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THEY SAID IT

It is not difficult to see what must be the consequences when democracy embarks upon a course of planning which in its execution requires more agreement than in fact exists. The people may have agreed on adopting a system of directed economy because they have been convinced that it will produce great prosperity. In the discussions leading to the decision, the goal of planning will have been described by some such term as "common welfare," which only conceals the absence of real agreement on the ends of planning . . . Then it will appear that the agreement on the desirability of planning is not supported by agreement on the ends the plan is to serve. The effect of the people's agreeing that there must be central planning, without agreeing on the ends, will be rather as if a group of people were to commit themselves to take a journey together without agreeing where they want to go: with the result that they may all have to make a journey which most of them do not want at all.

F.A. Hayek, *The Road to Serfdom*, 1944.

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SHALL THESE DEAD HAVE DIED IN VAIN?

At times like this, we believe that it is very important to choose words wisely and carefully. Specifically, it is critical not to be hyperbolic, not to exaggerate the woe that envelopes us, to carefully view the events at hand from the perspective of time.

With that said, we think that it is fair to say that this past weekend constituted the worst two days in the history of the universe. First, and most important, the damned University of Northern Iowa Panthers defeated the #1 overall seed-Kansas Jayhawks in the second round of the men's NCAA basketball tournament. This not only royally screwed up our brackets, but also sent one half of the Political Forum into semi-permanent depression, which will likely not be relieved until next November, when the Jayhawks return to the floor of storied Allen Fieldhouse.

In other news, on Sunday, the Democrats in the House of Representatives passed the Senate version of health care "reform," which means that the legislation will soon be signed by our beloved president, Barack Obama. And while this may not be as monumentally devastating as the Jayhawks' loss, it does likely mark the

end of the American experiment with constitutional democracy. And unlike the aforementioned basketball-induced depression, this consequence will not be reversed next November, no matter what happens at the ballot box.

We have written a great deal over the last several months about the fact that “health care reform” is about much more than health care. It is about government control of every aspect of our lives. It is about changing the relationship between the citizen and the state. It is, in short, about the evolution from the nanny state to what political commentator Patrick Basham correctly calls the “bully state.”

We won't bore you today with a reiteration of these arguments. It should suffice, for our purposes, to note that those of you who are unhappy with the government telling you what to eat, what not to eat, when to sleep, how much to sleep, when and how much to exercise, how much to drink, and so on, should make your peace with this sort of government meddling. It is all but certain to get much, much worse. After all, when the state has a direct financial stake in your well being, it has all the motivation it needs to tell you how best to maintain that well being. And after yesterday, it has the power to do so.

Dozens of writers better versed in the subjects than we have written on the technical constitutional challenges that await the health care reform bill, most of which will focus on the federal government's purported overreach. Already, several states are making plans to challenge the federal government for infringing upon the constitutional rights and responsibilities of the state governments. As Florida Attorney General Bill McCollum declared, “The health care reform legislation passed by the U.S. House of Representatives last night clearly violates the U.S. Constitution and infringes on each state's sovereignty.” According to McCollum – who, it is worth noting, was once a member of Congress and served as one the House managers in the impeachment of Bill Clinton – Florida will go to court to file suit against the federal government on behalf of “the State of Florida and of

the Attorneys General from South Carolina, Nebraska, Texas, Utah, Pennsylvania, Washington, North Dakota, South Dakota and Alabama.”

All of this, of course, comes in addition to the constitutional challenges that will be brought pursuant to the individual mandate that exists within the health care bill. As the constitutional scholar Randy Barnett put it over the weekend:

The individual mandate extends the commerce clause's power beyond economic activity, to economic *inactivity*. That is unprecedented. While Congress has used its taxing power to fund Social Security and Medicare, never before has it used its commerce power to mandate that an individual person engage in an economic transaction with a private company. Regulating the auto industry or paying “cash for clunkers” is one thing; making everyone buy a Chevy is quite another. Even during World War II, the federal government did not mandate that individual citizens purchase war bonds.

If you choose to drive a car, then maybe you can be made to buy insurance against the possibility of inflicting harm on others. But making you buy insurance merely because you are alive is a claim of power from which many Americans instinctively shrink.

