> Lowes, *supra* note 91; Medicare Program, Amendment to Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2011, 76 Fed. Reg. 1366-01; *see also End-of-life Talks Not Supported by Medicare*, LIFE HEALTH PRO (Jan. 18, 2011), <http://www.seniormarketadvisor.com/Exclusives/2011/1/Pages/Endoflife-talks-not-supported-by-Medicare.aspx>.

<sup>93</sup> *See, e.g.,* Stephen Goldfine, *A Sad Retreat for Discussion of Advance Care Directives*, THE TIMES OF TRENTON, Feb. 20, 2011, at A11, *available at* <http://www.nj.com/opinion/times/oped/index.ssf?/base/news-1/1298184307128431.xml&coll=5>.

<sup>94</sup> Lowes, *supra* note 91.

<sup>95</sup> *See* Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (Mar. 24, 2010); *see also* Renee M. Landers, “Tomorrow” May Have Finally Arrived—The Patient Protection and Affordable Care Act: A Necessary First Step Towards Health Care Equity in the United States, 6 J. HEALTH & BIOMEDICAL L. 65, 77-78 (2010).

<sup>96</sup> Barack Obama, *Toward a 21st Century Regulatory System*, WALL STREET J., Jan. 18, 2011, *available at* <http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html>.

<sup>97</sup> BARRY ET AL., *supra* note 21.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See* 5 U.S.C. § 551(1) (2012); *see also* Franklin v. Mass., 505 U.S. 788 (1992) (holding that the U.S. President is not an agency under the Administrative Procedure Act).

<sup>101</sup> Bressman & Thompson, *supra* note 12, at 664.

Procedure Act.<sup>102</sup> Presidents have increasingly resorted to senior advisors within the White House who may not need to endure the confirmation process.<sup>103</sup>

President Obama sought the unprecedented centralization of policy formulation within the White House through “Czars.”<sup>104</sup> These high-level White House senior advisors are “outside the normal cabinet structure” and are not subject to the scrutiny of Congress, such as Senate confirmation hearings.<sup>105</sup> President Obama employed a former Administrator of CMS<sup>106</sup> as the so-called Czar of healthcare reform.<sup>107</sup> The position installed by the White House was called Counselor to the President and Director of White House Office of Health Reform.<sup>108</sup> President Obama has, to the Republicans’ dismay, employed Czars in many other policy portfolios.<sup>109</sup>

On the West Wing, President Jed Bartlett devolves much of the responsibility for policy formulation and implementation on a coterie of senior advisors.<sup>110</sup> In a television show, devolving this level of responsibility is sensible. In reality this is a different issue. According to Republicans, centralizing this level of power in the President is seemingly afoul of the checks and balances system created by the founding generation of the co-equal branches of government. Republicans believe

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<sup>102</sup> *Cohen v. Rice*, 800 F. Supp. 1006 (D. Maine 1992).

<sup>103</sup> *See generally* BRADLEY H. PATTERSON, *THE RING OF POWER: THE WHITE HOUSE STAFF AND ITS EXPANDING ROLE IN GOVERNMENT* (Basic Books 1988).

<sup>104</sup> Bressman & Thompson, *supra* note 12, at 660.

<sup>105</sup> Lanora C. Pettit, Note, *Cincinnatus, Or Caesar: American Tsars and the Appointments Clause*, 26 J. L. & POL. 81, 81-82, 84 (Fall 2010).

<sup>106</sup> Czar Nancy-Ann DeParle is now serving as Deputy Chief of Staff. *White House Staff*, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/staff> (last visited Feb. 1, 2012). The former Administrator focused more on the clients served by the agency—beneficiaries—than any Administrator since her tenure did. It most assuredly upset pro-business factions.

<sup>107</sup> Bressman & Thompson, *supra* note 12, at 664.

<sup>108</sup> Pettit, *supra* note 105, at 90.

<sup>109</sup> *See, e.g.*, Gary Miller, *House Passes End-Year Continuing Resolution*, CAPITAL CONNECTION NEWSLETTER (Apr. 15, 2011), [http://garymiller.house.gov/UploadedFiles/Capitol\\_Connection\\_April\\_15\\_2011.pdf](http://garymiller.house.gov/UploadedFiles/Capitol_Connection_April_15_2011.pdf).

<sup>110</sup> *See, e.g.*, L. Anthony Sutin, Symposium Article, *The Presidential Powers of Josiah Bartlet*, 28 N. KENTUCKY L. REV. 560 (2001). L. Anthony Sutin stated in a symposium article,

Needless to say, *The West Wing* is fiction, created principally by Hollywood writer Aaron Sorkin. Despite the input of veterans of actual West Wing tours of duty and the fervent efforts of viewers to deduce the real-life inspirations for some of the characters, it remains fiction. In Mr. Sorkin’s words, “the appearance of reality is more important than reality.” Perhaps farthest from life is President Josiah Bartlet himself, a former three-term member of the U.S. House of Representatives, two-term Governor of New Hampshire, and Nobel laureate in economics. Bartlet’s farfetched persona (aggregating “Ronald Reagan’s charisma, Woodrow Wilson’s intellect, and the libido of Socks, the Clintons’ neutered cat”) led one reviewer to conclude that “such a man is too good to get elected, too good indeed to live.”

*Id.*

this emerging “shadow government” to be controversial, and perhaps even unconstitutional.<sup>111</sup>

An agency, independent in nature and titled the Independent Payment Advisory Board (hereinafter “Board”), is created by healthcare reform.<sup>112</sup> Certainly, advisory payment bodies within HHS are not new. In 1997, Congress established the Medicare Payment Advisory Commission to provide annual reports counseling on Medicare reimbursement issues.<sup>113</sup> The Commission has only advisory capabilities, lacking consequential authority to bully Congress into enacting positive legislation to reduce the tempo of federal healthcare insurance expenditures.<sup>114</sup> As with myriad facets of healthcare reform, “[t]he provision establishing the [B]oard is extremely lengthy and complex and requires a detailed analysis to understand its full impact.”<sup>115</sup> The Board’s purpose is to ensure that the growth in federal healthcare insurance expenditure is capped below the rate of inflation.<sup>116</sup> Under healthcare reform, the Board, a fifteen-member body,<sup>117</sup> will do this momentous task by formulating recommendations on healthcare reimbursement.<sup>118</sup> If Congress fails to supersede with positive legislation, the recommendations will be in effect as though they constitute substantive legislative enactment or agency regulation.<sup>119</sup> In addition, “[b]eginning no later than 2015, and at least once every two years thereafter,” healthcare reform also requires the Board to submit recommendations to the President and to Congress as a means to reduce national health expenditures “while preserving or enhancing quality.”<sup>120</sup>

As Republicans have argued, the Board is an expanded Medicare Payment Advisory commission<sup>121</sup> whose focus is the attempted shift of power from Congress to the executive branch.<sup>122</sup> The Board arguably constitutes an “unelected” body of “unaccountable individuals” with the unbridled purview to control federal healthcare reimbursement policy.<sup>123</sup>

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<sup>111</sup> Pettit, *supra* note 105, at 81, 91.

<sup>112</sup> See Patient Protection and Affordable Care Act; Elder Justice Act of 2010, Pub. L. No. 111-148, § 3403(a)(1), 124 Stat. 119 (2010) (codified at 42 U.S.C. § 1395kk).

<sup>113</sup> 42 U.S.C. § 1395 (2012).

<sup>114</sup> Michael H. Cook, Note And Comment, *Independent Advisory Payment Board: Part of the Solution for Bending the Cost Curve?*, 4 J. HEALTH & LIFE SCI. L. 102, 104 (Fall 2010).

<sup>115</sup> *Id.* at 105.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 117.

<sup>118</sup> *Id.* at 119-20.

<sup>119</sup> *Id.* at 111-13.

<sup>120</sup> *Id.* at 114 (citing Patient Protection and Affordable Care Act; Elder Justice Act of 2010, Pub. L. No. 111-148, §10,320(a)(5), 124 Stat. 119 (2010) (codified at 42 U.S.C. §1395kk)).

<sup>121</sup> Cook, *supra* note 114, at 104, 118.

<sup>122</sup> See Health Care Bureaucrats Elimination Act, 112th Cong. § 668 (2011).

<sup>123</sup> See, e.g., *Health Groups Rise Against Panel*, POLITICO, [http://www.politico.com/news/stories/0111/48166\\_Page 2.html](http://www.politico.com/news/stories/0111/48166_Page 2.html) (last visited Feb. 2, 2012).



Another tactic applied by the administration in fulfillment of its policy agenda is the appointments process. The U.S. Constitution provides that the President will appoint principal officers that the Senate has a chance to furnish “advice and consent.”<sup>124</sup> The Constitution provides for an exception: recess appointments.<sup>125</sup> President Obama appointed Dr. Donald C. Berwick as the Administrator of CMS—the single most individual who will lead the promulgation and implementation of the Act’s regulations.<sup>126</sup> By appointing Dr. Berwick through the recess appointment process, President Obama obviated his choice from proceeding through the Senate’s slow confirmation process.<sup>127</sup>

According to Republicans, the recess appointment circumvented the constitutional process and prevented them the Senate from questioning Dr. Berwick on his background and views.<sup>128</sup> The Administrator will be in office without a Senate confirmation hearing, serving in good tenure of office until the next session of Congress.<sup>129</sup> Republicans vociferously objected to the recess appointment, arguing that because of the President’s usurping move, the Senate is unable to openly hear controversial views of the appointment.<sup>130</sup> Even the Chair of the Senate Finance Committee, a Democrat, expressed concerns about resorting to the recess appointments process.<sup>131</sup> Delaying tactics in the Senate is the reason for appointment in this manner as the Act requires quick implementation and, therefore, needs a talented and experienced hand at the helm.<sup>132</sup> At the same time of the Administrator’s appointment, President Obama also resorted to the recess appointments process of two governmental officials, “Philip E. Coyle III as associate director for national security and international affairs at the White House Office of Science and Technology Policy” and “Joshua Gotbaum as director of the Pension Benefit Guaranty Corporation.”<sup>133</sup> While Presidents are legally within their purview to exercise this exception, doing so creates controversy.<sup>134</sup>

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<sup>124</sup> U.S. Const. art II, § 2, cl. 2.

<sup>125</sup> U.S. Const. art II, § 2, cl. 3.

<sup>126</sup> Robert Pear, *Confirmation Flight on Health Chief*, N.Y. TIMES, available at [http://www.politico.com/news/stories/0111/48166\\_Page2.html](http://www.politico.com/news/stories/0111/48166_Page2.html) (last visited Feb. 1, 2012).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Carol Eisenberg & John Reichard, *Dr. Berwick Gets the Treatment*, CQ WEEKLY (Mar. 12, 2011), <http://barnstablesewers.wordpress.com/2011/03/17/have-a-happy-healthy-st-patrick-s-day/>.

