



Bypassing Congress with Regulatory Decrees

When the New York Times reported on December 26 that the “advance care planning” benefit, deleted from last year’s health care reform legislation, had been effected by regulatory decree, the nation’s “paper of record” gave its readers a hint of things to come:



While the new law does not mention advance care planning, the Obama administration has been able to achieve its policy goal through the regulation-writing process, a strategy that could become more prevalent in the next two years as the president deals with a strengthened Republican opposition in Congress.

In fact, the new regulation, permitting Medicare reimbursements to physicians for end-of-life advisory sessions as a part of annual “wellness visits” with patients, was issued at least a month before the news got out. Rep. Earl Blumenauer (D-Oregon) and Sen. John D. Rockefeller IV (D-West Virginia) had tried unsuccessfully to get the change enacted by legislation. So when the new regulation was issued by Dr. Donald Berwick, Administrator of the Centers for Medicare and Medicaid Services, an e-mail went out from Blumenauer’s office warning supporters to celebrate the victory quietly:

While we are very happy with the result, we won’t be shouting it from the rooftops because we aren’t out of the woods yet. This regulation could be modified or reversed, especially if Republican leaders try to use this small provision to perpetuate the “death panel” myth...We would ask that you not broadcast this accomplishment out to any of your lists, even if they are “supporters” e-mails can too easily be forwarded.

The “death panel myth” refers to a controversy ignited by Sarah Palin in the summer of 2009, when the former republican vice presidential candidate posted in a Facebook message the following objection to the advance care planning provision included in the original version of the health care bill:

The America I know and love is not one in which my parents or my baby with Down Syndrome will have to stand in front of Obama’s “death panel” so his bureaucrats can decide, based on a subjective judgment of their “level of productivity in society,” whether they are worthy of health care.

Soon after, Iowa Senator Chuck Grassley spoke at a town hall gathering against “a government-run plan to decide when to pull the plug on grandma.” Palin argued at the time that the issue was whether “Grandma” would even get life-sustaining care, explaining:

These consultations are authorized whenever a Medicare recipient’s health changes significantly or when they enter a nursing home, and they are part of a bill whose stated purpose is “to reduce the growth in health care spending.” Is it any wonder that senior citizens might view such



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consultations as attempts to convince them to help reduce health care costs by accepting minimal end-of-life care?

House Republican leader John Boehner struck the same theme, warning: “This provision may start us down a treacherous path toward government-encouraged euthanasia.”

Apart from the end-of-life issues, the practice of imposing by regulation what was defeated in the legislative process is something that, as the *Times* pointed out, is likely to come up repeatedly in the new Congress. Another example that has already raised some hackles on Capitol Hill is the decision by the Environmental Protection Agency to impose by regulation carbon emission limits that Congress has thus far refused to enact. A bill to reduce heat-trapping greenhouse gas emissions while allowing companies to buy and sell pollution permits under a “cap-and trade” system was passed by the House but stalled in the Senate last year. Two days after the November election, President Obama said he was disappointed, but undeterred.

“Cap-and-trade was just one way of skinning the cat; it was not the only way,” he said. “I’m going to be looking for other means to address this problem.”

He didn’t have to look far or wait long. On December 23, EPA announced plans to impose new limits on greenhouse gas emissions.

“We are following through on our commitment to proceed in a measured and careful way to reduce GHG pollution that threatens the health and welfare of Americans,” EPA administrator Lisa P. Jackson announced, while stating that emissions from power plants and oil refineries combine for about 40 percent of the greenhouse gas pollution in the country. The EPA also announced it would take over the issuing of Clean Air Act permits to industries in Texas because state officials there “have made clear, they have no intention of implementing this portion of the federal air permitting program.” But “this portion” of the air permitting program the greenhouse gas regulations is a portion that Congress purposely did not enact.

The announcement came on the same day Secretary of the Interior Ken Salazar announced the repeal of the Bush administration policy limiting wilderness protection, a regulatory policy issued under former Interior Secretary Gale Norton. The practice of writing law through a regulatory process instead of by acts of Congress has been followed and expanded upon by administration after administration until, according to a 2008 report of the Heritage Foundation, more than 50 agencies had at that time 145,000 pages of rules and regulations to enforce. In a 2005 study done for the Small Business Administration, the cumulative cost to business and consumers of the whole catalogue of regulations contained in the Federal Register was \$1.1 trillion, an amount roughly equal to the sum collected in income taxes for 2007.

While some regulations may be necessary for implementing laws passed by Congress, the practice of establishing by executive fiat policies Congress has refused to enact strikes at the heart of republican government something that the federal government is supposed to guarantee, not deny, to the States: “The United States shall guarantee to every State in this Union a Republican Form of Government...” Article 4, Section 4, The Constitution of the United States.

The Constitution also stipulates in Article I, Section 1: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.” Yet much of the legislative power in America today has been turned over to unelected officials in the Executive branch who promulgate regulations that have the force of law. Despite a



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document that says “We the People” govern through elected representatives, we are increasingly governed by a bureaucratic elite establishing rules and regulations, supposedly for our good, whether or not our representatives in Congress have anything to say about it.

And Congress, rather than opposing this trend, too often meekly goes along. When Alaska Republican Lisa Murkowski last year offered legislation to block the EPA from imposing the cap-and-trade rules, the Senate rejected it by a vote of 53 to 47.

The men who devised the Constitution to be a check on the consolidation of power expected each branch of government to jealously guard its own prerogatives. Perhaps the Republicans in the new 112th Congress will be reminded of that long-neglected responsibility when the Obama administration makes future end runs around the legislative process.



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