

HEALTH CARE LEGISLATION – CONSTITUTIONAL ISSUES

Stephen L. Bakke – December 21, 2010

As health care legislation moved closer to its final legislative moments several months ago, some of the things being discussed by those opposing its passage included the constitutionality of the process being followed and also certain provisions of the proposed law. I think it is relevant and important to discuss the nature of these constitutional issues since there are such passionate opinions as to their existence.

As I recall, at the time there were four major areas of constitutional concerns:

- The “individual mandate” in the legislation, whereby individuals will be required to purchase health insurance.
- The deals that were cut to provide more favorable treatment to a few states.
- The requirement that states establish such things as benefit exchanges.
- The potential “deem and pass” procedure in the House followed by the “reconciliation” procedure in the Senate.

At the time it seemed that public opinion and strict application of our Constitution was going to get in the way of the Democrats’ goal to pass this legislation. Maybe Obama, usually a very savvy and clever politician, was anticipating a future battle when he “called out” and ridiculed the Supreme Court during his last State of the Union Address. Maybe he was saying, “don’t take me on because I’m too formidable.” I don’t think that was too smart!

The issues seem to have narrowed somewhat and I consider the first, third, and last items as still relevant. I dealt with the last item in a recent report on reconciliation, filibuster, et al. I will be dealing with the “individual mandate” in this and other reports to follow. At the end of this report, I will refresh my memory, and hopefully yours, about the “deem and pass” gimmick.

Individual Mandate

Quite simply, the individual mandate requires each person to purchase health insurance. If they don’t, they are subject to monetary penalties. In the 1994 health care reform debate, the Congressional Budget Office was sufficiently concerned over the issue of mandating health insurance. The CBO wrote:

A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy a good or service as a condition of lawful residence in the United States.

Supporters of the mandate would argue that Congress has such powers granted to it in the “Commerce Clause” of Article 1, Section 8 which reads:

The Congress shall have power ... To regulate commerce with foreign nations, and among the several states, and with Indian tribes ...

Opponents of this argument would say that the constitution does not permit the government to forbid any individual from not acting in a commercial manner i.e. not purchasing health insurance. To argue otherwise, they would say, implies infinite powers over all transactions or potential transactions. An interesting example of how this could be extended has been presented approximately as follows: What would then prevent the government from requiring all citizens to purchase a GM or Chrysler automobile to help out the suffering auto industry? Remember that most of the basis for requiring all persons to buy health insurance was to subsidize the expansion of coverage to millions of citizens.

Proponents of this bill also argue that Congress also has the right to do this under the “Necessary and Proper Clause” of Article 1, Section 8 which reads:

The Congress shall have power ... To make all laws which shall be necessary and proper for carrying into execution of the foregoing powers ... [That reference to “the foregoing” would include the earlier Commerce Clause]

Opponents would argue that there would be no limits to the power of Congress if they could extend their authority in any situation that their leadership considers “reasonable and proper.” A strict limitation on government is a cornerstone of our Constitution. That isn’t to say, however, that the Supreme Court would agree with this position given the huge commercial impact this legislation would have. But George Will commented that “if any activity, or inactivity, can be declared to have economic consequences, then anything can be regulated – or required.”

“Deem and Pass”

A procedure that was much discussed during the process of passing the Obamacare legislation is “deem and pass.” It uses a “self executing rule” which allows the House to accept the already passed Senate legislation without actually having an “up or down” vote on the Senate’s bill. If ever used, it would be part of the House’s entire effort to, at the same time, send their desired changes to the Senate. The actual House vote would only include their intended “fixes” to a previously passed Senate legislation.

Because of this rule, successful passage of the fixes would deem the Senate vote passed. The House members would receive “cover” because they can honestly say they didn’t vote for the Senate bill, rather it was the “fixes” that were approved. The Senate is then supposed to use reconciliation to pass the bill with 51 votes. But remember, reconciliation can’t be used unless the legislation is actually signed by the President. So the House has to “trust” the Senate to come back and apply “reconciliation” to make changes satisfactory to the house.

The constitutional problem with “deem and pass” is that it doesn’t comply with this:

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the president of the United States ...
- **Article 1, Section 7 of the United States Constitution**

This clause has always been interpreted as meaning that actual “up or down” votes must be used. Unless passed, the law can’t be sent to the President for consideration.

There seems to be strong precedence for requiring a formal vote. The Supreme Court recently emphasized that specific procedures must be followed – i.e. pass with a majority vote in the House; pass an identical version by vote in the Senate; and signed into law by the President. Justice Stevens wrote for the majority (re: The Balanced Budget Act of 1997):

The Constitution explicitly requires that each of those three steps be taken before a bill may “become a law” ... “The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debate and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only “be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”

Regrettably, there is also precedence for applying the self executing rule – unfortunately including by Republicans. But the prior use was for routine legislation and had been agreed to by both parties. There is nothing bi-partisan about Obamacare and it certainly isn’t routine. But is a “deem” actually equivalent to a constitutional vote? Clearly not if you pay attention to Nancy Pelosi’s comments about the procedure:

Nobody wants to vote for the Senate bill ... I like it (deem and pass) because people don’t have to vote on the Senate bill ...

Here is Obama’s response (dodge) when asked about the “deem and pass” process:

I don’t spend a lot of time worrying about what the procedural rules are in the House or Senate ...

A Little Editorial Comment by Me

Obviously, the end justifies the means for our President. This is reminiscent of what his “deemed” mentor “in-absentia,” radical leader and organizer Saul Alinsky, wrote in his book “Rules for Radicals.” Alinsky was ruthless and would stop at nothing to win. Alinsky’s tactics are eerily similar to Obama’s. It was reported that Obama taught community organizers using Alinsky’s book. Here is a montage – some of this is scary:

Ridicule is man's most potent weapon ... if you push a negative hard and deep enough, it will break through ... pick the target, freeze it, personalize it, and polarize it ... in war the end justifies almost any means ... the less important the end to be desired, the more one can afford to engage in ethical evaluations of means ... [an organizer] asks of ends only whether they are achievable and worth the cost; of means, only whether they will work ... you do what you can with what you have and clothe it with moral garments ... what follows is for those who want to change the world from what it is to what they believe it should be ... the first step in community organization is community disorganization ... an organizer must stir up dissatisfaction and discontent ...

In the final analysis, I'm not qualified to know if this "deem and pass" is technically constitutional or not. But I know it is not in keeping with the spirit of the Constitution. And I know "sleazy" when I see it.

In closing, I quote Thomas Jefferson who had this to say about the limited power of Congress:

[G]iving [Congress] a distinct and independent power to do any act they please which may be good for the Union, would render all the preceding and subsequent enumerations of power completely useless.