<sup>130</sup> *Groups Implore President to Push for Berwick Senate Confirmation Hearings*, 14 INSIDE CMS 7 (Mar. 31, 2011).

<sup>131</sup> Erica Werner, *Obama Bypasses Senate for New Medicare Chief*, THE SEATTLE TIMES (July 7, 2010), available at [http://seattletimes.nwsources.com/html/business/technology/2012297730\\_apusobamahealthcareappointment.html](http://seattletimes.nwsources.com/html/business/technology/2012297730_apusobamahealthcareappointment.html).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> See Anne Joseph O’Connell, *Vacancy Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 930-31 (July 2009).

Regardless of the pros or cons of his credentials and impressive career, the reality was that Dr. Berwick would not be confirmed.<sup>135</sup> Consequently, the Administrator resigned his office. President Jefferson expressed that, except for circumstances like the Louisiana Purchase, where an activist role of government can help expand national territory, and therefore opportunities of free citizens to increase their liberties, expansive measures like healthcare reform should be nugatory.<sup>136</sup> The former President recounted that, by the time his second term started in March 1805, he decreased the size of government and undertook steps to extinguish national debt.<sup>137</sup> President Jefferson admonished his dining companions that governments always tenaciously expand, thereby inhibiting the liberties of the people.<sup>138</sup>

President Adams disagreed with his colleague. If managed by moral and meritorious leaders, government, whether in its state or federal instrumentalities, can be a force for the positive good.<sup>139</sup> President Adams referenced, for instance, his support of a bill in Congress to provide for healthcare services to soldiers and sailors that served in the Revolutionary War.<sup>140</sup> Likewise, the federal instrumentality of government has a clear role in protecting the people from mobs of the clamorous, unschooled, and villainous.<sup>141</sup> President Adams argued that the Tea Party fails to remember that a motivating factor in creating the Constitution was to address the weaknesses in the Articles of Confederacy; the Articles failed to meet the needs of a burgeoning populous, including its socio-economic commerce.<sup>142</sup>

The Washington lawyer recounted to the two former Presidents that, in his undergraduate studies, a history professor once expressed the inquiry: how did the United States regress from President George Washington to President George Bush?<sup>143</sup> When President Washington died in 1799, Americans bemoaned his

<sup>135</sup> Eisenburg & Reichard, *supra* note 129.

<sup>136</sup> See, e.g., Letter from President Jefferson to Thomas Cooper Washington (Nov. 29, 1802), *available at* <http://www.let.rug.nl/usa/P/tj3/writings/brf/jeff148.htm> (last visited Apr. 1, 2012) (“If we can prevent the government from wasting the labors of the people, under the pretence of taking care of them, they must become happy.”).

<sup>137</sup> See *Jefferson Presidency*, SHMOOP.COM, <http://www.shmoop.com/jefferson-presidency/> (last visited Apr. 1, 2012).

<sup>138</sup> *Id.*

<sup>139</sup> “I must study Politicks and War that my sons may have liberty to study Mathematics and Philosophy. My sons ought to study Mathematics and Philosophy, Geography, natural History, Naval Architecture, navigation, Commerce and Agriculture, in order to give their Children a right to study Painting, Poetry, Music, Architecture, Statuary, Tapestry and Porcelain.” Letter from John Adams to Abigail Adams (May 12, 1780), *available at* <http://www.masshist.org/adams/quotes.cfm> (last visited Apr. 5, 2012).

<sup>140</sup> See Jacob Sloan, *How Congress Created Socialized Medicine—In 1798* (Feb. 11, 2011), <http://www.disinfo.com/2011/02/how-congress-created-socialized-medicine-in-1798/> (last visited Apr. 5, 2012).

<sup>141</sup> *The Alien and Sedition Acts*, CONSTITUTIONAL RIGHTS FOUNDATION, <http://www.crf-usa.org/america-responds-to-terrorism/the-alien-and-sedition-acts.html> (last visited Apr. 6, 2012).

<sup>142</sup> *Id.*

<sup>143</sup> Professor Edward A. Hass, a Chair of the History Department at Wright State University in Dayton, Ohio, posed the question to his students. See *History Department*,

passing.<sup>144</sup> Because of his charismatic presence and ability to lead a struggling army, and, then, burgeoning republic, he lived “[f]irst in war, first in peace, first in the hearts of his countrymen.”<sup>145</sup> By comparison, when President Bush departed the White House, metrics indicated that the public viewed his leadership with 56% to 76% negative ratings.<sup>146</sup> In an ever-divided republic, President Obama’s performance rating is as poor as that of President George H. W. Bush, perhaps worst.<sup>147</sup> Healthcare reform and the controversy it ignited is clearly one of the rating’s causes.

#### IV. CONGRESS

Lawyers have an important role within the legislative branch, either as representatives, staff persons, or lobbyists.<sup>148</sup> Regardless of political party, providing substantive contributions to the debate on any social policy issue, including within the legislative context, is a critical role of lawyers.<sup>149</sup> While President Obama and his lieutenants in the Democratic Party are ostensibly dueling their foes—namely the Republican controlled Congress—leaders sitting on both sides of the aisle should recall that the founding generation intentionally created a divided government as a means of fostering inter-branch tension and counterbalancing. The founding generation constituted “apostles of Montesquieu theory of the separation of powers .

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WRIGHT STATE UNIV., [http://www.wright.edu/cola/Dept/hst/e\\_haas.htm](http://www.wright.edu/cola/Dept/hst/e_haas.htm) (last visited Apr. 8, 2012). The comment stems from the Author’s memory.

<sup>144</sup> Will Lester, *Poles Reveal Favorite U.S. Presidents Washington Was First in Office But Is Sixth, Seventh in Popularity*, Akron Beacon J., Feb. 21, 2005, at A1.

<sup>145</sup> *Id.*

<sup>146</sup> See Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 715, 720 (Feb. 2012).

<sup>147</sup> See, e.g., Transcript of CNN: The Situation Room, *Healthcare Reform Debate; Obama and Congress’ Ratings; High Energy on Healthcare; Countdown to the Big Day* (Mar. 19, 2010), available at <http://transcripts.cnn.com/TRANSCRIPTS/1003/19/sitroom.03.html>.

<sup>148</sup> See, e.g., Kevin Hopkins, *The Politics of Lawyer Misconduct: Rethinking How We Regulate Lawyer-Politicians*, 57 RUTGERS L. REV. 839, 842-43 (Spring 2005). Although most state and federal politicians are not lawyers,

... there has always been a close relationship between law and politics. Throughout American history, the legal profession has played an important role in the lives and careers of many politicians. Law schools have become the training grounds for many of the nation’s leaders. While not a requirement for fulfilling the responsibilities of public office, a law degree is an attractive asset for politicians seeking federal and state elected offices and cabinet positions. Today, more attorneys run for and hold public office than members of any other profession. During the past decade alone, lawyers have held the governorships in approximately two-thirds of the states, and twenty-five out of forty-two U.S. presidents have been lawyers. Even at the state level, more legislators are selected from the ranks of lawyers than from any other profession. Lawyer-politicians and dual practitioners confront interesting predicaments for purposes of professional regulation for conduct occurring outside the practice of law.

*Id.*

<sup>149</sup> There is an argument, though unpersuasive in nature, that there are too many lawyers in the legislative branch. Gosta Lovgren, *A Constitutional Amendment Banning Lawyers from Public Office*, THE ETHICAL SPECTACLE (July 1997), <http://www.spectacle.org/797/gosta.html>.

. . .<sup>150</sup> As one author pens in his review on Congressional power, “[i]n many situations, the Constitution does not dictate a stable allocation of decision-making authority; rather, it fosters the ability of the branches to engage in continual contestation for that authority.”<sup>151</sup> Any attempt at finding and implementing the public good will only be achieved through the expression of a multiplicity of voices and perspectives vying against each other.<sup>152</sup> A noisy and clamorous debate is part of that exchange of ideas and construction of public policy. In participating in this process, each of the branches must possess the capacity to advance their position and the wisdom to do so in a judicious manner, as not to erode public confidence and support.<sup>153</sup> All of the dinner companions agreed that, “[a] judicious use of power is one that inspires public trust and confidence in the institution wielding it.”<sup>154</sup>

The Washington Lawyer expressed his frustration about the monolithic way in which public officials and newspaper authors, from the conservative bent, discuss healthcare reform.<sup>155</sup> The former Presidents commented that modern discourse is not engaged with the level of learning and style of our generation in which opinion pieces evidenced a study of the classics, the past, and social science.<sup>156</sup> As such, from both sides of the aisle, Washington lawyer-legislators, while strategically advancing or endeavoring to advance their positions, failed to serve as lawyer-political leaders in the social issue of the current era: healthcare reform.<sup>157</sup>

Combating the villainy of President Obama’s expansive social agenda, namely “Obama care,” would be reason for a Republican victory.<sup>158</sup> Representative Steve King of Iowa stated that he is obligated to defeat this unsustainable piece of social legislation.<sup>159</sup> “The Republican wins surpassed their sweep in 1994, when President

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<sup>150</sup> See Joyce Lee Malcolm, *Whatever the Judges Say It Is? The Founders and Judicial Review*, 26 J. L. & POLITICS 2 (Fall 2010).

<sup>151</sup> See Chafetz, *supra* note 146, at 769.

<sup>152</sup> *Id.* at 772.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> See Dennis Byrne, *The Imagination Goes Wild: Paying for the Healthcare of the Irresponsible*, Chicago Tribune, Apr. 3, 2012, at 21, available at [http://articles.chicagotribune.com/2012-04-03/news/ct-oped-0403-byrne-20120403\\_1\\_obamacare-advocates-obamacare-mandate-health-care](http://articles.chicagotribune.com/2012-04-03/news/ct-oped-0403-byrne-20120403_1_obamacare-advocates-obamacare-mandate-health-care).

<sup>156</sup> See, e.g., Jerry Hicks, *A Few Words to, and from, the Wise* by William Bennett, L.A. Times, Oct. 11, 1997, at 1, available at <http://articles.latimes.com/1997/oct/11/local/me-41565>.

<sup>157</sup> See, e.g., Eugene Robinson, *National View: Political Gamesmanship Trumps Common Sense*, DULUTH NEWS TRIBUNE (Apr. 10, 2011), <http://topics.areavoices.com/2011/04/09/national-view-political-gamesmanship-trumps-common-sense/> (“In political terms, who has the most to lose from this appalling brinksmanship over a federal government shutdown? House Speaker John Boehner? President Obama? Senate Democrats? Tea Party Republicans? The clear answer is all of the above, plus American democracy itself.”).

