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# National Health Care: Will Big Brother's Doctor Be Watching Us Federalist Society: Reinventing Self-Government: Can We Still Have Limits on National Power - Panel 1: National Power and Health Care

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# NATIONAL HEALTH CARE: WILL BIG BROTHER'S DOCTOR BE WATCHING US?

*Nadine Strossen*<sup>†</sup>

The concern of the American Civil Liberties Union (ACLU) in the ongoing health care debate is, of course, to guard civil liberties. We take no position on the many financial and policy issues involved in the debate. Nor do we maintain that Americans have a fundamental right to health care. The denial of adequate health care, however, can threaten an individual's rights to life, liberty, and property. Moreover, government involvement in health care can either advance or threaten these fundamental rights, depending on the nature of that involvement. For these reasons, the ACLU has actively participated in the health care reform debate.

Our positions are set out in detail in a comprehensive Public Policy Report that analyzes the Clinton Administration's reform plan.<sup>1</sup> The major civil liberties principles at stake in the health care debate, and that any reform measure must respect, fall into five categories: equal protection, informational privacy, due process of law, freedom of religion, and freedom of speech. For convenience, I will focus my remarks on the Clinton Administration's proposed Health Security Act. The same concerns, though, are implicated by any health care reform measure.

## I. EQUAL PROTECTION

Once the government undertakes to provide a system of health care, recognized the world over as a basic necessity of life, the Constitution requires that all persons be given fair and equitable access to adequate care.<sup>2</sup> Equal protection issues arise whenever government provides services or benefits to some of its constituents, while excluding others. In many respects,

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<sup>1</sup> See AMERICAN CIVIL LIBERTIES UNION, PUBLIC POLICY REPORT, TOWARD A NEW HEALTH CARE SYSTEM: THE CIVIL LIBERTIES ISSUES (Feb. 1994).

<sup>2</sup> U.S. CONST. amend. XIV, §1.

the Clinton plan provides for more equitable treatment than our present health care system. But the plan also creates some sharp inequities. I will mention just a couple of these.

The first Equal Protection concern I will touch on has to do with the scope of coverage in terms of individual participants. Although the Clinton plan would expand health care coverage to most of the thirty-seven million Americans who are currently uninsured, it unjustifiably excludes several groups, such as all undocumented immigrants, including pregnant women and children, as well as many legal permanent residents.<sup>3</sup> Prisoners and Native Americans also are inadequately covered.<sup>4</sup>

The Act's exclusion of aliens and incarcerated people is not only inequitable, but also irrational in terms of financial and public health considerations. Excluding any group from coverage is not sound medical policy and will put all of us at greater risk of contracting contagious diseases. Furthermore, the overall cost of health care can be sharply reduced by encouraging people to use preventative services and to obtain treatment promptly, rather than wait until medical problems escalate and require emergency attention. Yet the latter track is precisely the one to which many immigrants would be driven, resulting in enormous additional costs, especially for cities and states.

A second Equal Protection concern relates to the scope of the benefits package. While the plan is not required to include coverage for every conceivable medical treatment, it cannot exclude coverage of certain treatments that would, in effect, target particular population groups. Such exclusions are particularly problematic if they target groups that historically have been disadvantaged or politically powerless, such as women and children; racial, ethnic, and sexual minorities; the poor; and the disabled. For this reason, we oppose the Clinton plan's limits on outpatient rehabilitation services for persons with disabilities, and also limits on mental health and substance abuse services.

The Clinton plan properly recognizes that women have many unique health needs that often have received short shrift. The plan commendably provides for clinical preventive services for breast and cervical cancer, as well as fertility-related infectious diseases. Reproductive services are the health services

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<sup>3</sup> Health Security Act, H.R. 3600/S. 1757, 103d Cong., 1st Sess. § 1001(c) (1993).

