43. REGULATION AND THE CONSTITUTION #1

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January 4, 2011

For Immediate Release

Former Senator Schmitt Cites Constitutional Limits on Regulatory Government

Regulatory intrusions into the social and economic fabric of America have reached crisis levels in their attack on individual and collective freedom. Recent actions by the Obama Administration in placing regulatory limits on healthcare, the Internet, the use of public lands, transportation, energy production and transmission, and financial transactions merely constitute the tip of a colossal authoritarian iceberg ahead of the American Ship of Liberty.

It is now obvious that Congress got America into a real pickle when it agreed in 1933, as part of Roosevelt's New Deal, to delegate law-making power to agencies under the control of the President. This unconstitutional and increasingly threatening situation became entrenched with the passage of the 1946 Administrative Procedures Act. APA set up the formal mechanisms for creating regulatory law outside any direct action by Congress.

With the Administrative Procedures Act, Congress gave the Executive Branch almost complete responsibility for directly overseeing the economic burden, legality, and the constitutionality of non-legislative regulations. The legal oversight of regulatory law through the Federal Courts, and its costs were left to the people and the States, as the current challenges to healthcare law and regulations so clearly illustrate.

Does any constitutional authority exist for Congress to transfer the power to establish regulatory law to a federal agency? The very limited answer to this question is "yes." Clause 18 of Section 8, Article I, gives Congress the final power, "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 any Department or Officer thereof." The underlined phrases, however, clearly limit Congressional authority to enumerated powers, specifically Clauses 1-17. Federal Judge Henry Hudson's recent ruling that Clause 18 "may only be constitutionally deployed when tethered to a lawful exercise of an enumerated power" reinforces this obvious limitation.

Unfortunately for the economy and liberty, the limited congressional delegation of authority under this "necessary and proper" Clause has morphed into a vast and growing array of administrative regulations that suffocate private initiative and intrude into the lives of Americans far beyond the constitutional authority of the Congress and the Executive. Now, by ignoring enumerated powers, some would argue that the Congress can give the Agencies the authority to regulate almost everything Americans do by invoking the "general welfare" clauses of the Preamble and Article I, Section 8, Clause 1,

or through the "interstate commerce" Clause (Article I, Section 8, Clause 3). Such an argument blatantly ignores the word and intent of the Founders related to these two clauses.

The full Article I "general welfare" phrase, in fact, reads, "provide for the common Defence and general Welfare." Following Clauses both specify and limit the specific powers of the Congress in regard to the common defense and general welfare, but none give Congress power to do anything it decides is politically or ideologically expedient. This phrase also must be viewed in the context of the more inclusive phrase "promote the general welfare" contained in the Preamble to the Constitution. That phrase in the Preamble sets out one of several basic reasons for the establishment of our form of government, and, in so doing, it links the Article I Congressional general welfare power to other constitutional provisions. Of particular note in this regard are (1) the lack of any Section 8 enumeration of forms of "general welfare" open for Congressional intervention beyond the specifically stated areas and (2) the combined effect of the 5th and 14th Amendments that make unconstitutional the legislative imposition of reward or penalty on some and not on others and thereby depriving those others of "equal protection of the law". Unequal protection forms the basis of almost all regulatory law.

Nor can the power of Congress to regulate interstate commerce under Clause 3 of Section 8 provide constitutional justification for federal regulation of everything involved in commerce. Clause 3 merely states that Congress has the power "To regulate Commerce with foreign Nations, ***and among the several States***, and with the Indian Tribes". This Clause was intended to make commerce "regular" among the States, that is, to prevent artificial political, taxation, or other barriers from being created that would prevent the free flow of commerce between States. It was not intended to give Congress the power to regulate the details of actual commercial interactions, either directly or indirectly. Judge Hudson eloquently counters an expansive interpretation of the Commerce Clause in his recent ruling on the 2010 healthcare law that an individual mandate to buy health insurance under Obamacare unconstitutionally expands the scope of the Commerce Clause.

For example, the Commerce Clause permits the President's appointees to be authorized by Congress to capture and prosecute persons involved in interstate highjacking, wire fraud, and other commerce-related crimes. Congress also can direct agencies to oversee interstate road, rail, and river transportation as well as interstate energy transmission. Federal regulatory activities in these and comparable arenas counter threats to uninterrupted commerce between the States.

What can be done to restore constitutional control over regulatory law? The Founders clearly intended by the language of Article I that enactment of federal laws be the responsibility of the Congress and not passed on to the Executive Branch through generalized regulatory authority. The primary responsibility for reform therefore lies with the Congress. In order to return to the Founders' intent, Congress, first of all, should adhere to the original constitutional limitations of Article I, Section 8, relative to the transfer of regulatory authority to Executive Branch agencies. Second, a schedule for the sunset of existing regulatory authorities should be set in law along with a commitment to a coordinated schedule for constitutional and policy review by relevant Committees.

Then, by Rule and by action, neither House of Congress should allow floor consideration of any Bill or Joint Resolution that is not accompanied by a comprehensive constitutional analysis and justification, that is, a Constitutional Authority Statement. In addition, any Legislative Act should include such a Statement as modified by floor and Conference deliberation. If a Bill's Constitutional Authority Statement has not been approved by a roll-call vote of two-thirds of the members, the legislation automatically should be referred back to Committee.

What, then, can be done to restore constitutional control over existing regulatory law? Of course, if a constitutional challenge to a regulation is warranted, relevant authorities in the Congress can file suit in Federal Court to have that regulation or any generalized regulatory authority struck down. Relative to legislative action, the Constitution (Article I, Section 7, Clause 3) would appear to limit Congressional repeal of regulatory law or general regulatory authority to a separate bill passed by both Houses and signed by the President. In spite of the fact that the President is bound to uphold the Constitution, he or she may decide not to sign a Bill of Repeal. The President also may have conflicts of interest, as it would have been Agencies administered by his appointees, operating under Presidential authority, which issued the various regulations in the first place.

Alternatively, agreement by the House and Senate to a One House Legislative Veto process provides an additional constitutional approach to regulatory review and potential disapproval of regulations or any Executive or Agency order having the effect of a regulation. By compatible Resolutions, the House and Senate could create a One House Legislative Veto process relative to any decision, order, or regulation promulgated by the Executive Branch. Under this process, any Member could introduce a Resolution of Disapproval of a specific regulation or set of related regulations. The Committee of jurisdiction would have 60 days to act after which a discharge petition signed by at least 20 percent of the Members of the relevant body would be in order on that body's floor. The 20 percent requirement limits the possibility of tying up the business of the House or Senate with frivolous or personal use of a Resolution of Disapproval.

If a Resolution of Disapproval passes either House, the Congress can maintain constitutional control of its Legislative Veto process by adhering to the following sequence: one House passage of a Resolution of Disapproval, followed by the other House's opportunity within 60 days to pass a Resolution of Disapproval of the first House's action. This sequence avoids the constitutional requirement for the President to sign any joint action by the House and Senate. Should an Agency or Department refuse to honor the Legislative Veto of a specific regulation, the Congress can hold that Agency or Department in contempt of Congress or use a relevant Appropriations Bill to rescind funding for enforcement of the offending regulation.

The 112th Congress must counter the Obama Administration's now obvious intent to assume authoritarian power through regulatory fiat. This is one of the many opening battles in continuing the 2010 Revolution prior to the 2012 elections when super majorities in the House and Senate as well as the Presidency must be in the hands of men and women willing to govern as the Founders intended.

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