FROM: ACA DEATH SPIRAL

A ROADMAP FOR LEGAL ATTACKS ON THE EMPLOYER MANDATE DELAY

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After going through notice and comment rulemaking, the Internal Revenue Service and the Department of the Treasury announced a "final rule"[1] Monday that the employer mandate tax contained in the Affordable Care Act (26 U.S.C. § 4980H[2]) will not apply at all to large "bubble" employers with between 50 and 99 workers until after December 31, 2015, and that employers with 100 or more workers can avoid the § 4980H tax from December 31, 2014 to December 31, 2015, by offering compliant health insurance coverage to 70% of its employees. These provisions amend previous IRS rulings that the employer mandate tax would start for plan years beginning after December 31, 2014, and that a large employer would need to offer health insurance coverage to 95% of its employees before it would be exempt from the potentially steep taxes imposed by section 4980H. Both the new final regulations and the earlier ones contradict the language of the Affordable Care Act, which states that the tax kicks in for plans beginning after December 31, 2013, and that an employer must offer

[†] Foundation Professor of Law, University of Houston Law Center. Original at acadeathspiral.org/2014/02/12/a-roadmap-for-legal-attacks-on-the-employer-mandate-delay/ (Feb. 12, 2014; vis. Mar. 4, 2014).

[1] s3.amazonaws.com/public-inspection.federalregister.gov/2014-03082.pdf.

[2] www.law.cornell.edu/uscode/text/26/4980H.

health insurance coverage to "all" of its employees, not 95% and certainly not 70%, before it could escape this form of taxation.

In this blog entry, I want to accomplish three goals. I want to educate on the legal issues created by the recent regulation. I want to suggest both a conventional path to challenge the regulation and an unconventional path. And, I want to advocate. I want to implore the readers of this blog who are predisposed to think highly of President Obama to really question the precedent they let be set by permitting an Executive to refuse to collect a tax for years in circumstances where it is crystal clear that Congress has directed that it be done. There is a serious risk that future leaders may not share the same priorities as President Obama or themselves. Immunizing non-collection decisions from judicial correction will lead to collapse of government programs those sympathetic to our current President believe are worthy. It could also lead subsequent Congresses to refuse to enact government programs that make sense only if payment for them can not be subverted by a recalcitrant executive branch. In short, the people who should be most disturbed about what the President has done are his many friends who support not just the now-gutted employer mandate but who believe that the federal government has a major role in, as with the ACA, redistributing wealth acquired through the market. I would be very impressed if they mustered the courage to stand up to their friends.[3]

A CONVENTIONAL PATH TO CHALLENGE THE EMPLOYER MANDATE DELAY

Here are some plausible book moves in the legal chess game that likely lies ahead for the decision yesterday to modify the times and conditions under which the employer mandate will be enforced.

[3] www.imdb.com/title/tt0241527/quotes.

Standing

Opponents will hunt for a plaintiff. As others[4] have noted, due to a doctrine called "standing," this will not be so easy. Under Supreme Court precedent,[5] the plaintiff is going to have to show (a) that the failure to enforce the employer mandate caused the plaintiff's employer not to provide health insurance, (b) that the employer would provide the requisite form of health insurance if the tax were being enforced, and (c) that the plaintiff has actually been damaged by the failure of their employer to provide health insurance. If, for example, the employer says it is not sure what it would do if the tax were imposed, a case challenging the delay is likely to fail for lack of standing. Or if it could be shown that the failure of the employer to provide health insurance actually permitted the employee to purchase equally good and similarly priced health insurance on an individual Exchange, a case challenging the most recent IRS rules would likewise likely fail for lack of standing.

On the other hand, there may well be plaintiffs out there with standing to sue. There are about 18,000 firms with more than 50 employees in the United States. While some might make decisions on whether to provide health insurance that would be unaffected by the tax, if even 5% would admit to being affected by the tax – whose whole point, after all, is precisely to cause the result plaintiff will need to show – that would represent a universe of 900 potential businesses that almost surely employ more than 50,000 employees. It takes only one employee with standing to bring suit in order to challenge the legality of the President's latest actions.

