

Ignoring the U.S. Constitution Results in the Destruction of Medicine in the Hippocratic Tradition

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Physicians' abilities to fulfill their obligations under the Oath of Hippocrates are directly linked to the freedoms assured them by the U.S. Constitution.

Physician rules of conduct under the classical version of the Oath of Hippocrates¹ include:

- Keep patients from harm and injustice.
- Give no deadly drugs.
- Give no abortifacients.
- Avoid treatments the physician is not qualified to perform (not using the knife for sufferers of stone).
- Perform services for the benefit of the sick, and avoid sexual relations with patients.
- Maintain patient confidentiality.

The performance of these obligations is directly dependent upon the physician's independent control of his medical practice, without being subject to supervision, control, or employment by any other person or entity. I am aware of physicians who are fearful of speaking forcefully on behalf of patients because of employment constraints. Physicians' fears of recrimination for taking positions contrary to those of their employers are not at all unfounded. Physicians can easily be disciplined or even summarily terminated simply for selecting a more effective (but perhaps less profitable) treatment modality, referrals to other physicians or facilities unacceptable to employers, or advocating forcefully on behalf of patients.

Many states have enacted laws that prohibit the corporate practice of medicine, but these laws are easily skirted, and as increasing numbers of independent physicians find themselves unable to maintain profitability because of the federal government's price controls, such physicians find themselves employed by other entities, generally hospitals that have obtained more lucrative payment schedules. In order to avoid potential conflicts of interest between employers and clients, it is illegal for a non-lawyer to own a law firm. Is avoidance of conflicts of interest any more important in legal matters than in medical matters?

Third-party price controls will always affect the marketplace. If the goods or services are in demand, one of three effects will occur: (1) A black market will develop, thus criminalizing the transactions; (2) Those goods or services will become unavailable, causing great harm to both willing buyers and sellers; (3) Sellers will become subsidized by someone else, thus making it possible for the seller to provide goods or services without suffering adverse economic consequences. This third effect is ultimately disastrous, since transactions depend on continuation of subsidies, and the entity providing the subsidies controls, *de facto*, the transactions. In

this event, both buyer and seller suffer, since the seller has lost independence, and will become more subservient to the subsidizer, and less so toward the buyer. Ultimately, the subsidizer might pronounce those dreadfully enslaving words, "You now work for me." If the subsidizer is using legislation to enact illegal price controls while simultaneously using public money for subsidization, the end result will be criminalization of transactions, marked inefficiencies in distribution of goods or services, and/or loss of independence.

Citizens of these United States of America are fortunate that the Founding Fathers crafted a document known as the U.S. Constitution, which was designed to maintain individual freedoms not only for physicians, but also for everyone else. These patriots were deeply suspicious of a strong central government that might someday curtail individual liberties, so they clearly delineated the powers and obligations of the federal government, while reserving *all* unlisted powers and obligations to the states or to the people. These men fully realized that governmental respect for private property and economic freedoms was the centerpiece for preservation of all other liberties and freedoms.

Many today claim that the U.S. Constitution is a living, breathing document. This should not mean that there is freedom to ignore or distort the clear meaning of this document. It does mean, however, that like any other constitution or set of bylaws, changes may be made *only* via amendments. Provisions for such changes are generally designed to be difficult to accomplish—usually a simple majority vote is insufficient. The nation's founders guaranteed strong individual and state freedoms that were not to be easily discarded, *except* by amendments. The original intent was *not* to create a document that could be ignored, or have its intended meaning distorted, but rather, a document that was to be followed and protected by all three branches of government as the law of the land. If any change was suitable and met the requirements of the amendment provisions, the document would live on, but perhaps breathe a bit differently.

The federal government's intrusion into medical care is *nowhere* authorized by the U.S. Constitution, and clearly violates it. As time passes, more and more infractions are occurring. The Constitution has six articles and 27 amendments, with the vast majority of federal powers residing in Article I Section 8, but *nowhere* is there any mention of "health," "healthcare," or "medical care"—not in any article, section, or amendment. The Founding Fathers wished to ensure that any powers not listed as belonging to the federal government would not somehow be appropriated by it. Thus, they specifically underscored their intention that any unlisted powers were retained by the states or the people, by clearly specifying it in the 10th Amendment, ratified on December 15, 1791.

