

# The Affordable Care Act: Does the Supreme Court Decision Matter to Its Proponents?

G. Keith Smith, M.D.

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This past fall I made two trips to Washington, D.C., not to ask for anything, but to relay a real-life story and example of the free market at work in medical practice, particularly as it relates to the surgery center I co-founded.

At one point I found myself in the “members only” dining room in the Capitol, just down the stairs from the House chamber, with four U.S. Representatives. One conversational thing led to another and I found myself paraphrasing Murray Rothbard, who is considered the dean of the Austrian school of economics and the founder of libertarianism. I asked these men what their reaction was to the following: Rothbard had stated that governments are formed by men, ultimately to secure some advantage otherwise unavailable to them; and that by extension, the same was true of laws, that is, that their primary purpose is a grant of privilege to those advocating those same laws. Their reaction was interesting. These men all agreed that in the vast majority of cases, the legislation they were asked to promote or support fit this characterization.

I relate this vignette because I find the uncompromising approach to political economy, an approach championed by Rothbard, Ludwig von Mises, and others, to be more and more vindicated over time. As Nobel prizewinner Friedrich Hayek said of Mises, “At first we all felt he was frightfully exaggerating and even offensive in tone. You see, he hurt all our deepest feelings, but gradually he won us around...”

Similarly, Rothbard’s views on the corruption of government were vilified as extremist, but his warnings and conclusions appear more and more correct as time goes by. He was just ahead of his time and of most of his peers.

## **Cui bono? (Who Benefits?)**

In his *History of Money and Banking in the United States*, Rothbard repeatedly asks: Cui bono? He started with this question as part of his historical method and went backwards from there to deconstruct the patterns of theft and deception that characterized central banking practices in this country. Let us apply this method to the debate over the Affordable Care Act (ACA) in the U.S. Supreme Court: Create a list of the players and then examine what benefit was bestowed on them with the passage of this bill. I think that Rothbard would have found that the big-money players have already achieved their purpose, regardless of the fate of the bill in the courts.

It is possible that the deceptions were effective enough to hide some of the players involved entirely. I would therefore welcome any additions to the following discussion.

One of the huge supporters of the ACA was the electronic medical records (EMR) or health information technology (HIT) industry. GE Healthcare and Allscripts (clients of Newt Gingrich) were big winners. Physicians and hospitals were presented with a carrot and a stick by our big brother, Uncle Sam. The positive incentive was that taxpayers would pick up a portion of the expense. That is, whatever the cost of the EMR system, the taxpayers would pay for part of it. The negative incentive was that Medicare payments to physicians and facilities without EMR would be slashed. There was even some talk that the reduction in Medicare payments would be accelerated each year, the stick hitting harder as time went by. This subsidy of the HIT industry provided for a boom in their sales. As Mises taught us: “that which is subsidized proliferates and that which is taxed is destroyed.” These clients of Mr. Gingrich have already made billions that they would never have made without this government intervention. Since the subsidy was part of the HITECH (Health Information Technology for Economic and Clinical Health) Act, enacted as part of the American Recovery and Reinvestment Act of 2009 (ARRA), repeal or overturning of the ACA might have little effect on them.

The central planners who want to control every aspect of our lives also already have most of what they wanted from ACA. Once they have EMR in place, they will know who has cancer, heart disease, or diabetes, or other conditions of interest, and will also know how much patients with a certain disease profile “cost.” This is the ominous death panel feature that without EMR has no teeth. Overturning just the individual mandate would not affect the rationing mechanism, or the ability to enforce it. The pervasive price control regime depends on Medicare, not the ACA.

## **Doctors, Hospitals, and EMRs**

The requirement to implement EMR has vastly different implications in a doctor’s office and in a hospital. Consider a doctor, who is busy taking care of his patients, who has to pay all of his own bills. The government sends him a letter telling him to buy an EMR system that costs \$100,000—or else face pay cuts. There is a high level of urgency: “Do it now, or it will just get worse for you.” There is a list of approved vendors—and an offer (a bribe?) that the government will eventually pay a portion of the

expense if the doctor buys from one of them—and meets a long list of arcane requirements.

This letter could represent a practice-ending event for a doctor. Like any sane physician, he wanted no part of the legislation.

Now contrast his experience with that of the big hospital. The hospital gets a similar letter, with a demand to buy a very costly EMR system. The hospital, however, probably supported the law. Does that make sense?

