HEALTH CARE LEGISLATION – CONSTITUTIONAL ISSUES

Stephen L. Bakke – March 20, 2010

As health care legislation moves closer to its final legislative moments, one of the things that is being discussed by those opposing its passage is the constitutionality of the process being followed and also certain provisions of the proposed law. Whether or not the legislation passes, it is relevant to discuss the nature of the constitutional issues. And if the legislation does pass, it is likely there will be attempts at constitutional challenges.

As I understand it there are 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.

It seems that public opinion and strict application of our Constitution is getting in the way of the Democrats' goal to pass this legislation – so they are resorting to nothing less than trickery. Maybe Obama, 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."

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 – particularly since these are now owned/controlled by the federal government? Remember that most of the basis for requiring all persons to buy health insurance was to subsidize the expansion of coverage to many 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 comments that "if any activity, or inactivity, can be declared to have economic consequences, then anything can be regulated – or required."

Favorable Treatment Given Certain States

Senator Orrin Hatch, and several legal scholars believe that granting of favors in exchange for votes is a violation of the General Welfare Clause of Article 1, Section 8 which reads:

> *The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties imposts, and excises shall be uniform throughout the United States.*

Their argument seems logical that selective spending targeted at certain states runs afoul of the "General Welfare Clause." The impact of these favors seems to be diminishing, but is not totally eliminated.

Requiring the States to Establish Benefit Exchanges

Under this legislation, states would be required to establish benefit exchanges and other such things. I will again quote Senator Orrin Hatch, et al:

> *… [the proposed legislation commands] that states establish such things as benefit exchanges … requires states to establish these exchanges or says that the Secretary of Health and Human Services will step in and do it for them. It renders states little more than subdivisions of the federal government. This violates the letter, the spirit, and the interpretation of our federal-state form of government … In [two decisions] the Supreme Court struck down two laws on the grounds that*

> *the Constitution forbids the federal government from commandeering any branch of state government to administer a federal program …*

This is dealing with the issue of "dual sovereignty," which I understand to recognize the fact that the federal and state governments each have their own distinct sovereign constitutional powers. While I understand that federal law can trump state law on some issues, I found reference to the fact that the Supreme Court has upheld that each level of government can "remain independent and autonomous within their proper sphere of authority."

"Deem and Pass"

The procedure being considered for passing the bill is called "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 that version of the bill. As of this late date we don't know if they will have the temerity to use this procedure, but it's worth examining just in case.

If used, it will be part of the House's entire effort to, at the same time, send their desired changes to the Senate. The actual vote will be on the House's intended "fixes" to the Senate bill but because of this rule, successful passage of the fixes will deem the Senate vote passed. The House members receive "cover" because they can honestly say they didn't vote for the Senate bill, rather it was the "fixes" they were approving.

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. There really isn't any incentive for the Senate to do so. So it's highly likely the Senate version will be the final law!

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 1 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 recent comments:

> *Nobody wants to vote for the Senate bill … I like it 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 …*

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. Pay attention and see if they do try to use "deem and pass.

For information on the "reconciliation" procedure, refer to my recent report thereon.

If this legislation passes, I believe a judicial review should be performed. As of this date, a majority of states (37) and other groups have stated their intention to seriously consider challenging this legislation on Constitutional grounds. Obviously there is more to the issue of constitutionality than can be effectively summarized here. I gave it my best shot anyway.

In closing, I will 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.*