Obviously, there are some very real concerns here with regard to the Constitution, the Commerce Clause, federalism, and the whole bit. And we certainly don't want to dismiss these or to suggest that they are anything less than critically important – not just for the survival of the constitutional regime in the broader sense, but for the defeat of this specific “reform” bill in the narrower sense. These constitutional challenges may be long shots, but they are also the only shots we have at this point. If they fail, we're all screwed, worse even than our NCAA tournament brackets.

That said, what disturbs us the most about the health care bill is the means by which it was passed. Yes, some provisions may be unconstitutional. And yes, reform will change your relationship with Uncle Sam. But more important, we think, and more suggestive for the future, the passage of the health care bill proves unquestionably that “the will to power” is all that is necessary to transform a nation and, by extension, the world. Madison’s checks and balances (based on Montesquieu’s genius) may have stood up for 200-plus years, but as of March 21, 2010, they are no longer relevant. They are merely procedural obstacles to be overcome. If the end is significant enough, then there are no means that are not justifiable.

Now, we may think that President Obama will go down in history as the man who destroyed the country; or as the man who saddled the country with an all-powerful superstate; or as a one-termer. But none of this really matters in the grand scheme. He will also go down as a hero, the guy who proved that there is no obstacle too large that it can prevent truly ambitious and committed politicians from achieving their goals. Public opinion, precedent, promises, Constitutional roadblocks, procedural roadblocks, longstanding Congressional rules: none of these matter if the will is strong enough. As the Democratic Congressman (and impeached federal judge) Alcee Hastings put it: “There ain’t no rules here, we’re trying to accomplish something . . . All this talk about rules . . . When the deal goes down . . . we make ‘em up as we go along.” Rules, codes, constitutions are simply unimportant to those brazen enough to “make ‘em up” as they go along.

We have written for years now about the coming of the administrative state and the eventual “rule of experts.” The nation took an enormous step in this direction yesterday, even though the “rule of experts” was, at least temporarily, replaced by the “rule of those who know better than you do what you need, despite the fact that they are anything but experts.”

Our concerns about the administrative state have been many and continue to be so. But one of the most palpable and critical is the fact that the elevation of the

will of the experts necessarily means the diminution of the will of the people. We have written countless times that representative government cannot survive the imposition of another’s will for that of the people. It should be noted that this remains true, whether the will that is substituted is that of an allegedly impartial bureaucracy or that of an obstinate and destructive parliamentary majority.

The procedural hoops through which the Democrats had to contort their bill are manifold and manifest. There was simply no way to manufacture enough support to pass this legislation without amending decades of precedent and thus perverting the constitutional and institutional ties that are intended to bind the legislative branch to the concept of “government of the people, by the people, and for the people.”

The use of the budget reconciliation process is clearly dishonest in this case. The bribes offered to Nebraska’s Ben Nelson, to name just one, are clearly corrupt. The threat to “deem” the bill passed in the House without actually voting on it was clearly inappropriate and constitutionally questionable. The executive order offered as an inducement to the allegedly pro-life Congressman Bart Stupak is clearly illegal and unconstitutional (not to mention of little or real, long-term value). This entire deal just reeks of corruption, misbehavior, and disregard – not just of precedent and law, but of the will of the people as well.

The standard response to these charges, of course, is to whine childishly about how “Republicans did it too!” Republicans passed non-budget bills using reconciliation. Republicans used “deem and pass” to secure legislation. Republicans bribed and coerced and did all sorts of other naughty things too, you see.

Well, for starters, that’s not entirely true. Yes, Republicans, when they controlled Congress, engaged in some procedural flim-flammy, but never on a scale such as this and never on a bill so important, so controversial and so nation-altering as this one. The Republicans, for example, gave their members some

semblance of political cover by using “deem and pass” to raise the debt ceiling, which is not really the same thing as taking over 17% of the nation’s economy.