Hospitals wanted this EMR requirement for two reasons. First, desperate physicians are more likely to fold when big hospitals attempt a takeover of their practice. The doctors may think: "I've got employee expenses, malpractice insurance, office rent, and now this EMR thing! I can't take it any more! I just want to practice medicine. I'm going to give these problems to someone else and just take a salary, or I'm quitting!" This is a perfect entrée for the hospital.

The second reason the hospitals wanted EMR was that once the physicians surrendered and became employees the EMR would be the remote control of those doctors and their practices. No longer would the physicians be able to send their patients to the best surgeon, for example. They would have to send their patients to the surgeon the hospital had hired. No longer would the physicians be able to order this or that test, or more importantly, not order this or that test. They would order the tests or not order the tests as the hospital wished, all the while guided by the hospital's objective to "not make a profit," of course. No leaks. No surgeries or referrals outside of the "network." If a doctor employee fails to comply, a flip of a switch can remove him from the grid. He is not a competitor; he is out of business.

This big EMR expense provided another benefit to the big hospitals: easier takeovers of the little hospitals. I have no doubt that the price of this software was set such that only the big hospitals could afford it. Crushing the small hospitals with such mandates simply places more power into the hands of the few and relieves the hospitals of competitors, relief for which big businesses are more than willing to pay big money.

### **The Pay-off to Insurers**

The "Medical Loss Ratio" (MLR) provision will do the same thing to the little insurance companies that EMR has done and will do to the little hospitals, leaving only the biggest and most powerful competitors in business.

The ACA demands that insurance companies pay out in claims 80%-85% of what they collect in premiums (an MLR of 80% to 85%), with no more than the remaining 10-15% to be used for salaries and administrative functions within the insurance company. Insurers who can't meet the ratio will be required to rebate premiums to subscribers. The overall amount to be rebated may top \$1 billion.<sup>1</sup> These checks will be really popular, but they actually constitute one of the most sinister

parts of the ACA, the alliance of government and big business at its worst.

There are two main beneficiaries of the MLR provision: gigantic insurance companies and big government.

For a gigantic insurer, 10%-15% of \$100 billion is plenty of money, for instance, to pay for administrative functions and giant CEO salaries. The small insurance companies, however, will have serious difficulty complying with this. Fewer players in the insurance market will necessarily drive business to the remaining players. The "rebates" the largest companies are being "forced" to pay will be returned many times in terms of new revenue as small companies fold and their business goes to the giants. The MLR provision is a virtual guarantee that these gigantic companies will receive the gift of the total destruction of their smaller competitors.

Insurers knew about the MLR provision and these rebates when they supported the ACA.

If the goal is a single-payer national health plan the elimination of small insurance carriers is a big step. In this way, the entire health insurance market is destabilized, bringing us closer to that "no other choice," "against the wall" situation that those in government seem to love. Single payer in the U.S. is unlikely to be government run. Rather, as with Medicare, large carriers will run the government plan, carving the country up into regions, like meat for the wolves.

How does one label such a system? A word that I hesitate to use but that is the best description for it is fascism. Professor Robert Higgs uses the phrase "participatory fascism." This marriage of government and big business has been called "mercantilism," or more recently "public-private partnership," but this conspiracy between big business and government in medicine deserves the term "fascism," as people's lives are truly at stake.

Certain waivers were granted to 7 of the 17 states that applied for them. Requests by Texas and Florida, staunch opponents of the ACA, were turned down.<sup>1</sup> I wonder what the answer to the "Cui bono?" question is with respect to those waivers.

### **Conclusion**

Getting caught up in what Lew Rockwell has called the "political theatre" at the U.S. Supreme Court could be the distraction that advocates of government medicine desire. The process reminds me of how a bank board member, having admitted embezzlement, successfully turned a meeting to a heated discussion on whether he gets copies of the bank keys, while the past heist was forgotten.

As patients we should care whether the ACA is overturned. It is likely, however, that the main perpetrators of the law are indifferent to the Supreme Court's actions at this point.

**G. Keith Smith, M.D.**, practices anesthesiology at the Surgery Center of Oklahoma, which he co-founded. Contact: KSmith@surgerycenterok.com.

### **REFERENCE**

1 Alonso-Zaldivar R. Report: Health care law rebates to top \$1B. Associated Press, Apr 26, 2012.