<sup>158</sup> See, e.g., *Affordable Care Act Under Siege as It Celebrates Its First Birthday*, THE ALTER GROUP (Mar. 30, 2011), <http://www.altergroup.com/alter-care-blog/index.php/healthcare/affordable-care-act-under-siege-as-it-celebrates-its-1st-birthday/> (last visited Feb. 2, 2012).

<sup>159</sup> *Id.*

Bill Clinton's Democrats lost 54 House seats, and was the biggest shift in power since Democrats lost 75 House seats in 1948."<sup>160</sup> Republicans, even leaders within the party, who historically leaned toward bipartisan legislation, argue that the Act is a "government takeover" where "unelected, unaccountable bureaucrats" intrude into the relationship among Providers and patients.<sup>161</sup> Democrats, however, control the Senate.<sup>162</sup>

In as much as there is a legitimate concern about the debt of the United States government, the caucus has a fringe-like nature akin to the No-Nothing Party of the 1850s.<sup>163</sup> Should this caucus wish to remain in power or even acquire more seats within both chambers of Congress during the 2012 election, it must continuously demonstrate that it can obstruct the President's social policy agenda.<sup>164</sup> Leaders should strive mightily for their position while retaining a course of conduct and relationships as to allow them to dine as colleagues.

The caucus can apply, and has persistently sought to apply, the following set of strategies to achieve its goal: (1) repeal, in whole or in part, healthcare reform;<sup>165</sup> (2) utilize the power of Congress's purse to ensure healthcare reform is defunded;<sup>166</sup> or (3) if necessary, close the government.<sup>167</sup> Moreover, when Republicans assumed control of the House, they expanded the "pay-as-you-go" rule that requires new

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<sup>160</sup> See *Republicans Capture House in Historic Wave, Claim "Mandate" to Shrink Government*, FOXNEWS.COM (Nov. 3, 2010), <http://www.foxnews.com/politics/2010/11/03/republicans-capture-house-historic-wave-make-gains-senate/> (last visited May 28, 2012).

<sup>161</sup> See, e.g., Press Release, Cornyn, Hatch Renew Efforts to Give Consumers More Control in Health Care Decisions (Mar. 29, 2011), *available at* <http://hatch.senate.gov/public/index.cfm/releases?ID=0ecc8d4f-75ab-419d-82ab-de64e7eeddfd>.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* The No-Nothings movement, and even a political party called the American Native Party, espoused anti-immigrant sentiments. See Traci Siegler et al., *The No Nothings*, TEACHING AM. HISTORY IN MD., <http://teachingamericanhistorymd.net/000001/000000/000065/html/t65.html> (last visited Apr. 3, 2012). In the mid-19th century, Irish and other Roman Catholics, who would swell population rates in large urban centers, were the immigrants disliked by the nativist movement. Millard Fillmore, a President of the United States, is an individual who campaigned for President under the flag of the movement. *Id.* Considering the debate about the citizenship of President Obama, it is interesting to know that the American Native Party sought a twenty-five year restriction of residency before a petitioner could obtain citizenship. *Id.* The movement is an example of one of the occasional third political movements or parties who will arise from time to time in American history during times of flux and change.

<sup>164</sup> See, e.g., Bill Steiden, *Parties Just Getting Started*, ATLANTA J. CONST., May 1, 2011, at 4A.

<sup>165</sup> See, e.g., *1099 Repeal Marks 1st Big Change to Health Reform as Uncertainties Loom*, FDA WK. (Feb. 4, 2011), *available at* <http://healthpolicynewsstand.com/FDA-Week/FDA-Week-02/04/2011/menu-id-315.html>.

<sup>166</sup> *Id.*

<sup>167</sup> See, e.g., David Badash, *Shutdown Looming, Top House Tea Party, GOP Reps Head to Religious Convention*, NEW CIVIL RIGHTS MOVEMENT (Apr. 8, 2011), [http://thenewcivilrights\\_movement.com/shutdown-looming-top-house-tea-party-gop-reps-head-to-religious-convention/politics/2011/04/08/18569](http://thenewcivilrights_movement.com/shutdown-looming-top-house-tea-party-gop-reps-head-to-religious-convention/politics/2011/04/08/18569).

spending to be offset from a ten-year projection to one-year, five-year, and ten-year projections.<sup>168</sup> Unsurprisingly, the rule provides an exception for repealing or modifying healthcare reform.<sup>169</sup> Republicans will also likely resort to the appropriations process, seeking to reduce or restrict funding of the Department of Health and Human Services (HHS), the Department of Labor, and the Internal Revenue Service (IRS), all of which are concerned with implementation.<sup>170</sup> Republicans will concomitantly seek “targeted repeals, administrative oversight, and new legislative initiatives.”<sup>171</sup>

In January 2011, the House of Representatives controlled by Republicans passed legislation purporting to repeal healthcare reform.<sup>172</sup> What is the practical value of enacting legislation that would be laid on the table in the democratically controlled Senate? The House Republicans must adhere to the mandate to derail the “liberal agenda” of President Obama and the Democratic Party.<sup>173</sup> Passing the repeal bill has the strategic effect of either marking individual Democrats in vulnerable districts as supporters of Obama-care, or placing the responsibility with Democrats to counter their own legislative measures.<sup>174</sup> Congressional Democrats have followed the lead of the Obama administration’s attempt to preempt the Republicans’ argument about healthcare reform.

The administration attempted to portray itself as dedicated to improving healthcare reform. Frustrating to the liberal base, President Obama’s volition to accommodate the other side was most evident in the enactment of the legislation itself; specifically, the public option was cast aside.<sup>175</sup> On limited circumstances, the

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<sup>168</sup> Joyce Cowan & Stephen Bloom, *2011: Healthcare Policy in the New Congress*, MORGAN, LEWIS & BOCKIUS LLP (Jan. 7, 2011), [http://www.morganlewis.com/pubs/FDA\\_LF\\_HealthcarePolicyinNewCongress\\_07jan11.pdf](http://www.morganlewis.com/pubs/FDA_LF_HealthcarePolicyinNewCongress_07jan11.pdf).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> H.R. Res. 2, 112th Cong. (2011).

<sup>173</sup> See, e.g., Transcript of Rep. Joe L. Barton, R. Texas on FBN (Nov. 1, 2011), available at <http://trove.nla.gov.au/work/158495482>.

<sup>174</sup> *Obama Care Unravels, House Votes to Repeal*, IND. BUS. DAILY (Jan. 20, 2011, 8:11 PM), <http://news.investors.com/Article/560296/201101192011/Reform-Unravels.htm>. North Carolina Representatives Heath Shuler and Larry Kissell are both “from conservative districts, both voted against ObamaCare last year, yet both voted against repeal this time.” *Id.* GOP challengers will target the representatives “on this issue in 2012 . . . [and] will do the same to all others who look unprincipled in their straying.” *Id.*

<sup>175</sup> Carolyn Wiede, *A General Semantics Approach to Health Care Reform, Or, Looking for a Cure to My IFD*, ETC.: A REVIEW OF GENERAL SEMANTICS (2010), available at [http://findarticles.com/p/articles/mi\\_hb6405/is\\_3\\_67/ai\\_n57000679/](http://findarticles.com/p/articles/mi_hb6405/is_3_67/ai_n57000679/). Reform policy only made slight changes in the health-care system by mandating coverage. *Id.* It continues “to posit privatized insurance as the solution to the problem of the exorbitant price of health care; insurance companies will continue to sell insurance as a differentiated product with the government now enforcing legislation mandating coverage.” This ignores the central question in reform: whether health insurance actually promotes good health care. *Id.*

administration has been willing to seek repeal of singular provisions.<sup>176</sup> In addition, it quickly capitulated to Republicans on other provisions or their implementation.<sup>177</sup> For example, Congress provided within healthcare reform certain tax generating provisions, including an amendment to Section 6401 of the Internal Revenue Code, which requires that after December 31, 2011, all businesses must file an information return (1099 form) when payments to a single payee equaled \$600 or more.<sup>178</sup> Democrats would co-sponsor and support the passage of the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2010.<sup>179</sup> Specifically, Michigan Democrat and Senator Debbie Stabenow would lead the Senate, offering the bill as an amendment to the reauthorization of the Federal Aviation Administration.<sup>180</sup> Private interest organizations, including but not limited to the United States Chamber of Commerce, advocated this repeal.<sup>181</sup> CBO “. . . estimated that repealing the policy would cost roughly \$17 billion in lost revenue, which Stabenow’s amendment would offset . . . by directing the White House budget office to find \$44 billion in appropriated discretionary funds.”<sup>182</sup> Furthermore, President Obama signed the bill.

The Republicans seem to view their role as a counterpoise to the Obama administration’s outlandish spending, even if that requires closing the federal government.<sup>183</sup> Under the Anti-Deficiency Act, the federal government cannot operate without funding.<sup>184</sup> The purpose of the Act is twofold: (1) to address the issue of executive branch officials requiring funds before Congress has appropriated such funds; and (2) to insulate Congress from the difficult position of either appropriating those funds after the fact or not appropriating those funds and causing

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<sup>176</sup> See Richard Rubin, *Obama Signs Law Repealing Business Tax Reporting Mandate*, BLOOMBERG (Apr. 14, 2011, 6:01 PM), <http://www.bloomberg.com/news/2011-04-14/obama-signs-law-repealing-business-tax-reporting-mandate-1-.html>.

<sup>177</sup> A recent example is the controversy that arose with respect to faith based organizations and certain family planning services. See generally Molly K. Hooper, *Dem Reveals Abortion in Planned Parenthood Funding Debate*, THE HILL (Feb. 18, 2011), <http://thehill.com/blogs/blog-briefing-room/news/145019-planned-parenthood-debate-gets-personal-as-lawmaker-tells-of-her-abortion>.

<sup>178</sup> See, e.g., Tom Flynn, *1099 Reporting Changes from New Health Care Tax Legislation (PPAC): Patient Protection And Affordable Care Act*, LAVANTE (May 29, 2010), <http://www.lavante.com/the-hub/ap-industry/1099-reporting-changes-from-new-health-care-tax-legislation-ppac-patient-protection-and-affordable-care-act/>.

<sup>179</sup> See, e.g., Christine Gramaldi, *Senate Passes Provision to Repeal Form 1099 Reporting Rules*, ACCOUNTING AND TAX TIPS (Feb. 5, 2011), <http://mastertype.blogspot.com/2011/02/senate-passes-provision-to-repeal-form.html>.

<sup>180</sup> *Id.*

<sup>181</sup> See, e.g., FDA, *supra* note 165.

<sup>182</sup> *Id.*

<sup>183</sup> Chernow, *supra* note 1.