The best plaintiff would be an employee of a large corporation that has not provided "minimum essential coverage" (a/k/a/ health insurance) but which says, without equivocation, that it would do so if the employer mandate were in place. It would be best if the insurance the employer would have provided would cost the employee less than alternatives made available on the individual Exchanges.

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[4] www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/11/another-day-another-illegal-obamacare-delay/.

[5] www.law.cornell.edu/supremecourt/text/504/555.

Perhaps, for example, the employee worked for an employer that had extraordinarily healthy employees – a large gymnasium chain filled with youthful, mostly male,[6] low-health-cost physical trainers, for example – and could thus provide even minimally acceptable coverage via self insurance for less than the amount the employee could obtain on an individual Exchange.

Violation of the Administrative Procedures Act

Plaintiff's argument

Once the standing hurdle is overcome, expect a challenge based on violation of section 702 of the Administrative Procedures Act (5 U.S.C. § 702[7]). This law states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The plaintiff will argue that Congress has spoken with crystal clarity on the issue of when section 4980H was supposed to take effect: it was supposed to take effect for plan years beginning after December 31, 2013. There is nothing ambiguous about that date. There is nothing for the Supreme Court – let alone the Internal Revenue Service – to interpret.

Saying the year 2013 means the year 2015 is completely and totally absurd. The 2013 date chosen by Congress did not encompass the idea of "sometime in the kind of nearish future." Congress balanced many factors, including the difficulty of complying with the statute and the desirability of having the employer mandate coordinate with many other provisions of the ACA that take effect starting in 2014. Moreover, given the enormous costs of the ACA, even in the reduced form taken by original projections, the $10 billion per year[8] in tax revenues the employer mandate was expected to generate, was another reason to call for adoption in 2013. Under these circumstances, Congress did not choose to give large employers 5 years and 9 months to figure out how to finance and acquire health insurance for their employees; Congress thought 3 years and 9 months of "transi-

[6] acadeathspiral.org/2014/01/25/gender-equity-and-the-affordable-care-act/.
[7] www.law.cornell.edu/uscode/text/5/702.
[8] www.cbo.gov/publication/44465.

tional relief" was perfectly adequate. Congress did not want the goal of reducing the number of uninsureds subverted by letting employers off the hook or, perhaps, the burdens on the subsidized Exchanges exacerbated by large employers not pulling their weight.

The situation is no better, plaintiffs will argue, for the Obama administration's decision in the regulations to distinguish amongst different sorts of large employers, letting employers with between 50 and 99 employers off the hook in the year 2015 while compelling at least some employers with more than 100 employees to provide health insurance in the same year. The statute carefully defined large employers in this context to mean more than 50 employees and deliberately chose 50 as the point at which to balance the importance of employer-provided insurance against the administrative and financial burdens of forced provision. Congress did not choose, for example, to stage imposition of the employer mandate first on the biggest of the large employers and a year or so later on the smaller within that group.

Finally, even if there was some basis for staging imposition of the mandate, plaintiffs will argue, the Obama regulations have butchered the provision of 4980H that calls for imposition of a large tax unless the employer offers insurance to all eligible employees. Conceivably the agency could stretch the "all" concept to 95% as it did before. Perhaps 95% could be justified as a bright line proxy for the sort of honest mistakes that Congress would not have wanted to serve as a predicate for a hefty tax. But when the Executive branch goes from "all" to 70% it can not be said with a straight face that anyone is speaking about providing a safety zone against honest mistakes. Now we are talking an entirely different regulatory regime. The Administrative Procedures Act does not give the Executive branch the power to legislate; and if it did so, the APA would itself be unconstitutional.