How then did the U.S. Government derive its authority to engage in medical care or the medical insurance business through the Medicare or Medicaid programs? The usual reasons proffered are: (1) the “General Welfare” clause, (2) the “Interstate Commerce” clause, or (3) the “Necessary and Proper” clause, each of which appear in Article I Section 8. Let us examine each argument.

The General Welfare Clause

The first paragraph of Article I Section 8 says: “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;...” There are at least six reasons why this is *not* a valid defense for authorizing the federal government’s incursion into medicine.

First, “general welfare” is mentioned here in connection with common defense, which directly refers to protecting the nation’s boundaries.

Second, “general welfare” in Article I Section 8 is very similar to the first introductory paragraph of the Constitution, which states: “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.” Here again is “general welfare” used in conjunction with “common defense,” but additionally, the clause “secure the Blessings of Liberty to ourselves and our Posterity” is added. How can one possibly secure the blessings of “liberty” if all such liberties are withdrawn and given to the central government authorities? This is the introduction of the U.S. Constitution, prior to the enumeration of *any* articles, and is simply an added clause that refers to protecting the borders and securing the liberties of this new country. A claim that this clause authorizes the federal government’s involvement in medical care is utterly ridiculous.

Third, in a message to the people of New York on Saturday, Jan 19, 1788, James Madison (the same James Madison who authored the U.S. Constitution), said:

It has been urged and echoed, that the 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,” amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction. Had no other enumeration or definition of the powers of the Congress been found in the Constitution, than the general expressions just cited, the authors of the objection might have had some color for it, though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the course of descents, or the forms of

conveyances, must be very singularly expressed by the terms “to raise money for the general welfare.” But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follow, and is not even separated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded, as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning, and shall the more doubtful and indefinite terms be retained in their fullest extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing, had not its origin with the latter.²

Clearly, Madison not only rejected the notion of unlimited powers being vested upon the federal government via the “general welfare” clause, but he labeled this an absurdity!

Fourth, as if to underscore the strict limitations of powers to be held by the central government, the 9th and 10th Amendments were ratified effective Dec 15, 1791. The 9th Amendment says: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” The 10th Amendment clearly limits the central government’s authority: “The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Could this be clearer? In common language, clarity is given to this issue by specifying that any powers not particularly and specifically stated are *not* to be usurped by the federal government, but are to be retained by the States and by the citizens. There is no reason whatsoever for the existence of the 9th and 10th Amendments, which reserve rights to the States and to the people, if the States and the people have already been stripped of those rights by a blanket “general welfare” clause. James Madison condemned such as an absurdity.

Fifth, if the “general welfare” clause can be improperly expanded to include medical care, why not claim the federal government is authorized to provide fine homes for everyone? How about luxury automobiles? Why not include free electronics for each citizen? Would not these “benefits” qualify under the “general welfare” clause? These things would be wonderful, and recipients would be truly grateful, and perhaps even be happy to vote for any facilitator of such gifting. On the other hand, how would government pay for such largesse without taxation, borrowing, or currency devaluation? If the “general welfare” clause authorizes the U.S. Government’s excursion into Medicare/Medicaid, then it

must, of necessity, include authorization for virtually anything and everything the population might desire—a perpetual Santa Claus! Such a notion is utopian and utterly unrealistic.

Sixth, previous U.S. Congresses fully recognized that the “general welfare” clause did *not* grant the federal government blanket authority. Who could argue that complete elimination of alcoholic beverages would not benefit the “general welfare”? Indeed, injudicious consumption of alcohol is often linked to crimes, deaths, illnesses, lack of productivity, divorces, etc. Members of Congress voiced this thinking early in the 20th century. “Why,” they thought, “if we just rid the country of this harmful substance, the general welfare will rise a few notches.” They knew, however, that constitutional authority did *not* grant Congress the power to simply ban alcohol, even if it could potentially benefit the “general welfare.” Thus, with full respect to the U.S. Constitution, Congress embarked upon the constitutional provision for *amending*, and the 18th Amendment was ratified Jan 16, 1919, banning the manufacture, sale, and transportation of intoxicating liquors. The 18th Amendment was a disaster, and it was subsequently repealed via the 21st Amendment on Dec 5, 1933.