<sup>184</sup> 31 U.S.C.S. § 1341(a)(1)(A) (2012). The Act is based on the Constitutional prohibition that no money shall be drawn from the treasury, but in consequence of lawful appropriations. U.S. CONST. art. I, § 9, cl. 7.

the federal government to default.<sup>185</sup> Arguably, the caucus and Democrats acquired notable coverage of their dueling positions through the shutdown that almost occurred on Friday, April 8, 2011.<sup>186</sup> Another strategy that the Republicans can employ, is delaying the installation of federal judges nominated by President Obama.<sup>187</sup>

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<sup>185</sup> *Aircraft Co. v. Dalton*, 126 F.3d 1442 (Fed. Cir. 1997), *cert. denied*, 525 U.S. 818 (1998).

<sup>186</sup> See, e.g., Carl Hulse, *No Accord in Budget Talks as Policy Fights Hamper Deal*, N.Y. Times, April 7, 2011, available at <http://www.nytimes.com/2011/04/08/us/politics/08congress.html>. If the size of the federal instrumentality of government and governmental spending was an issue in the time of the former Presidents, then one need not comprehend why this issue was especially present in 1996 and on April 8, 2011, in which public officials in Congress and in the Immediate Office of the President combated budgetary concerns. *Id.* In 1996, a shutdown occurred; a shutdown of the federal government almost occurred on April 8, 2011 because Congressional leaders and the White House could not agree on a budget. Democrats, who controlled Congress through November 2010, failed to pass a budget, thereby requiring the government to operate on a continuing budget resolution. See, e.g., American Association for Justice, *House Open Amendment Process Threatens Surprise Debates*, 47 Trial 48, 48 (May 2011). Under the Anti-deficiency Act, the government cannot operate without a budget. The government has a debt ceiling of more than 14 trillion that the federal government cannot violate without Congressional action; it was reached in May, 2011, requiring administration officials and Congressional officials to arrive at a compromised sealing increase. See Jeanne Sahadi, *Treasury Reaffirms Aug. 2 Debt Ceiling Deadline*, CNNMoney (July 1, 2011), [http://money.cnn.com/2011/07/01/news/economy/debt\\_ceiling\\_deadline/index.htm](http://money.cnn.com/2011/07/01/news/economy/debt_ceiling_deadline/index.htm).

<sup>187</sup> Bruce Moyer, *Column, Washington Watch: Will the Pace of Judicial Nominations Pick Up?*, FED. BAR ASS'N, <http://www.fedbar.org/Advocacy/Washington-Watch/WW-Archives/2010/MarchApril-2010.aspx> (last visited Feb. 1, 2012). Bruce Moyer, columnist for the Federal Bar Association, noted that:

[t]he power to nominate federal judges is one of the greatest prizes of the presidency, legal analyst Jeffrey Toobin commented recently in *The New Yorker*. And execution of that power, or so the conventional thinking goes, is sweetened when the President's party also controls the Senate, which constitutionally must "advise and consent" upon the appointment of all judicial nominees. Since assuming office, President Obama has nominated 33 candidates for district judgeships, and the Senate has approved 11 of them. He has nominated 15 candidates for circuit courts and has won approval of six. At the same point in his presidency, George W. Bush had secured Senate confirmation of more than five times as many district judges and almost three times as many appeals judges; in a comparable period since taking office, Bush won Senate approval for 61 district court nominees and 15 appeals court nominees. Out of 854 appeals and district judgeships in the federal judiciary, 103 currently are vacant: 19 of the 179 appellate court judgeships are empty, and 84 of the 675 district judgeships (more than 10 percent) are waiting to be filled. According to the Administrative Conference of the U.S. Courts, 30 of those vacancies constitute "judicial emergencies." At least another 21 district judges have announced their intent to resign, acquire senior status, or retire before the end of this year. Clearly, if the growing number of judicial vacancies is not filled soon, the swift dispensation of justice by our federal courts will take a hit.

*Id.*



The Congressional Budget Office is among an array of Congressional agencies, and public officials should be aware of it.<sup>188</sup> The Speaker of the House and the President Pro Tempore of the Senate appoint the Director, an officer of Congress, with the recommendation of chairs of the House and Senate budgetary committees.<sup>189</sup> The Congressional Budget and Impoundment Control Act of 1974 and the Gramm-Rudman-Hollings Act provide a critical role for the administrative agency of Congress in checking appropriations.<sup>190</sup> These Acts empower the Congressional Budget Office to provide estimates of all proposed legislation on the federal budget.<sup>191</sup> In March 2011, the Director of the Congressional Budget Office, Douglas W. Elmendorf, testified before the House Energy and Commerce Committee that his office projected healthcare reform will “reduce federal budget deficits during the 2022-2031 periods by an amount that is in a broad range around one-half percent of GDP, assuming that all provisions of the legislation . . . [are] fully implemented.”<sup>192</sup> The Director also testified that, overall, healthcare reform will positively impact federal healthcare-entitlement programs.<sup>193</sup> According to the Congressional Budget Office and the Joint Committee on Taxation, repeal of healthcare reform would be financially detrimental to the long-term budget, causing a net increase during the 2012-2019 Fiscal Years of approximately \$145 billion.<sup>194</sup> Republicans inanely posited that the Congressional Budget Office’s estimate is a sign of Democrat bias.<sup>195</sup> Republicans may be misinformed about healthcare reform, including its long-term financial impact; but their concern about the debt of the federal government is not.<sup>196</sup>

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<sup>188</sup> 2 U.S.C.S. § 601(a)(1) (2012).

<sup>189</sup> 2 U.S.C.S. § 601(a)(2) (2012).

<sup>190</sup> Kate Stith, *Congress’ Power of the Purse*, 97 YALE L. J. 1343, 1348 (June 1988) (citing Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended in scattered sections of 2, 31 & 42 U.S.C.)).

<sup>191</sup> *Id.*

<sup>192</sup> CBO’s *Analysis of the Major Health Care Legislation Enacted in March 2010: Before the Subcomm. On Health of the H. Comm. on Energy & Commerce*, 112 Cong. 7 (2011) (Testimony of Douglas W. Elmendorf, Director of the CBO), available at <http://www.cbo.gov/ftpdocs/121xx/doc12119/03-30-HealthCareLegislation.pdf>.

<sup>193</sup> *Id.*

<sup>194</sup> Letter from Douglas W. Elmendorf, Director of Congressional Budget Office to Honorable John Boehner, Speaker, CONG. BUDGET OFFICE (Jan. 6, 2011), [http://www.cbo.gov/ftpdocs/120xx/doc12040/01-06-PPACA\\_Repeal.pdf](http://www.cbo.gov/ftpdocs/120xx/doc12040/01-06-PPACA_Repeal.pdf); Letter From Douglas W. Elmendorf, Director of Congressional Budget Office to Honorable Paul Ryan, Chairman of Committee on the Budget, CONG. BUDGET OFFICE (Feb. 18, 2011), <http://www.cbo.gov/ftpdocs/120xx/doc12070/hr2RyanLtr.pdf>.

<sup>195</sup> See, e.g., Sarah Kliff, *Chris Van Hollen Said Republicans Are Ignoring the Findings of the CBO*, POLITICO (Jan. 7, 2011), <http://www.politico.com/news/stories/0111/47189.html>.

<sup>196</sup> See Stith, *supra* note 190. One scholar eloquently stated, “[a]n additional obstacle to enlargement of the national government is that federal action usually costs money, and financing of any such action must be constitutionally authorized.” *Id.*

The rating organization—Standard & Poor’s—issued a negative budgetary outlook of the United States government.<sup>197</sup> From 2003 to 2008, federal deficits equaled approximately five percent of the Gross Domestic Product.<sup>198</sup> By 2009, deficits will more than double to eleven percent of the Gross Domestic Product.<sup>199</sup> Standard and Poor’s admonished that, if the issue is not addressed immediately, the Triple “A” rating of the United States will likely be lowered.<sup>200</sup>

The sheer amount of money increasingly involved in election cycles, as well as the extent to which elected representatives of the people are emerging as the newfound aristocracy, arguably has the effect of diminishing the quality of representative government.<sup>201</sup> As economist Joseph E. Stiglitz suggested, a new aristocracy is emerging in this republic, where the division between wealth and poverty is increasing.<sup>202</sup> Congress is at the vanguard of this disparity.<sup>203</sup> Even the self-righteous members of the Tea-Party caucus are part of this “the top one percent” that has power and the intent to keep such power.<sup>204</sup>

To utilize and alter the words of Lord Acton, the British historian, money corrupts and absolute money corrupts absolutely.<sup>205</sup> Of disturbing concern, “[v]irtually all U.S. Senators, and most of the representatives in the House, are members of the top 1 percent when they arrive, are kept in office . . . from the top 1 percent, and . . . know they will be rewarded by the top 1 percent when they leave office.”<sup>206</sup> The Presidential election cycle of 2008 witnessed a new record of

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<sup>197</sup> Jennifer DePaul, *Federal Debt: S&P Issues Negative Outlook*, THE FISCAL TIMES (Apr. 18, 2011), <http://www.thefiscaltimes.com/Articles/2011/04/18/Federal-Debt-SP-Issues-Negative-Outlook.aspx>.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* Standard & Poor’s agency lowered the credit rating of the United States from its historical status as a Tripple A worthy nation to AA-plus status because of the failure of legislative and executive branch officials, from both parties, to address the national debt. Tom Feran, *Both Parties Share Blame on Down Grade*, CLEVELAND PLAIN DEALER, Aug. 16, 2011, at B1. The inability of public officials participating in stable and effective governance would constitute the chief cause of the August, 2011, downgrade of the United States as a risk-free borrower. Orbach, *supra* note 55. Congress has an eighty-seven percent disapproval rating by Americans, due to, in no small part, the fiscal leadership of its officials. See Jeffrey M. Jones, *Congress’ Job Approval Rating Worst In Gallup History*, GALLUP.COM (Dec. 15, 2010), <http://www.gallup.com/poll/145238/Congress-Job-Approval-Rating-Worst-Gallup-History.aspx>.

<sup>201</sup> See, e.g., Joseph E. Stiglitz, *Of the 1%, by the 1%, for the 1%*, VANITY FAIR, (May 2011), <http://www.vanityfair.com/society/features/2011/05/top-one-percent-201105>.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> JOHN EMERICH EDWARD DAHLBERG, *ESSAYS ON FREEDOM AND POWER* 7 (P. Smith ed., 1972).

<sup>206</sup> Stiglitz, *supra* note 201.

fundraising and spending of over \$1 billion.<sup>207</sup> In 2008, Congressional elections for all seats that were open cost a total of \$1.39 billion.<sup>208</sup> President Obama spent \$740 million of the amount spent on the Presidential election.<sup>209</sup> As the 2010 election in Connecticut demonstrates, candidates who campaign for Congress are often millionaires, spending millions of personal funds on winning a seat in Congress.<sup>210</sup> There is consequently no question why Congressmen divulge much of their responsibility to complete legislative work to professional staff.<sup>211</sup> Instead of serving as artisans of legislation or as concerned servants of the people, they must participate in “dialing for dollars.”<sup>212</sup> This state of affairs will likely worsen because of the recent United States Supreme Court decision, *Citizens United v. FCC*.<sup>213</sup> The current state of campaign finance is not inuring in high-quality representatives, but rather a polarization of both political parties.