The Chevron Deference rebuttal

Expect the defendants to fight back with something known in the law as "Chevron deference."[9] This widely cited doctrine emerges

[9] en.wikipedia.org/wiki/Chevron_U.S.A.,_Inc._v._Natural_Resources_Defense_Council,_Inc.

from the observation that executive agencies actually have a lot of expertise in interpreting statutes in their area. Therefore, it should be assumed that Congress would have wanted the agency to have considerable leeway in interpreting statutes. So long as the agency follows the right procedures in developing its rules, such as the "notice and comment" rulemaking that preceded the recent pronouncement on the employer mandate, the rules developed by the agency are lawful and binding even if the court would itself not have interpreted the statute the way the agency does. The main caveat – and it is the big "Step 1" in the Chevron process – is that the agency's interpretation has to be a reasonable interpretation of the statute, a "permissible construction."

But, the plaintiff will argue – and I believe with great success – "Chevron deference" does not exist where the statute is really not subject to interpretation at all. As the Supreme Court said in Chevron, USA v. Natural Resources Defense Counsel, Inc.,[10] "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." And it is hard to imagine anything clearer than "December 31, 2013." It is hard to imagine a construction of "all" – particularly in a context in which alternative taxes (4980H(b)) are placed on employers that offer compliant health insurance to at least some of their employees– that could mean 70%. It is just not a reasonable construction.

"But wait," I hear some judge asking. "Are you saying that the IRS could not give a company a few extra weeks to get health insurance? Are you saying that the IRS could not give companies any leeway in obtaining health insurance and saying that if a single employee goes uninsured the company is subject to a $2,000 per employee (minus 30) tax?" No, not quite. As to the few weeks grace period, I do not believe the IRS can interpret the statute to permit such to occur automatically. I understand giving a select company a few extra weeks if there were extraordinarily circumstances – a natural disaster, an unintentional failure of communications – but Congress (a) already

[10] www.law.cornell.edu/supremecourt/text/467/837.

gave the companies more than a three year grace period to get health insurance for their employees and (b) assesses the tax on a monthly basis, $166.67 per employee per month, so that the company would not in fact be hit with a $2,000 whammy. And as to whether the IRS could give companies some leeway, again, if there were a factual showing that it would be easy for a company to mess up on a small percentage of employees and that some accommodation was necessary in a particular case, I do not believe some leniency would subvert the intent of Congress. But I see no evidence from the IRS that a 30% mistake zone is necessary; instead, this appears to be a way of simply mellowing out a tax regime that the Executive branch now believes (perhaps rightly) is too harsh without, however, asking Congress, who might actually agree were the case respectfully put to them, to assist with a modification of the statute.

The Prosecutorial Discretion rebuttal

The better argument the Obama administration will muster goes under the name "prosecutorial discretion." The idea, buttressed by many case, including the 1985 Supreme Court decision in Heckler v. Chaney,[11] is that the Executive branch needs lots of leeway in determining enforcement priorities and there is therefore a very strong presumption against judicial review of decisions not to prosecute and not to pursue agency enforcement actions. And while, to be sure, most of these cases arise where the government is less transparent about its enforcement priorities, surely the government should not be restricted in its otherwise existing discretion just because it sought notice and comment before deciding what to do and was transparent enough to publish the basis on which it would make decisions.

Here are some quotes from *Chaney* which the Obama administration's attorneys are likely to throw in the face of any potential challenger to its regulations.

- "[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess

[11] supreme.justia.com/cases/federal/us/470/821/case.html.

whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved."

- "In addition to these administrative concerns, we note that, when an agency refuses to act, it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.
- "[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed." U.S.Const., Art. II, § 3."
- "The danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance."

Sounds bad for our plaintiff!

There is, however, the noteworthy footnote 4 in *Chaney* that should give plaintiffs some hope. After all, *Chaney* articulates the doctrine of agency discretion as a strong presumption, not an irrebutable one. Here is what Justice Rehnquist said:

> *We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could justifiably be found that the agency has "consciously and expressly adopted a general policy" that is so extreme as to*

> *amount to an abdication of its statutory responsibilities."* See, e.g., Adams v. Richardson, *156 U.S.App.D.C. 267, 480 F.2d 1159 (197) (en banc). Although we express no opinion on whether such decisions would be unreviewable under § 701(a)(2), we note that, in those situations, the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion."*

In other words, plaintiffs may be able to argue that this is not a case where the agency is in fact making enforcement decisions based on budgetary priorities or the probability of success. Few if any of the reasons behind the discretion doctrine exist here; the doctrine of discretion should not exist for its own sake precisely because it derogates from popular sovereignty exercised via Congress. There should be enough of a paper trail for the plaintiff to show persuasively that, the agency is making an enforcement decision based on a sense that the statute is unfair or unwise or, if someone has left a smoking-gun email around, pure political considerations.