Additionally, and more to the point, so what? So the Republicans are guilty of ignoring the will of the people and enacting their will over the objections of their opponents as well as their constituents. So flipping what? If we’re expected to say that this therefore makes the Republicans guilty of advancing the destruction of constitutional governance also, then we’ll say it: this therefore makes the Republicans guilty of advancing the destruction of constitutional governance. This isn’t news.

For at least a decade now, the Republican Party has been just as responsible as the Democratic Party for promoting the will of the state over the will of the people. George Bush spent like the proverbial drunken sailor; he passed the largest expansion of the welfare state since Johnson. Tom DeLay twisted (and maybe even broke) a few arms to get his way on legislation that massively expanded the size and scope of government.

The Republicans are anything but innocent here. They may have expanded the state and imperiled freedom less dramatically than the Democrats just did, but they still played along and they still did their bit.

More dishearteningly, the Republican establishment has no intention whatsoever of doing things any differently next time around. You wanna know why we doubt seriously that this will be repealed and why we believe (as we noted at the top of this piece) that the election results in November won’t change a thing? Because, for the most part, the powers that be in the Republican Party are just as enamored with power as the Democrats are, which is to say that they will, come November, find that what they hated seems less hateful when they’re in control of it.

Think for example, of Barack Obama and the promises he made regarding the repeal of the Bush-era civil rights “infringements” – the Patriot Act, the warrantless wiretaps, etc. He hasn’t kept those

promises, of course, because he learned, rather quickly, that it’s different when he does it; it’s better, safer, and a helluva lot more fun when you’re the guy flexing the muscle.

Yesterday, Newt Gingrich was talking tough, insisting that “this will not stand.” Newt declared that:

The American people will not allow a corrupt machine to dictate their future.

Together we will pledge to repeal this bill and start over.

Together we will prove that this will not stand.

2010 and 2012 will be among the most important elections in American history.

These elections will allow us to save America from a leftwing machine of unparalleled corruption arrogance and cynicism.

Yay for Newt! Well ... kinda. The problem is that what Newt really means by all of this is that we should all vote for him in 2012, that we should elect him to take over and to “fix” things and set the world right. The breakdown in the logic here is that the last time we put Newt in charge of anything, it all fell apart rather quickly. His desire to fight the power took a back seat to his desire to impress the little girl who worked for the Ag. Committee (the current Mrs. Gingrich). And his fellow Republicans’ desire to fight the power took a back seat to their own embrace of power for power’s sake.

And as of right now, there is no reason for us to believe that it won’t happen again. As the historian and classicist Victor Davis Hanson put it:

In the future when the Republicans gain majorities (and they will), the liberal modus operandi will be the model—bare 51% majorities,

reconciliation, the nuclear option, talk of deem and pass, not a single Democrat vote—all ends justifying the means in order to radically restructure vast swaths of American economic and social life . . .

They've entered the arena, boasted "let the games begin" and shouted "by any means necessary" . . .

The only hope for this country, therefore, lies with its people. The Republicans won't save them, even if they manage to parlay opposition to this bill into a massive electoral victory this fall. Washington, as we've said before, isn't where the big battles are won and lost. Washington is where the score is kept. The battles have to be won by the people.

In the very recent past, we have suggested that we are heartened by the idea that the people may, in fact, still have the thirst for freedom to fight the administrative state and to resist the ongoing deterioration of their freedoms. If nothing else, the strength and the longevity of the Tea Party movement provides evidence that at least some Americans still desire to live free or die.

If you're asking us to tell you for certain how the American people will react, however, we will plead ignorance. The American people are, in many ways, a mystery to us, and their political predilections never cease to amaze us. After all, it was less than 18 months ago that this very same American public elected president a charlatan with no experience who nonetheless promised to do exactly as he has done.

We would suggest that relying on the American people to save themselves is a risky proposition. It is less risky than expecting our politicians to save us, but risky nonetheless. We hope they're up to the job. We really do. But if they're not, then that "government of the people, by the people, and for the people" that we mentioned earlier shall, contra Lincoln, indeed perish from the earth. And, again contra Lincoln, all those who died to preserve such government – at Gettysburg, Normandy, Khe Sanh, Fallujah, and everywhere in between – will have died in vain.

This was, in other words, a really bad weekend.

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