The only legal way to authorize the federal government’s activities in medical care is by an amendment to the U.S. Constitution. Previous Congresses recognized this. The primary author of the U.S. Constitution, James Madison, clearly articulated this.

According to Dr. Jane Orient, executive director of the Association of American Physicians and Surgeons, during oral arguments in *Stewart vs. Sullivan* Judge Nicholas Politan said, “I can shut down Newark Airport, but you want me to shut down Medicare?” (J. Orient, personal correspondence). The correct answer should have been, “Your Honor, did you not solemnly swear to uphold the U.S. Constitution? Is not the Constitution the Supreme Law of this great nation? Does not this Constitution confer upon you and me specific liberties and privileges, prohibiting the federal government from infringement of those liberties? If you find that the federal government has trespassed Constitutional authority, are you not legally and morally bound to refer the operation of Newark Airport back to the State and/or to the people? Similarly, if you find no Constitutional provisions for federal government’s operation of medical insurance, are you not morally and legally required to return these activities to the States and/or to the people? How could you possibly do otherwise, your Honor?”

The Interstate Commerce Clause

The Interstate Commerce Clause in Article I Section 8 allows the federal government to “regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.” There are at least four reasons why this clause does *not* authorize the federal government’s involvement in any medical care activities.

First, commerce is defined by the dictionary as “an interchange of goods, wares, production, or property of any kind, between nations or individuals.”³ Medical care does not meet that definition since doctors are not engaged in distribution of goods or property any more than lawyers are. True, the interstate exchange of durable

goods such as wheelchairs, intravenous catheters, medical machines, etc., would qualify under the clause of “regulate interstate commerce,” just as pens, paper, typewriters used by lawyers would also be subject to this clause.

Second, to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes,” certainly does *not* authorize the federal government to engage in medical care activities of foreign nations, does it? Why then should this clause authorize Congress to engage in the delivery of medical care across state lines?

Third, regulation of interstate commerce cannot possibly apply to medical care, since nearly all medical care is delivered in one state or another. There certainly is not transportation of medical care across state lines. Even with telemedicine, medical care is rendered in one state or another, and would be subject to the regulation of the state/states in which the activity is taking place. Since there are no “goods” crossing state lines, there is no need for regulation above and beyond what is currently being exercised by the states. The argument that telemedicine government regulation is authorized by the interstate commerce clause would actually be welcome. In that event, if goods and property are considered to belong to the physician, and being transported across state lines, the 5th Amendment clearly prohibits such property being taken without due process or just compensation, which is clearly the case with Medicare’s price controls.

Fourth, the authority to “regulate” is far different from “engaging in business.” In the case of Medicare, the federal government is *not* regulating, but actually engaging in the business of medical insurance and the delivery of medical care. Via Medicare’s price controls and voluminous laws on how, when, where, and by whom medical care is to be delivered, the federal government is today actively engaging in the business of medical care, not just the regulation thereof. The U.S. Government collects taxes and premiums for the delivery of medical care, then “pays” for such care. This does not merely represent regulation of commerce, but rather, the actual engaging in commerce, which is *nowhere* authorized by the U.S. Constitution. Then, because of widespread inefficiencies in the delivery of medical care, a continuous cascade of unfair legislation follows. Over time, this not only escalates the inefficiencies and unfairness, but also ultimately enslaves physicians via unequal price controls, causing physicians to seek subsidies from hospitals and other entities that have successfully lobbied for generous reimbursements.

The Necessary and Proper Clause

The last paragraph of Article I Section 8 states: “To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” This clause clearly grants *no new powers* to the federal government above those listed anywhere else in Article I Section 8. To claim otherwise would be a clear disregard to the reference to “foregoing” powers and “all other powers” vested by the Constitution. This argument is outrageous and is not often used.