The facts of *Adams* bear some resemblance to the facts here. Just as here there is a statute calling on the IRS to levy a tax starting in 2014, in *Adams*, there was a statute that directed certain federal agencies to terminate or refuse to grant assistance to public schools that were still segregated. Just as here the agency in charge (the IRS) is apparently going to refuse to pursue that tax in 2014 (and 2015) as a matter of policy, in *Adams* the federal agency in charge (Health, Education and Welfare) effectively adopted a policy of refusing to stop funding segregated public schools. The fact that there was general non-enforcement as a matter of policy distinguished the case, in the view of the *Adams* court, from conventional prosecutorial discretion.

The other hope for plaintiffs would be to use the extreme example of this case as a way of infusing contemporary doctrine on review of agency inaction with some thoughts from Justice Thurgood Marshall in his concurring opinion in *Heckler v. Chaney*. Marshall's thoughts might have particular appeal to Justice Elena Kagan, for example, who, in addition to being fair minded, was one of Marshall's clerks close to the time *Chaney* was decided. Marshall, who perhaps unfortunately took an expansive view of the majority opinion in order to criticize it, and who appears to have drafted without

noting its cautionary footnote 4, wrote several quotations that might prove helpful if introduced gently.

"[T]his 'presumption of unreviewability' is fundamentally at odds with rule-of-law principles firmly embedded in our jurisprudence, because it seeks to truncate an emerging line of judicial authority subjecting enforcement discretion to rational and principled constraint, and because, in the end, the presumption may well be indecipherable, one can only hope that it will come to be understood as a relic of a particular factual setting in which the full implications of such a presumption were neither confronted nor understood."

"But surely it is a far cry from asserting that agencies must be given substantial leeway in allocating enforcement resources among valid alternatives to suggesting that agency enforcement decisions are presumptively unreviewable *no matter what factor caused the agency to stay its hand."* (emphasis in original)

Moreover, conceivably traction might be gained in an attack on the employer mandate regulations by limiting the theory of the case to agency failure to enforce a regulation as opposed to decisions of prosecutors not to pursue criminal charges. As Justice Marshall wrote:

"A request that a nuclear plant be operated safely or that protection be provided against unsafe drugs is quite different from a request that an individual be put in jail or his property confiscated as punishment for past violations of the criminal law. Unlike traditional exercises of prosecutorial discretion, "the decision to enforce – or not to enforce – may itself result in significant burdens on a . . . statutory beneficiary." (citing *Marshall v. Jerrico, Inc.,* 446 U.S. 238,[12] 446 U.S. 249[13] (1980)).

Nonetheless, plaintiffs will have to contend with the fact that (a) Thurgood Marshall's ideas on prosecutorial and agency discretion were not shared by the remainder of the court and (b) the extreme conditions found in *Adams* have not been found in other cases in which such "footnote 4" claims have been brought. The presumption established by *Heckler v. Chaney* has clearly remained a very strong one.

[12] supreme.justia.com/cases/federal/us/446/238/case.html.
[13] supreme.justia.com/cases/federal/us/446/238/case.html#249.

A Tax Whistleblower action:
An unconventional path for challenging
the employer mandate delay

The greatest difficulty for those disturbed by the Obama administration's regulatory subversion of its own law is the prosecutorial discretion argument discussed above. Almost everyone thinks there should be some degree of prosecutorial discretion and the case law strongly and pretty persuasively supports the idea that the judicial branch should at least seldom be able to force prosecutors or agencies to more forcefully enforce laws, particularly where Congress has the ability to coerce the Executive branch to do so through aggressive techniques such as appropriations or, I suppose, in the most egregious cases, impeachment. The tension will be whether and under what circumstances the Executive branch under the rubric of "prosecutorial discretion" can completely subvert the language and intent of a statute through a refusal to collect a tax.