Presidents Jefferson and Adams expressed shock in learning the size of the government and of the nation’s debt. The United States debt will equal 17.5 trillion dollars by the end of the 2013 Fiscal Year.<sup>214</sup> The former Presidents opine that this

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<sup>207</sup> See, e.g., Dan Walker, Colloquy, *The Mother’s Milk of Politics Is Corrupting Absolutely*, 103 NW. U. L. REV. 430 (2009).

<sup>208</sup> Seth Fiegerman, *The Cost of Running for Political Office*, MAIN STREET, <http://www.mainstreet.com/print/19196> (last visited Apr. 28, 2011). Although it may seem obscene to spend this amount on a single race, “such numbers have become the rule rather than the exception.” *Id.* In 1990, candidates who were elected to Senate spent an average of \$3.9 million, and the winning candidate for the House spent \$400,000. *Id.* By 2000, the averages doubled and “as of 2008, the average amount spent by winning candidates was an astounding \$7.26 million in the Senate and \$840,000 for House candidates.” *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> John W. Whitehead, *Government by the Rich: Is this the American Dream?*, THE RUTHERFORD INSTITUTE (Apr. 4, 2011), [https://www.rutherford.org/publications\\_resources/john\\_whiteheads\\_commentary/government\\_by\\_the\\_rich\\_is\\_this\\_the\\_american\\_dream](https://www.rutherford.org/publications_resources/john_whiteheads_commentary/government_by_the_rich_is_this_the_american_dream).

<sup>211</sup> Professor Nicholas Allard, Lecture at Washington College of Law (Spring Semester 2011) (lecture notes on file with Author).

<sup>212</sup> *Id.*

<sup>213</sup> See, e.g., Transcript of Rep. Jerrold Nadler at Hearing on Campaign Finance Reform, 111th Cong. (2010), available at <http://political-transcript-wire.vlex.com/vid/rep-jerrold-nadler-holds-hearing-reform-75800616>. Representative Jerrold Nadler, Chairman, stated:

[s]o now that corporations, including those controlled by foreign interests, have the same rights as any voter, what is in store for our democracy? What other rights will the court confer on corporations? Perhaps one day we will have Exxon as a colleague here in Congress. Many would say we already do. And what can Congress, within the bounds set by the court, still do to control the influence of the monied aristocracy in our political process?

*Id.*

<sup>214</sup> See *Obama’s 2013 Budget Plan Down Plays Deficit Threat*, DAYTONA BEACH NEWS J. (Feb. 16, 2012), <http://www.news-journalonline.com/opinion/editorials/n-j-editorials/2012/02/16/obamas-2013-budget-plan-downplays-deficit-threat.html>.

level of debt will likely cause the United States to depend on foreign powers.<sup>215</sup> Given the ineptness of public officials in addressing this debt, the former Presidents could not believe a budget proposed by President Obama for 2013 equaled 3.8 trillion dollars.<sup>216</sup> By comparison, the debt incurred by the United States as result of the Revolutionary War equaled 522 million dollars.<sup>217</sup> Because the early Presidents seriously regarded the nation's debt, President Madison lived to observe, in his old age in 1836, extinguishment of the debt.<sup>218</sup> By all accounts, the United States owes China, its emerging international nemesis, a significant portion of that debt.<sup>219</sup> The debt likely weakens the national security of the United States.<sup>220</sup> The former Presidents opined that modern Americans need to heed President Washington's farewell address that admonished against debt.<sup>221</sup>

In sum, the Tea Party deserves opprobrium for its hypocrisy, divisive sophistry, and simplistic disregard of the healthcare reform's complexity. The caucus arguably overlooks that President George W. Bush expanded the size of government and, in initiating conflicts in two differing theatres, obliterated the optimism about extinguishing the national debt.<sup>222</sup> By calling healthcare reform "Obama care," the

<sup>215</sup> Federalist documents show the founding generation to be talented students of human nature and history. Specifically, Federalist No. 4, entitled *Danger From Foreign Force and Influence*, effectively anticipated that a weakness of a republic can be caused by internal deficiencies, such as the United States is now experiencing because of its debt. The founding generation attempted to create a Constitution, with the hope of future generations of Americans adhering to it, as a check against such weaknesses. See John Jay, *Federalist No. 4*, FOUNDING FATHERS, available at <http://www.foundingfathers.info/federalistpapers/fedindex.htm> (last visited Apr. 8, 2012) ("But the safety of the people of America against dangers from FOREIGN force depends not only on their forbearing to give JUST causes of war to other nations, but also on their placing and continuing themselves in such a situation as not to INVITE hostility or insult; for it need not be observed that there are PRETENDED as well as just causes of war.").

<sup>216</sup> See *id.*

<sup>217</sup> *Government Debt: From Billions to Trillions*, INVESTOPEDIA (July 9, 2010), <http://www.investopedia.com/financial-edge/0710/Government-Debt-From-Billions-To-Trillions.aspx#axzz1qvtd6F17> (last visited Apr. 2, 2012).

<sup>218</sup> See Burton Folsom, *Our Presidents and the National Debt*, 56 FREEMAN ONLINE 6 (Apr. 2006), <http://www.thefreemanonline.org/columns/our-economic-past-our-presidents-and-the-national-debt/> (last visited Apr. 2, 2012).

<sup>219</sup> See, e.g., *China Urges U.S. to Be "Responsible" on Debts*, MSNBC.COM, (July 14, 2011, 1:33 PM), available at [http://www.msnbc.msn.com/id/43751206/ns/politics-capitol\\_hill/t/china-urges-us-be-responsible-debts/#.T8UtF9XYiVo](http://www.msnbc.msn.com/id/43751206/ns/politics-capitol_hill/t/china-urges-us-be-responsible-debts/#.T8UtF9XYiVo).

<sup>220</sup> In the mid-19th century, Mexico defaulted, and its leaders initiated a moratorium on paying such debt payments to foreign powers. Timothy Neeno, *French Intervention in Mexico (1862-67)*, MILITARY HISTORY ON-LINE, <http://www.militaryhistoryonline.com/usmexicanwar/articles/frenchinmexico.aspx> (last visited May 29, 2012). As a result, this triggered an invasion by France. *Id.*

<sup>221</sup> See *George Washington's Farewell Address*, EARLY AMERICA <http://www.earlyamerica.com/earlyamerica/milestones/farewell/text.html> (last visited May 29, 2012).

<sup>222</sup> See, e.g., *The Tea Party's (and the Media's) Inconvenient Truths*, DON'T TEA ON ME BLOG (May 28, 2010), <http://dh1976.wordpress.com/2010/05/28/the-tea-party%E2%80%99s-inconvenient-truth/>.

legislative enactment is not given the complexity it deserves. Instead of furnishing a more informed, substantive debate about the omnibus statute for the American populous, the caucus only contributed to the debate with lacking commentary via modern conduits of communications and even menacing behavior at rallies.<sup>223</sup> Congressional Democrats also failed to act with the kind of leadership our founding fathers commonly knew and likely appreciated.<sup>224</sup>

Democrats deserve a rebuke for enacting healthcare reform in a hasty manner,<sup>225</sup> creating no legislative history, and failing to incorporate the views of a broader range of policy experts.<sup>226</sup> “Congressional Democrats united and pursued the most viable option in the wake of Scott Brown’s election to the Senate: they ushered the Senate bill through the House of Representatives, and then passed amendments to it with a later bill using the reconciliation process.”<sup>227</sup> Democrats’ liberal wing criticized that President Obama, in his pronounced willingness to negotiate, disregarded the views of a more liberal range of policy experts, including, but not limited to, reforming

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<sup>223</sup> For the founding generation, many of whom were masters of the English language and many other languages, the extent to which both sides of the aisle have seemingly diminished in their writing and speaking abilities would be arguably appalling. When the founding generation debated through newspapers, they utilized esoteric references to ancient figures. Is that kind of knowledge apparent in the oratory of leaders today? *See generally* Ed. Janet Gabler-Hover, et al., “Oratory” (*American History through Literature*), ENOTES.COM (Apr. 28, 2006), <http://www.enotes.com/oratory-68678-reference/oratory>. A level of skill is especially absent in the oratory of the misinformed Tea Party.

<sup>224</sup> As a student at Cleveland-Marshall College of Law, the Author had the prestigious opportunity to serve as part of the Student Senate and interviewed distinguished Professor Gordon S. Wood for the law school newspaper, *The Gavel*. Prof. Wood’s corpus of work is impressive and served an important role of edifying the general public about the leadership talents of the founding generation. *See* GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDING FATHERS DIFFERENT* (Penguin Books, 1st ed. 2006); *see also* Jon Meacham, *Original Intent: Founding Fathers Books by Gordon S. Wood and Richard Brookhiser*, N.Y. TIMES, June 25, 2006, available at <http://www.nytimes.com/2006/06/25/books/review/25meacham.html>. For the founding fathers:

... the ideal cultural values were those of ancient Rome. In a series of sketches of critical figures, from Washington to Thomas Paine to Aaron Burr, Wood charts how important it was in the founders’ world not only that they be seen as powerful but that their power be understood to have come to them by merit: “They sought, often unsuccessfully but always sincerely, to play a part, to be what Jefferson called natural aristocrats—aristocrats who measured their status not by birth or family that hereditary aristocrats from time immemorial had valued but by enlightened values and benevolent behavior.”

*Id.*

<sup>225</sup> *See, e.g.*, Transcript of Rep. Mike Pence before the 111th Cong., *Obama Care One Year Later: It’s Still A Government Takeover of Healthcare* (Mar. 21, 2011), available at [http://mikepence.house.gov/index.php?option=com\\_content&view=article&id=4543&Itemid=94](http://mikepence.house.gov/index.php?option=com_content&view=article&id=4543&Itemid=94).

<sup>226</sup> *See id.*; *see generally* BARRY ET AL., *supra* note 21.