<sup>4</sup> *Id.* at §§ 1004(b)(3), 1001(e) (1993).

that women most commonly seek. It is imperative that the comprehensive health care package include abortion as one of a number of women's reproductive options, consistent with the fundamental constitutional right to choose an abortion.<sup>5</sup> While the Clinton plan provides coverage for abortion services, it leaves open the possibility that these services could be restricted or delayed by a health plan's "gatekeeper" requirements. Any reform plan must clearly assure that the determination of whether an abortion is medically necessary or appropriate remains with the pregnant woman and her physician.

Let me mention one more concern in the Equal Protection area. Any health care reform plan necessarily would create numerous opportunities for discrimination. Therefore, in addition to including substantive provisions consistent with Equal Protection, any health care reform legislation must contain protections against discrimination. We recommend comprehensive anti-discrimination provisions, extending to all entities involved in the health care system, and barring discrimination based on any of the following factors: race, national origin, gender, age, religion, disability, socio-economic status, citizenship or immigration status, sexual orientation, language, political beliefs, family status, or health status.

## II. INFORMATIONAL PRIVACY

Decisions about medical treatment are among the most sensitive decisions we make, and our medical records contain some of the most intimate and confidential information about our lives. Therefore, any health care reform legislation must incorporate comprehensive privacy protections.

The Clinton plan would create a national electronic data network containing vast amounts of information on every person in the United States. Developing enforceable privacy protections for medical information and records is critically important. These protections should include the following key principles:

- 1) Access to and disclosure of all personally identifiable health data, regardless of the form in which the information is maintained, must be strictly limited.

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<sup>5</sup> Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2804 (1992); Roe v. Wade, 410 U.S. 113 (1973).

2) All personally identifiable health records must be under an individual's control. No personal information may be disclosed without that individual's voluntary, informed consent.

3) Health record information systems must be required to build in security measures to protect personal information against both unauthorized access and misuse by authorized users.

4) Employers must be denied access to personally identifiable health information about their employees and prospective employees.

5) Individuals must be given notice of all uses of their health information.

6) Individuals must have a right of access to their own medical records, including the rights to copy and to correct any information in those records.

7) To prevent or remedy wrongful disclosures or other misuse of information, both a private right of action and a governmental enforcement mechanism must be provided.

8) A federal oversight system should ensure compliance with privacy laws and regulations.

The Clinton plan acknowledges most of these principles, but lacks any mechanism for enforcing them, instead deferring the development of such a mechanism to a later date.<sup>6</sup> But experience shows that it is difficult, if not impossible, to build privacy protections into a complex informational system once it is already in place. Therefore, these protections must be included at the outset, as an integral part of the enabling legislation for any health reform measure.

The Clinton plan further jeopardizes privacy by calling for a health security card and a unique identifier system for individuals.<sup>7</sup> Although the plan appropriately limits the uses of the health card to health-related purposes and provides criminal penalties for misuse,<sup>8</sup> any comprehensive, linked database would pose a great temptation to people in both public and private sectors who want access to the information for many non-health-related purposes, ranging from marketing to law enforcement. Once the network was in place, it would be very difficult to limit its use. History is replete with examples of information systems being created for a limited purpose, only to

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<sup>6</sup> Health Security Act, *supra* note 3 at §5101(b) (1993).

<sup>7</sup> *Id.* at §§ 5104, 5105 (1993).

<sup>8</sup> *Id.* at §5438 (1993).

be expanded at a later date. For instance, the Social Security system, created for a limited purpose sixty years ago,<sup>9</sup> now functions as a de facto national identifier.

We urge that the Social Security number not be used as the unique identifier number for accessing health information. The Social Security number has become the most frequently used identifier in the United States for a wide array of public and private purposes. Moreover, as the Social Security Administration has itself recognized, this number is not a reliable identifier due to the high percentage of duplicate, fraudulent and inaccurate numbers.<sup>10</sup> For these reasons, the use of the Social Security number in the health context would jeopardize the privacy and security of personal health information. To protect personal health records from unauthorized access, we need a new, unique identifier limited to the health care context.

