

9. HEALTH CARE AND THE CONSTITUTION #2

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Former Senator Schmitt Finds Healthcare Proposals Unconstitutional

The “unalienable rights” stated in the Declaration of Independence, as described previously, include “life” as well as “liberty and the pursuit of happiness.” “Life,” however, implies something very different than “health.” The right to life coexists with the “liberty” of individual choice of how life shall be lived in “the pursuit of happiness.” The Constitution of the United States cites no right to “health.” Rather, preservation of health clearly lies with the people within the activities not enumerated as functions of the Federal Government. The 10th Amendment gives the people or States control of health.

Current Congressional leadership and the President remain intent on the impossible task of managing 16 percent of the American economy we call “healthcare.” They argue that Congress’ power to “provide for the...general Welfare” found in Article I, Section 8, Clause 1, permits any form of federal legislation. The full Article I phrase, in fact, reads, “provide for the common Defence and general Welfare.” Following Clauses limit the specific powers of the Congress in regard to the common defense and general welfare, but none give Congress power to do anything it decides is politically or ideologically expedient. This phrase also must be viewed in the context of the more inclusive phrase “*promote* the general welfare” in the Preamble to the Constitution.

That phrase in the Preamble sets out one of several basic reasons for the establishment of our form of government, and it subordinates the Article I Congressional power to other constitutional provisions. Of particular note in this regard are (1) the lack of any Section 8 enumeration of healthcare among other specifically stated areas for Congressional intervention and (2) the combined effect of the 5th and 14th Amendments that make unconstitutional the legislative imposition of reward or penalty on some and not on others, thereby depriving those others of “equal protection of the law.”

The constitutional bounds of the Constitution nonetheless include everything necessary for Americans to have superior healthcare choices and delivery. Americans only need to have broadly applicable income tax deductions for health insurance and insurance providers need to be able to compete across state lines. Lower cost insurance coverage then could be purchased and tailored to individual needs, including income levels, pre-existing conditions, home health care, hospice care, and so on. Congress could further lower healthcare and insurance costs by giving the Courts the authority to limit tort awards in alleged malpractice cases to actual, provable damages and to substantially fine and/or disbar attorneys that bring frivolous or fraudulent suits.

In addition to the unconstitutionality of mandating health reform by selective prohibition and regulation, specific provisions of current proposals add constitutional insult to injury and should not be part of any legislation. Some proposals, enumerated further below, violate provisions of several amendments to the Constitution, specifically, equal protection (5th and 14th), due process (5th), warrantless searches of papers (4th), criminal prosecution rights (6th), and the right for private patients and physicians to associate (9th).

Insurance Mandates: Congress has no specific or general welfare power under Article I, Section 8, to mandate that all Americans use their incomes to purchase anything, much less health insurance. Nor can the power of Congress to regulate interstate commerce under Clause 3 provide constitutional justification for federally regulated insurance unless it requires States to allow insurance companies to compete across state lines. Even then, regulation must be restrained regulation of “commerce” and not unconstitutional mandates on the insured. To make matters worse, those who do not wish to purchase insurance would be deprived of equal protection under the 5th and 14th Amendments. Further, the mandate would confiscate private property (money) without just compensation as required under the 5th Amendment. Nor can the States mandate the purchase of insurance due to the same restrictions of the 5th and 14th Amendments.

Criminalization of Non-Compliance: Proposed criminalization of both an individual’s lack of health insurance and the purchase of health insurance above a government imposed limit violates the 6th Amendment without providing for the extensive and far-reaching protections required for “all criminal prosecutions.”

Prosecutions: Some Congressional proposals require that private contracts between patient and insurer contain specific man-

dated coverage, violating the 4th Amendment right of the people to be secure in their “...papers...against unreasonable searches and seizures...”. Without a constitutionally valid warrant, the government has no power to access what is in a contract (paper or oral) between an American and his or her insurer.

Taxation of Mid-Level Incomes: Proposed new income taxes to be imposed on the few to subsidize the many, and to cover the vast administrative costs of government health-care bureaucracies, violate equal protection under the 5th and 14th Amendments.

Free Association: Many Congressional proposals trample the rights to privacy and free association protected by the 9th Amendment by inserting government review and control between a private patient and his or her doctor. The 9th Amendment states, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The “certain rights” referenced by this Amendment, clearly include those specified in the Bill of Rights. Those “others retained by the people” logically would embrace all naturally encompassing, or intensive, human rights of a free people, for example, the “unalienable rights of life, liberty, and the pursuit of happiness,” identified by the Declaration of Independence. Other such intensive rights include free association, as well as privacy, education, travel, communication, and thought, in other words, rights that inherently belong to humans as a species. Activities like healthcare that relate only to the voluntary exercise of intensive rights clearly would not be included as a “right.”

Mandated State Benefit Exchanges: Congress would require the States to legislate and regulate health benefit exchanges to oversee insurers’ allocation of benefits to subsidized patients. Absent State action, the

federal government would set up and manage an exchange. This coercive mandate on the States violates both nature of the federal system of government envisioned by the Founders and the specific rights of the States and the people spelled out in the 10th Amendment. As James Madison put it, "...it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects."

State Earmarks: With some of its proposals, Congress would selectively exempt some States from healthcare cost payments and related burdens that would be imposed on other States. State earmarks clearly run roughshod over both the general welfare rationale for the Constitution, stated in the Preamble, and the general welfare restrictions on the Congress in Article I, Section 8. On top of this travesty, the people of States not favored by the bill would be deprived of 5th and 14th Amendment equal protection.

Insurance Companies as Utilities: Directly and indirectly, Congress proposes to herd insurance companies into a stable of public utilities. In so doing, Congress not only illogically assumes that insurance constitutes a natural monopoly, like a local power company, but fails to provide for a market rate of return to the companies and their shareholders. Insurers would be limited by law to spending only ten percent of revenues on their actual administrative costs. At the same time, the government would establish minimum standards of care over which the "insurance utility" would have no control as to costs, administrative or otherwise. In addition to the economic lunacy of this proposal,

the unconstitutionality of this charade lies in the 5th Amendment's right not to have "private property" be taken for public use without just compensation."

Limitation on Drug and Device Costs: Congress directly and indirectly proposes to mandate limitations on the costs of drugs and devices. Without the ability to recover the costs of development, testing, and regulatory approval, drug and device companies will be unable to continue vigorous research and development efforts that potentially benefit everyone. Such Congressional restrictions are at a minimum adverse to the intent of Article I, Section 8, Clause 8 that gives Congress broad power to "promote the Progress of Science and the useful Arts." At a maximum, Congress has no enumerated constitutional power to impose restrictions of this nature on selected private entities, either in Article I or under the equal protection mandate of the 5th and 14th Amendments.

Although the final provisions of future attempts to socialize healthcare remain uncertain, Americans must stay forever on guard in the protection of both their liberty and specific Constitutional limitations on government power. The elections of 2010 are a place to once again successfully demonstrate that duty to the future and humankind.

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