<sup>227</sup> Matthew R. Farley, *Challenging Supremacy: Virginia’s Response to the Patient Protection and Affordable Care Act*, 45 U. RICH. L. REV. 37, 42 (2010).

healthcare in the model of European systems.<sup>228</sup> Failure to pass a budget—a task that should not have held both chambers of Congress until the mid-term elections—is clearly a dereliction of Congressional Democrats.<sup>229</sup>

#### V. JUDICIAL REVIEW

*“With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.”*<sup>230</sup>

The timeframe at which filing in court is advantageous depends on certain considerations, including whether other avenues were available to achieve goals, inclusive of informal access to the agency or notice and comment were exercised. In *Abbott Laboratories v. Gardner*,<sup>231</sup> the United States Supreme Court interpreted the Administrative Procedure Act to provide for a general presumption of judicial review of the agencies’ actions.<sup>232</sup> Sections 701-06 of the Administrative Procedure Act constitute the provisions specifically providing for the review of agency action or inaction.<sup>233</sup> Absent an explicit statutory bar, judicial review of agency action is available “except in those rare instances where statutes are drawn in such broad terms that . . . there is no law to apply”<sup>234</sup> and where the agency would have no standard against which to determine agency discretion.<sup>235</sup> Whether any statute meets

<sup>228</sup> See, e.g., Philip Elliot, *Pressure May Force Obama to Cast Aside Public Option*, PITTSBURGH TRIBUNE REVIEW (Aug. 17, 2009), [http://www.pittsburghlive.com/x/pittsburghtrib/obituaries/s\\_638614.html](http://www.pittsburghlive.com/x/pittsburghtrib/obituaries/s_638614.html).

<sup>229</sup> Michael Eden, *GOP or Democrats: Who’s to Blame for the Budget, Spending, and Shutdown Mess We’re Now In?*, START THINKING RIGHT BLOG (Apr. 10, 2011), <http://startthinkingright.wordpress.com/2011/04/08/gop-or-democrats-whos-to-blame-for-the-budget-spending-and-shutdown-mess-were-now-in/>; see Connie Hair, *House Democrats “Deem” Faux \$1.1 Budget “As Passed”*, HUMAN EVENTS (July 2, 2010), <http://www.humanevents.com/article.php?id=37893#> (“Last night, as part of a procedural vote on the emergency war supplemental bill, House Democrats attached a document that ‘deemed as passed’ a non-existent \$1.12 trillion budget. The execution of the ‘deeming’ document allows Democrats to start spending money for Fiscal Year 2011 without the pesky constraints of a budget.”).

<sup>230</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 346 U.S. 579, 655 (1952) (Jackson, J., concurring). The federal courts acquired an important status as arbiters of Congressional and Presidential action or inaction since *Marberry v. Madison* (1803) in which your colleague Chief Justice Marshall established the principle of judicial review of co-equal branches of government. See, e.g., Jonathan R. Siegel, *Suing the President: Non-statutory Review Revisited*, 97 COLUM. L. REV. 1612, 1630 (Oct. 1997).

<sup>231</sup> *Abbott Labs. v. Gardner*, 387 U.S. 136, 136 (1967).

<sup>232</sup> *Id.* at 140-41.

<sup>233</sup> See generally 5 U.S.C. §§ 701-06 (2012); see also Eric Piper, *Two Sides of the Same Coin: Judicial Review of Agency Action and Inaction*, 26 VA. ENVTL. L. J. 461, 464-66 (2008) (discussing the APA and judicial review).

<sup>234</sup> *Webster v. Doe*, 486 U.S. 592, 607 (1988).

<sup>235</sup> *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

this standard, “is statute specific and relates to the language of the statute and whether the general purposes of the statute would be endangered by judicial review.”<sup>236</sup> Two avenues for judicial review are present: (1) under an organic statute, such as the Social Security Act; or (2) under the Administrative Procedure Act where there is final agency action for which no other adequate remedy exists.<sup>237</sup>

The Social Security Act<sup>238</sup> provides for judicial review of the actions of HHS.<sup>239</sup> Any civil action must be filed within sixty days of a final action, and any civil action must be brought: (1) in the District Court where the plaintiff’s residence or principal place of business is located; or (2) in the United States District Court for the District of Columbia.<sup>240</sup> Opponents to the Obama administration would quickly apply this tool for its legal consequence of the Supreme Court hearing the issue and for its value in the “court of public opinion.”

The Washington Lawyer stated that, in as much as he may approve of certain provisions of the Act, “[e]ach and every federal law, whether reforming health care or building a new interstate highway, must be grounded in one of the specific grants of authority found in the Constitution.”<sup>241</sup> If the Act is constitutionally legitimate, it must be ground in such constitutional bases as Article 1, Section 8, which provides Congress with enumerated powers to enact legislation that permits the government to lay and collect taxes and to regulate interstate commerce.<sup>242</sup> The Washington Lawyer concluded that, “[i]f the federal government has any right to reform, revise, or remake the American health care system (without simply paying for it out of the federal treasury), it must be found in this all important provision, and this is especially true of any mandate that every American obtain health care insurance or face a penalty.”<sup>243</sup>

Governors, States Attorney Generals, and even Congressional representatives who variously filed against healthcare reform or who defended healthcare reform, seemingly do so based on partisan lines.<sup>244</sup> Shortly after the President signed healthcare reform into law, opponents—States Attorneys Generals of 13 states—jointly filed litigation.<sup>245</sup> The State Attorney General of Virginia also filed a separate

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<sup>236</sup> *Esmeralda v. Dep’t of Energy*, 925 F.2d 1216, 1218-19 (9th Cir. 1991).

<sup>237</sup> 5 U.S.C. § 702 (2012); 5 U.S.C. § 704 (2012).

<sup>238</sup> 42 U.S.C. §405(g) (2012).

<sup>239</sup> 42 U.S.C. § 405(g) (2012).

<sup>240</sup> *Id.*

<sup>241</sup> David B. Rivkin & Lee A. Casey, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. Pa. L. Rev. 93, 96 (2009).

<sup>242</sup> *Id.* at 96-97.

<sup>243</sup> *Id.* at 97.

<sup>244</sup> See Brief for the American Center for Law & Justice et al., as Amici Curiae supporting Plaintiff, Fla. ex rel. McCollum v. U.S. Dep’t. of Health & Human Serv., 716 F. Supp. 2d 1120 (N.D. Fla. 2010); Brief for the Governors of Wash., Colo., Mich., & Pa. as Amici Curiae, supporting Defendant’s Motion for Summary Judgment, McCollum, 716 F. Supp. 2d at 1120.

<sup>245</sup> Complaint at 1-2, McCollum, 716 F. Supp. 2d at 1120.

complaint.<sup>246</sup> “Six additional states joined the law suits in the subsequent weeks.”<sup>247</sup> By July 2010, some twenty states filed against the administration.<sup>248</sup> Representing both public interest and private interest clients, Washington lawyers were involved in the debate about and the legal challenges to healthcare reform.

Washington Lawyers were involved in challenging or defending healthcare reform by participating in amicus briefs. Washington lawyers represent or lead a wide range of public interest or private interest clients, such as: (1) the Center for American Progress and American Nurses Association, a liberal public interest organization;<sup>249</sup> and (2) the American Center for Law and Policy, a more conservative public interest organization.<sup>250</sup> Filing litigation in close proximity to President Obama signing the Act into law would arguably be his opponents’ strategy to ensure that their position receive copious media coverage.

Healthcare reform presents issues of whether there is a “case and controversy” to warrant judicial review.<sup>251</sup> Issues of standing and ripeness are especially noteworthy; as Bonnie Robin-Vergeer discussed during a lecture, the approach to the issue of standing has changed in the federal courts.<sup>252</sup> Public interest organizations experience great difficulty in meeting this barrier.<sup>253</sup> Federal District Courts in Michigan and Virginia held that standing existed, allowing the plaintiffs to challenge healthcare reform.<sup>254</sup> The Federal District Court in New Jersey<sup>255</sup> and the Federal

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<sup>246</sup> Complaint at 1, Va. ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010).

<sup>247</sup> Leonard, *supra* note 27, at 115.

<sup>248</sup> *Id.*

<sup>249</sup> Brief for Am. Nurses Ass’n as Amici Curiae, supporting Defendant’s motion for summary judgment, McCollum, 716 F. Supp. 2d at 1120.

<sup>250</sup> *Id.*

<sup>251</sup> On the whole, there has been neither action nor inaction. As to myriad provisions of healthcare reform, there is the potential for future action or inaction on the part of the Department of Health and Human Services. As such, it is certainly the apropos time for public interest or private interest Washington lawyers to be proactively involved in the informal rulemaking process.

<sup>252</sup> Bonnie Robin-Vergeer, Lecture at Washington College of Law (Spring Semester 2011) (lecture notes on file with Author).

<sup>253</sup> *Id.*

<sup>254</sup> Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 889 (E.D. Mich. 2010); Sebelius, 702 F. Supp. 2d at 607.

<sup>255</sup> N.J. Physicians, Inc. v. Obama, 757 F. Supp. 2d 502, 502 (D. N.J. 2010). The judge explained:

[t]herefore, there is a real possibility that Roe will neither have to pay for insurance nor be subject to the penalty. Hence, his claims are conjectural and speculative, at best. Consequently, Roe does not have standing to challenge the Act because the Supreme Court has repeatedly held that . . . [a]llegations of possible future injury do not satisfy the requirements of Art. III . . . .

*Id.* at 507.



District Court in California<sup>256</sup> dismissed claims brought against healthcare reform, based on a lack of standing. The New Jersey court distinguished *Massachusetts v. EPA*, which held standing exists to challenge constitutional claims where the alleged harm will occur in the future.<sup>257</sup> The court indicated that in *Massachusetts*, the plaintiff was a state and, unlike the New Jersey case, there was an administrative record present or at least a body of “research and study,” which ensured that the claim was not “speculative or conjectural.”<sup>258</sup>

In the Northern District of Ohio, Federal District Court Judge David D. Dowd, Jr., held that plaintiffs met the standing and ripeness requirements in a case challenging the Act and dismissed the plaintiff’s amended complaint.<sup>259</sup> Senior Federal District Court Judge Robert Vinson of Florida held that both private citizens and the state had standing and that the challenges met the requirement of ripeness.<sup>260</sup> Federal district courts in Florida and Virginia held healthcare reform to be unconstitutional—either in whole or as to specific provisions, including the “Individual Mandate.”<sup>261</sup> Federal District Courts in Michigan and Washington D.C. conversely held healthcare reform to be constitutional.<sup>262</sup> Such conflicting opinions as to the constitutionality of healthcare reform in federal district and circuit courts provided a basis for review by the United States Supreme Court.

The Washington Lawyer informed the Presidents that on March 26th through the 28th, 2012, the Supreme Court heard oral arguments about the constitutionality of the Act.<sup>263</sup> A myriad of parties challenged the Act—some twenty-five states and the National Federation of Business, among others—and asked the Court to declare it unconstitutional.<sup>264</sup> The challengers against the Act and the Solicitor General representing the administration argued four questions:

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<sup>256</sup> *Baldwin v. Sebelius*, 2010 WL 3418436 at \*5 (S.D. Cal. Aug. 27, 2010), *cert denied*, 131 S. Ct. 573 (2010).