So, might there be another path for attacking the regulation, one either already in existence or one created by Congress?
Perhaps. There is a remedy on the books already that might at least make the Obama administration squirm. It would do so because it might make clear that what was going on was not an exercise in prosecutorial discretion at all, but rather an effort to rewrite the statute. The idea is to for anyone at all to be a whistleblower under 26 U.S.C. § 7623 and to advise the IRS via a Form 211[14] that a particular large employer, preferably one that had over 1030 employees and therefore could owe more than $2,000,000 in 4980H taxes, had failed to provide health insurance to its employees and had failed to pay any of the taxes created in section 4980H. The whistleblower does not need to show fraud to file a Form 211. The whistleblower merely needs to show that there has been an underpayment of tax. Of course, to protect against claims of bad faith, the Form 211 should disclose that the claimant knows that the employer is relying on IRS regulations as a defense but that the claimant asserts that those regulations are unlawful.

[14] www.irs.gov/pub/irs-pdf/f211.pdf.

Form 211
(Rev. December 2007)

Department of the Treasury - **Internal Revenue Service**

Application for Award for Original Information

OMB No. 1545-0409

Date Claim Received:

Claim No. (completed by IRS)

1. Name of individual claimant	2. Claimant's Date of Birth (Month / Day / Year)	3. Claimant's SSN or ITIN
Principaled Liberal	7 / 4 / 1980	XXX-XX-XXXX
4. Name of spouse *(if applicable)*	5. Spouse's Date of Birth (Month / Day / Year)	6. Spouse's SSN or ITIN

7. Address of claimant, including zip code, and telephone number

Main Street, USA xxxxx xxx-xxx-xxxx

8. Name & Title of IRS employee to whom violation was reported	9. Date violation reported:
Any IRS Agent	1/1/2015
10. Name of taxpayer (include aliases) and any related taxpayers who committed the violation:	11. Taxpayer Identification Number(s) (e.g., SSN, ITIN, or EIN):
The Large Corporation	xxx-xx-xxxx
12. Taxpayer's address, including zip code:	13. Taxpayer's date of birth or approximate age:

14. State the facts pertinent to the alleged violation. (Attach a detailed explanation and all supporting information in your possession and describe the availability and location of any additional supporting information not in your possession.) Explain why you believe the act described constitutes a violation of the tax laws.

This employer has more than 50 full time equivalent employees and did not offer health insurance to them. It did not pay the tax required by 26 USC 4980H. I know this because the company president admitted in news reports that it was grateful for an IRS ruling that it did not have to pay the tax. This IRS ruling, however, is unlawful because it is contrary to the express language of the Affordable Care Act.

15. Describe how you learned about and/or obtained the information that supports this claim and describe your present or former relationship to the alleged noncompliant taxpayer(s). (Attach sheet if needed.)

I learned about this from public admissions by the taxpayer.

16. Describe the amount owed by the taxpayer(s). Please provide a summary of the information you have that supports your claim as to the amount owed. (Attach sheet if needed.)

On information and belief, the employer has 1031 employees and therefore owes $2,020,000 in taxes under 26 USC 4980H.

Declaration under Penalty of Perjury
I declare under penalty of perjury that I have examined this application, my accompanying statement, and supporting documentation and aver that such application is true, correct, and complete, to the best of my knowledge.

17. Signature of Claimant — 18. Date: 1/1/2015

MAIL THE COMPLETED FORM TO THE ADDRESS SHOWN ON THE BACK

Form **211** (Rev. 12-2007) Catalog Number 16571S publish.no.irs.gov Department of the Treasury-**Internal Revenue Service**

Now, I would not expect the IRS to then take a customary next step of pursuing the non-paying large employer for the 4980H taxes. I would not expect the IRS to provide any award to the whistleblower that would be available if the IRS had actually collected any money as a result of the Form 211 filing. But it is this failure of the IRS to do anything or to pay anything that might trigger the right of

the Form 211 claimant to bring a legal action in which the legality of the Obama administration's delay of the employer mandate could be challenged. Section 7623(b)(4) of the Internal Revenue Code permits "any determination regarding an award" to be appealed to the Tax Court, which has jurisdiction over such appeals.