Unconstitutional Legislation and Medicine

The illegal intrusion of the federal government into medical ventures via the Medicare and Medicaid programs has led to a full frontal assault on physicians by depriving them of their independence through price-control legislation and bureaucratic pronouncements concerning “medical necessity.” The government, finding it could not properly deliver on its promises, felt compelled to impose price controls on physicians and hospitals. Hospitals have been able to protect revenue by lobbying aggressively, both individually and through hospital organizations. Physicians, on the other hand, have been subjected to outrageous price controls, sometimes with actual decreases in fees, and at times forced to provide services for less than the cost of their overhead.

Legislation that requires physicians to render care at an unfair price set by government is a violation of the 5th Amendment, which guarantees that “No person shall be ... deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.” Since physicians earn their living from services rendered, such services represent real property, which is being taken through unconstitutional legislation. This has ultimately caused physician loss of freedom and independence, corralling them into the employ of other entities, usually hospitals, that are more generously compensated by the U.S. government.

To secure the vote of Senator Ben Nelson for “healthcare reform” that greatly expands the federal role in medicine, Nebraska was permanently exempted from paying its share of Medicaid expansion fees, while the other 49 states will be subjected to those taxes. In addition, both Sen. Ben Nelson (D-NE) and Sen. Carl Levin (D-MI) obtained exemptions for nonprofit insurers in their states from taxes that have to be paid in 48 other states. Legislators in other states also carved out special deals in exchange for their votes.⁴ All of these special backroom deals represent gross violations of Article I Section 8, which mandates state equality: “But all Duties, Imposts and Excises shall be uniform throughout the United States.”

Current trends in medicine are already undermining the Oath of Hippocrates. With the advent of electronic medical records (being unconstitutionally mandated and subsidized by the U.S. Government), physicians can no longer assure patients of confidentiality, unless they refuse to enter such data into the record. Some physicians are already being pressured to perform procedures they do not feel qualified to perform. How many physicians will resist the inevitable government-directed rationing? Richard Amerling, M.D., reports, “In January 2011, Medicare will implement a new payment system for patients receiving dialysis for end-stage kidney disease that will severely ration care to this vulnerable (and largely minority) population based on equally arbitrary payment reductions. These patients will be the unfortunate canary in the Medicare coal mine: ‘reform’ legislation will expose millions of Medicare patients to rationing and reduced quality of care.”⁵

Legislators sworn to uphold the Constitution often display utter disdain for it. For example, a reporter questioned Speaker of the House Nancy Pelosi at her Oct 29, 2009, press conference, asking

where in the U.S. Constitution is Congress granted the authority to enact healthcare legislation. Her response: “Are you serious? Are you serious?” She then refused to respond further.⁶

The Social Security Act of 1935 was known to be unconstitutional. On Feb 5, 1937, President Franklin D. Roosevelt, concerned that the Supreme Court would overturn his SSA, sent a message to Congress proposing that the President be granted new powers to add additional judges! The pressured Supreme Court listened also, and, curiously, refused to overturn this illegal assault on the Constitution!⁷ Is it not alarming that, when finding the Supreme Court to be an obstacle to federal overreaching, a U.S. President would propose to mold his own Supreme Court?

The Choices Ahead

It would seem that our United States of America has three choices: (1) Amend the U.S. Constitution to allow for the decades-long assault by unauthorized involvement in the business of medical care. (2) Continue to pretend to follow the Constitution while tolerating continued assaults and ultimate total governmental control over both patients and physicians, eventually forcing physicians to choose between their “careers” and their patients’ best interests. (3) Challenge the unconstitutional usurpations by which the federal government is depriving Americans of their liberty, especially regarding their medical care. Would such a challenge be successful? Possibly not. Probably not. But, there is clearly a zero expectation for any reversal of constitutional assaults from the legislative and executive branches. The judicial branch is the last stop short of a dangerous, bloody revolution, which is ill-advised.

Constitutional challenges should be made in conjunction with massive media attention and the focused spotlights of the Tea Party groups and other freedom fighters. This would force the Supreme Court to fulfill its sworn duty to uphold the U.S. Constitution and order the federal government to completely disengage from the business of medicine. Alternatively, the Supreme Court should openly declare that this document is null and void, bidding it a final farewell on its path toward extinction, while casting vain blessings on the citizenry on its journey toward an archipelago called Gulag.

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