<sup>257</sup> *New Jersey Physicians, Inc.*, 757 F. Supp. 2d at 508 (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

<sup>258</sup> *Id.*

<sup>259</sup> *U.S. Citizens Ass’n v. Sebelius*, 754 F. Supp. 2d 909, 906 (N.D. Ohio 2010).

<sup>260</sup> *McCollum*, 716 F. Supp. 2d at 1148, 1150.

<sup>261</sup> *Fla. ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1306 (N.D. Fla. 2011); *Sebelius*, 728 F. Supp. 2d at 782.

<sup>262</sup> *Thomas More Law Ctr.*, 720 F. Supp. 2d at 895; *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 649 (W.D. Va. 2010) (granting Geithner’s motion to dismiss because the Patient Protection & Affordable Care Act was held to be constitutional). Opinions in federal courts to date also indicate a notable concern: the ever-increasing political nature of the judicial nominations process and of the federal judges who eventually serve for life. *See Thomas More Law Ctr.*, 720 F. Supp. 2d at 895 (holding that the Patient Protection & Affordable Care Act is constitutional); *Bondi*, 780 F. Supp. at 1306 (holding that the Patient Protection & Affordable Care Act is unconstitutional).

<sup>263</sup> *See* Georges Benjamin, *Supreme Court Should Uphold Affordable Care Act*, PUB. HEALTH NEWSWIRE (Mar. 28, 2012, 9:10 AM), <http://www.publichealthnewswire.org/?p=2953> (last visited Apr. 6, 2012).

<sup>264</sup> *Id.*

- (1) whether the fine for not buying health insurance was a simple penalty or a tax, addressing the nineteenth century Anti-Injunction Act;
- (2) whether Congress has the authority to mandate health insurance (the individual mandate provision);
- (3) federalism: whether Congress may require states to expand their Medicaid programs as a condition of participation; and
- (4) if the Court finds any singular provision unconstitutional, whether the Act can stand, especially in light of not having a severability clause.<sup>265</sup>

The Act is in serious trouble should the Court declare it unconstitutional.<sup>266</sup> Provisions like the individual mandate are integral to overall healthcare reform, but there is no severability clause.<sup>267</sup> Considering the breath of the Act on the one hand, and the lack of this all-important clause on the other; what is the role of the Court? Should it declare provisions of the Act unconstitutional or should the Court vacate the entire statutory enactment?

In the mind of the Washington Lawyer, severability could implicate the so-called reframe of activism or lack thereof by the Court.<sup>268</sup> At the core of that reframe, often disgorged by individuals who dislike a particular opinion, is that the Court is actively promoting some particular public policy rather than sitting as withdrawn judicial scholars. By the end of its 2012 term, the Court will address the constitutionality of the Act.

In the United States, founded upon distrust of abuse of power, the judiciary is its own, independent branch of government.<sup>269</sup> The judiciary, like the legislature, derives its power from the grant of the sovereign people.<sup>270</sup> Part of its intended role is to check the other branches and to enforce the limits placed upon government.<sup>271</sup> The Court has only the power of the pen and not of the sword, thereby particularly

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<sup>265</sup> *Id.*

<sup>266</sup> See Opinion Brief, *Obamacare on Trial: Is the Individual Mandate Doomed?*, THE WEEK (Mar. 27, 2012), <http://theweek.com/article/index/226096/obamacare-on-trial-is-the-individual-mandate-doomed>.

<sup>267</sup> Matt Negrin, *Justice Kennedy Seen as Key to Obamacare Decision*, ABCNEWS.COM (Mar. 27, 2012, 3:00 PM), <http://abcnews.go.com/blogs/politics/2012/03/justice-kennedy-see-n-as-key-to-obamacare-decision/>.

<sup>268</sup> The Court could study the voluminous Act, striking out certain provisions and keeping others, but the Justices would clearly act as activists serving the legislative, rather than the impartial judiciary. Conversely, the Court could vacate the entire Act, also serving as an activist in the sense that it would be, in the mind of President Jefferson, abrogating an enactment sought by elected officials. As such, the task before the Court is to determine whether the Act is constitutional and announce its interpretation of the law, without also imbuing a lack of credibility into its decision. The Court may be prudent to turn to the wisdom shown by Chief Justice Marshall. Chief Justice Marshall wrote in *Marbury v. Madison*, 5 U.S. 137 (1803), “[i]t is emphatically the province and duty of the judicial department to say what the law is.” This is true even should the actions on which the court may be called, from time to time, to rule on is those of one’s cousin.

<sup>269</sup> Siegler & the Maryland State Archives et al., *supra* note 163.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

demanding that the Court have widely held public support.<sup>272</sup> Comments of any administration—whether by a Republican or a Democrat—that pretends to cajole the Court into a certain holding is nullifying to the coequal branches of government.<sup>273</sup> While any given member of the Court may find merit in the Act, it is not the role of the Court to review each line like a line item veto. The Court must determine whether the Act is constitutional, regardless of whether they find public policy merit in the Act or have personal relationships with a given administration.

The Washington Lawyer posited that, if the Court vacates the Act due to the lack of a severability clause, he would not malign the Court as conservative or as activist in due respect to its constitutional role.<sup>274</sup> In this regard, the sophistry is troubling. If elected, they would determine ways to violate Article III of the Constitution: nominating federal judges who would not serve for life, or disavowing and failing to comply with decisions with which they do not accord.<sup>275</sup> Newt Gingrich, former Speaker of the House of Representatives, stated that, if elected President, he would defy decisions of the Court with which he disagrees as judicial review is over stated.<sup>276</sup> Candidate Rick Santorum, a former Senator of the Commonwealth of Pennsylvania, not to mention an attorney, stated that, if elected President, he would sign legislation to abolish the United States Court of Appeals for the Ninth Circuit.<sup>277</sup> In short, an issue is clear: decisions either in favor of or against healthcare reform will galvanize the political base of each party at the Presidential or Congressional fall elections.<sup>278</sup>

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<sup>272</sup> *Id.*

<sup>273</sup> Compare Warren Richey, *Holder Answers Judge, Defending Both Judiciary and Obama Healthcare Remarks*, CS\_MONITOR.COM (Apr. 5, 2012), <http://www.csmonitor.com/USA/Justice/2012/0405/Holder-answers-judge-defending-both-judiciary-and-Obama-health-care-remarks> (last visited May 29, 2012), with Justice Alito Mouths “Not True”, POLITICO (Jan. 27, 2010), [http://www.politico.com/blogs/politicolive/0110/Justice\\_Alitos\\_You\\_lie\\_moment.html](http://www.politico.com/blogs/politicolive/0110/Justice_Alitos_You_lie_moment.html) (last visited May 29, 2012). Occasionally, the Court could be blamed for fostering a perception that it is an activist rather than a neutral body adjudicating the actions of Congress and the President. Namely, during *Bush v. Gore*, it is argued that the Court played the role of “Kingmaker.” See, e.g., Joe Conason, *The High Court’s Supremely Unethical Activists*, CREATORS.COM (2012), <http://www.creators.com/liberal/joe-conason/the-high-court-s-supremely-unethical-activists.html>. An affront to the separation of powers and to the neutrality of the Court occurred during the Bush administration; Associate Justice Scalia would enjoy exclusive hunting trips with the Vice President. *Id.*

<sup>274</sup> Ruth Marcus, *Obama Should Know Better*, RICHMOND TIMES-DISPATCH (Apr. 5, 2012), <http://www2.timesdispatch.com/news/oped/2012/apr/05/tdopin02-marcus-obama-should-know-better-ar-1819152/>.

<sup>275</sup> See Erwin Chemerinsky, *GOP Candidates: Bashing Judges, Threatening Democracy*, LOS ANGELES TIMES (Dec. 20, 2011), <http://articles.latimes.com/2011/dec/20/opinion/la-oe-chemerinsky-fedjudges-20111220>.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> See generally Michael Tomasky, *Healthcare Repeal Votes and Democratic Strategy*, THE GUARDIAN (London) (Feb. 3, 2011), <http://www.guardian.co.uk/commentisfree/michael-tomasky/2011/feb/03/congress-healthcare-obama-court-repeal>.

## VI. A LAWYER WITH A DISABILITY

Imbibing coffee after they finish dinner, the Presidents express they are astounded at advancements in technology, concluding it must assuredly affect all three branches of government. Technology affects not only the role of President Obama as an executive, but also the ability of disabled lawyers to serve as an actor within all three branches.<sup>279</sup> A Report for the Second Conference of the American Bar Association on Mental and Physical Disability Law stated, “[i]n today’s technological world, it is clear that making legal websites and the information on them fully accessible is one of the most important aspects of disability integration.”<sup>280</sup> There is, however, a range of issues with the equal participation of disabled Washington lawyers within the legal profession, including but not limited to a “digital divide” with regard to accessing information technology, websites, and new social media.<sup>281</sup>

Technology, including new social media, emphasizes the administration.<sup>282</sup> The administration appointed a White House Director of Information Technology and expanded the transparency of government through the means of the Internet.<sup>283</sup> The administration relied on technology to extol healthcare reform and to defend its need.<sup>284</sup> Specifically, the administration created a blog about healthcare reform, often collaborating with public-interest organizations to garner compelling stories.<sup>285</sup> As masters of social media during the 2008 campaign, the administration and its Republican adversary will utilize technology even more during the next campaign cycle.<sup>286</sup>

Conservative public-interest or private-interest organizations, such as the Americans for Limited Government, also turned to technology, including new social

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<sup>279</sup> See generally Paul Lamkin, *Obama Worried Technology Can Affect Democracy*, POCKET LINT, (May 10, 2010), <http://www.pocket-lint.com/news/32990/obama-worried-tech-nology-affects-democracy>.

<sup>280</sup> American Bar Association: Commission on Mental & Physical Disability Law, *The Second National Conference On the Employment of Lawyers With Disabilities: A Report From the American Bar Association For the Legal Profession* (2009), available at [http://www.americanbar.org/content/dam/aba/migrated/disability/PublicDocuments/09report.uthcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/disability/PublicDocuments/09report.authcheckdam.pdf).

<sup>281</sup> *Id.*

<sup>282</sup> See, e.g., Gloria Goodale, *Watch Out, Obama: Everyone Else Has Caught Up to What You Did in 2008*, CHRISTIAN SCIENCE MONITOR (Apr. 20, 2011), <http://www.csmonitor.com/USA/Society/2011/0420/New-social-media-and-the-2012-election-Waaaaay-beyond-Facebook-2008>; see also *Technology*, THE WHITE HOUSE (Sept. 16, 2011), <http://www.whitehouse.gov/issues/technology> (last visited May 30, 2012).