Again I would not expect the IRS to take such an appeal lying down. The IRS will claim that it has complete discretion over whether to pursue a taxpayer brought to its attention under Form 211. A decision to the contrary could create the potential for massive, expensive litigation. Moreover, the IRS will say, the appeal permitted by section 7623(b)(4) is one over the size of any award not over whether the IRS decides to proceed with any administrative or judicial action based on information contained in a Form 211.

These will be strong arguments. They may well persuade the Tax Court. They may well persuade a Circuit Court of the United States to which an adverse decision of the Tax Court can be appealed. But what they will expose is that the IRS does not regard the regulatory changes it has made as merely ones of prosecutorial discretion – deciding where and how to expend its resources detecting underpayments. Here, that work has already been done for them. Instead, they constitute a substantive rule on the circumstances – none for 2014 and few for 2015 – under which a large employer that fails to provide health insurance should be liable for taxes that Congress demanded be paid under section 4980H. Perhaps, therefore, the Tax Court, or, on appeal, an Article III appellate court or the Supreme Court might summon up the courage to say, kind of like the suggestion in footnote 4 in *Chaney*, that, although the IRS may have broad discretion, it does not have "discretion" to abdicate its statutory responsibilities. It can not fail to pursue obvious tax deficiencies brought to its attention by a third party when the only reason for so declining is an unlawful regulation promulgated by the IRS in a usurpation of legislative powers. Whatever one thinks of the merits of the employer mandate, such a decision, in my view, would be a healthy restoration in the balance of power among the federal branches of government.

One other note

It was suggested by a friend that Congress could overcome such exercises of prosecutorial discretion by an expanded use of "qui tam" lawsuits. This remedy, which dates back to the 13th Century and has seen a resurgence over the past 20 years in the United States, allow a private citizen to bring a civil action in the name of the government and collect some of the money otherwise owed to the government. Qui tam litigation is a broad and complex subject on which I do not pretend great expertise. But, as I understand it, qui tam lawsuits generally permit a private party to go forward only if the Executive branch either supports the private party's efforts at supplemental enforcement of a regulatory norm or at least acquiesces to it. Under 31 U.S.C. 3730(c)(2)(A)[15] and case law[16] interpreting one of the major branches of qui tam actions, the government can basically kill a qui tam lawsuit to which it objects even if the underlying claim is meritorious. It would therefore take a special qui tam statute that expressly squelched this veto power in order for such action by Congress to permit an attack on the delay of the employer mandate. More fundamentally, however, the probability of a gridlocked Congress enlarging qui tam rights to facilitate judicial overturning of the Obama administration's delay of the employer mandate and doing so over a presidential veto is about zero.

CAUTION

I'm forging some new ground here and laying out arguments without weeks of legal research in order to get them on the table. I am likely missing things or even, perchance, getting things wrong. My hope, however, is that what I've written is intelligent and helpful enough to get others to discuss further and potentially take action on the serious legal issues involved when a President decides not to collect taxes that Congress has clearly demanded be paid.

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[15] www.law.cornell.edu/uscode/text/31/3730.

[16] scholar.google.com/scholar_case?case=4486425499165060593&q=318+f.3d+250&hl=en&as_sdt=6,44.

Acknowledgement

This blog post benefited greatly from a conversation with Professor Sapna Kumar,[17] an expert on administrative law. I, of course, am responsible solely for any mistakes made herein and I have no idea what Professor Kumar – whose main focus is the intersection of administrative law and intellectual property – thinks about the Affordable Care Act or its implementation. So, if you don't like the post or there is something wrong, don't blame her. //

[17] www.law.uh.edu/faculty/main.asp?PID=4715.