<sup>283</sup> See THE WHITE HOUSE, *supra* note 282.

<sup>284</sup> David Jackson, *Obama Campaign Promotes Health Care Law*, USA TODAY (Dec. 21, 2011), <http://content.usatoday.com/communities/theoval/post/2011/12/obama-campaign-promotes-health-care-law/1>.

<sup>285</sup> Tombari Bonkoo, *Obama Launches Healthcare Blog: Goal to Maintain Grassroots Nature of His Campaign*, YAHOO! VOICES (July 7 2007), <http://voices.yahoo.com/obama-launches-healthcare-blog-433551.html?cat=7>.

<sup>286</sup> Goodale, *supra* note 282.

media.<sup>287</sup> For example, Americans for Limited Government operate getliberty.org, an online platform through which the organization galvanizes its masses of conservative activists to oppose the Obama administration.<sup>288</sup> By way of a simple electronic missive, conservative organizations can actively oppose Presidential nominees, participate in conservative talk radio, and otherwise serve as gadflies to the administration.<sup>289</sup>

Washington lawyers with a range of differing disabilities often encounter full inclusion issues within the legal profession; namely, they have salary disparities, do not always receive reasonable accommodations, and with regard to benefiting from technology, are sometimes part of the “digital divide.”<sup>290</sup> The issue of reasonable accommodations presumes that a law student is able to access fully instructional materials and to take the bar exam to enter the legal profession.<sup>291</sup> Once a disabled law student surmounts the natural and even legitimate barriers of law school and the bar exam, and successfully fought against prejudice and a lack of reasonable accommodations,<sup>292</sup> it can be difficult to acquire a position, such as at a large firm.<sup>293</sup>

The doleful reality for Washington lawyers with disabilities is that only thirty-nine percent of this diverse class possesses gainful employment.<sup>294</sup> Should a Washington lawyer with a disability acquire a position, progressing within that organization can be a challenge.<sup>295</sup> The issue of reasonable accommodations or the unwillingness to furnish reasonable accommodations is at the core of this situation.<sup>296</sup> A reasonable accommodation that is helpful to a range of disabilities, including sensory disabilities, is that of technology.<sup>297</sup>

Utilizing the computer is not as simple for a disabled lawyer as clicking a mouse. For example, a blind Washington lawyer requires verbal output from a computer.<sup>298</sup>

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<sup>287</sup> Scott Shane, *A Critic Finds Obama Policies A Perfect Target*, N.Y. TIMES (Sept. 26 2009), <http://www.nytimes.com/2009/09/26/us/politics/26activist.html>.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> See Brenda Jeffreys, *Reasonable Accommodations; Lawyers with Disabilities (Say Obstacles, (Stereotypes Persist))*, TEXAS LAWYER (Jan 1, 2007), <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=900005470519>.

<sup>291</sup> See Joshua L. Friedman & Gary C. Norman, *Blindly Taking the Maryland Bar Exam*, 44 MD. BAR J. 26 (2011). Organizers, such as the National Conference of Bar Examiners proved to be reluctant to furnish reasonable accommodations or demonstrated, through their regular denials of accommodations, outright bigotry.

<sup>292</sup> *Id.*

<sup>293</sup> See, e.g., Jeffreys, *supra* note 290.

<sup>294</sup> Am. Bar Ass’n, Comm’n on Mental & Physical Disability Law, *ABA Disability Statistics Report* (2010), available at <http://www.americanbar.org/content/dam/aba/migrated/disability/PublicDocuments/ABADisabilityStatisticsReport.authcheckdam.pdf>.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> See, e.g., Bill Albert, et al., *Perspectives On Disability, Poverty, and Technology*, 15(1) ASIA PAC. DISABILITY REHAB. J. 12 (2004).

<sup>298</sup> See, e.g., Friedman & Norman, *supra* note 291.

The frequent difficulty in accessing information technology, including websites such as Westlaw, simple PDF documents, and smart phones tailored to individual disabilities, is of continued concern.<sup>299</sup> Often, information technology professionals simply do not know about the user's needs, issues, and daily experience of disabled lawyers.<sup>300</sup> Westlaw's website is designed specifically for lawyers with sight impairments, but the site is not in equilibrium with the amount of features and information contained on the portals accessed by the able-bodied. PDF documents are still inaccessible on occasion, because creators do not know about the accessibility features contained within Adobe.

Disability is not always considered an aspect of diversity.<sup>301</sup> The American Bar Association recognized only began recognizing disability as part of its diversity goals and commitment in 1999.<sup>302</sup> As the statistics implicitly demonstrate, there is arguably a degree of prejudice within the legal profession requiring abolition.<sup>303</sup> Compounding this problem is the fact that few jurisdictions collect data that focuses on capturing information about whether there are lawyers with disabilities.<sup>304</sup> Learning this, the Presidents note that 21st Century lawyers with disabilities can clearly constitute leaders, especially if given reasonable accommodations.

The American Bar Association's Commission on Mental and Physical Disability Law hosted two conferences on the employment of lawyers with disabilities;<sup>305</sup> each conference resulted in continued outreach to the able-bodied members of the profession.<sup>306</sup> An important initiative of the Commission is an "affirmative action" pledge.<sup>307</sup> Many firms, individuals, and organizations have signed this pledge, committing their management to a more accessible and inclusive profession and

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<sup>299</sup> Lamont Wood, *Blind Users Still Struggle with "Maddening" Computing Obstacles*, COMPUTERWORLD (April 16, 2008), [http://www.computerworld.com/s/article/9077118/Blind\\_users\\_still\\_struggle\\_with\\_maddening\\_computing\\_obstacles?pageNumber=1](http://www.computerworld.com/s/article/9077118/Blind_users_still_struggle_with_maddening_computing_obstacles?pageNumber=1).

<sup>300</sup> Friedman & Norman, *supra* note 291.

<sup>301</sup> See, e.g., Ann W. Parks, *Disability as a Law Firm Diversity Issue on Legal Employment in First National Forum*, THE DAILY RECORD (May 19, 2006), <http://daily-record-baltimore.vlex.com/vid/disability-diversity-employment-forum-68710589>.

<sup>302</sup> See generally Am. Bar Ass'n, *Diversity in the Legal Profession: The Next Steps* (April 2010), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/diversity/041511\\_aba\\_nextsteps.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/diversity/041511_aba_nextsteps.authcheckdam.pdf).

<sup>303</sup> Parks, *supra* note 301.

<sup>304</sup> ABA Disability Statistics Report, *supra* note 294.

<sup>305</sup> This important Commission within the American Bar Association recently changed its name to the Commission on Disability Rights. This Article utilizes its former name as it is the better-known name of the Commission.

<sup>306</sup> See Am. Bar Ass'n, Comm'n on Mental & Physical Disability Law, *The Second National Conference on the Employment of Lawyers with Disabilities: A Report from the American Bar Association for the Legal Profession*, (2009), available at <http://www.americanbar.org/content/dam/aba/migrated/disability/PublicDocuments/09report.authcheckdam.pdf>.

<sup>307</sup> Am. Bar Ass'n, *Pledge for Change: Disability Diversity in the Legal Profession*, AMERICANBAR.ORG, [http://www.americanbar.org/groups/disabilityrights/initiatives\\_awards/pledge\\_for\\_change.html](http://www.americanbar.org/groups/disabilityrights/initiatives_awards/pledge_for_change.html).

welcoming workplace.<sup>308</sup> As Scott LeBar, a blind lawyer, stated at the American Bar Association's first conference, "[e]ven though you might not believe that you could practice law if you were blind, if you were deaf, or if you used a wheelchair, you must begin the process of considering how you might in fact do so."<sup>309</sup> Clearly, issues relating to employment of disabled lawyers, while improving, demand resolution by the legal profession.<sup>310</sup>

## VII. CONCLUSION

The Presidents departed at midnight, demanding that the conversation soon conclude.<sup>311</sup> Lawyers have an important role as a strategic actor within all branches of government, regarding public policy challenges and the formulation of solutions for those challenges.<sup>312</sup> Healthcare reform will continue to be the subject of discussion, debate, and policy positioning as political leaders seek to influence civic society and address the debt crisis.<sup>313</sup>

While finishing a dessert platter consisting of fruit, cheese, and pudding,<sup>314</sup> the Presidents thank their host for a wonderful dinner, commenting that it sounds like America is more pluralistic yet more divided today, especially as to pressing public-policy concerns. Healthcare reform is an issue on which President Obama campaigned and through which he galvanized the liberal base to elect him; his first term of office will, either with the success of the laurel reef or the failure of sour grapes, be defined by this policy priority.<sup>315</sup> Lawyers arguably have a larger ethical obligation, regardless of the client represented, to seek a greater public good.<sup>316</sup> As the Presidents filter out of the tavern, they express that, with issues such as the quality of civil discourse and debt, finding political leaders at the level, with all of

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<sup>308</sup> *Id.*

<sup>309</sup> The Disability Independence Group, *Florida Lawyers with Disabilities: A Survey Report*, iv (August 2007), available at [http://www.floridabar.org/TFB/TFBResources.nsf/0/43978A94AFC940F9852573CA006E2526/\\$FILE/DIG%20Survey%20Report%20Final%2012%2007.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/0/43978A94AFC940F9852573CA006E2526/$FILE/DIG%20Survey%20Report%20Final%2012%2007.pdf?OpenElement).

<sup>310</sup> *Id.*

<sup>311</sup> See, e.g., Arnott, *supra* note 2.

<sup>312</sup> See, e.g., Fred C. Zacharias, *Symposium Foreword: True Confessions of the Role of Lawyers in a Democracy*, 77 *FORDHAM L. REV.* 1591, 1592-93 (Mar. 2009).

<sup>313</sup> Washington lawyers, as this Article argued, had, and will have, myriad opportunities to apply their trade. While advocating for a position, a Washington lawyer would be truly remiss to fail in seizing the opportunity provided by healthcare reform to consider the overall role of lawyers in effecting change.

<sup>314</sup> See, e.g., *History Notes: Colonial American and 17th and 18th Century France*, THE FOOD TIMELINE, <http://www.foodtimeline.org/foodcolonial.html> (last visited May 2, 2011).

<sup>315</sup> See, e.g., Neil McLaughlin, *Sound Familiar? Debate Over Repeal of Healthcare Law Evokes Discord of Earlier Times*, 41(4) *MOD. HEALTHCARE* 22 (Jan. 24, 2011) ("And President Barack Obama would sooner amputate his hand than affix his signature to a bill scrapping his signature domestic accomplishment.").

<sup>316</sup> John J. Coughlin, *Sacrifice, the Common Good, and the Catholic Lawyer*, 3 *U. ST. THOMAS L. J.* 6 (2005).

their flaws, that the Presidents knew in their time will be difficult. Yet, today, such officials are needed.