The ACLU also opposes the health care card proposed by the Clinton plan. Any such card would evolve into a de facto national identity card that all citizens and residents would have to carry at all times in order to function in society. At present, a variety of regional documents can serve as identification. If a single, uniform national card were created, it would replace all other forms of identification and function as an "internal passport" does in other countries.

### III. DUE PROCESS OF LAW

The constitutional guarantee of procedural due process contains two key components. First, individuals must receive timely information about their rights and responsibilities. Under a reformed health care system, individuals have a due process right to receive information necessary to make informed choices. This information must be thorough, understandable, accessible, and timely. The Clinton plan does not contain sufficiently specific requirements on this score.

Second, any health care plan must provide adequate procedural protections for individuals whose rights are denied under it, affording them a fair opportunity to challenge such a denial. This requirement, in turn, has two components. First, the law must provide substantive remedies for individuals whose rights

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<sup>9</sup> See FRANKLIN D. ROOSEVELT, *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 411 (1941).

<sup>10</sup> *Wolman v. Selective Serv. Sys.*, 501 F. Supp. 310 (D.D.C. 1980).

are denied by creating causes of action and measures for relief. Second, the law must establish procedures for enforcing those rights that are designed to yield fair, accurate, and expeditious resolutions. Here, too, the Clinton plan falls short in some respects. For example, the Act's prescribed procedures for contesting denials of service could take more than a year to complete.<sup>11</sup> Such a protracted process is unacceptable where a patient seeks preauthorization for treatment. The Clinton plan needs to be shored up in both of these respects.

Another due process problem with the Clinton plan is its improper restriction of judicial review.<sup>12</sup> The right of access to the courts is central to our constitutional order. Only through judicial review of executive and legislative action can our separation of powers be preserved. In two respects, the Clinton plan improperly purports to restrict judicial review. First, the plan purports to limit facial constitutional challenges to the Act by requiring that all such challenges be brought within one year of the Act's passage,<sup>13</sup> and it also bars any preliminary injunctive relief.<sup>14</sup> Second, the Clinton plan attempts to insulate the National Health Board's determinations regarding premium caps from judicial review.<sup>15</sup> These determinations may affect the level of payment received by every health care provider in the country, as well as the premiums paid by every family and employer. Therefore, these determinations must be subject to judicial review when they adversely affect particular persons.

#### IV. FREEDOM OF RELIGION

Whether they are patients or health care providers, people cannot be forced to participate in medical treatment that conflicts with their religious beliefs or moral convictions.<sup>16</sup> The requirement that all eligible individuals enroll in health plans threatens the First Amendment right to free exercise of religion.<sup>17</sup> Certain faiths, notably Christian Science, reject tradi-

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<sup>11</sup> Health Security Act, *supra* note 3 at §§ 5202-5206 (1993).

<sup>12</sup> *Id.* at §§ 5232, 5241 (1993).

<sup>13</sup> *Id.* at § 5241 (1993).

<sup>14</sup> *Id.* at § 5241 (1993).

<sup>15</sup> *Id.* at § 5232 (1993).

<sup>16</sup> *Jehovah's Witnesses v. King County Hosp. Unit 1*, 278 F. Supp. 488 (D.D.C. 1967).

<sup>17</sup> U.S. CONST. amend. I.

tional medicine. Accordingly, any governmental health plan must recognize the equivalent of "conscientious objector" status.

Individual health care providers cannot be compelled to perform medical procedures that violate their personal beliefs, and the Clinton plan appropriately respects that right.<sup>18</sup> The plan, however, also extends the so-called "conscientious clause" to institutions, permitting any "health facility" to refuse to perform a procedure.<sup>19</sup> This provision not only goes beyond legitimate free exercise concerns, but also raises serious Establishment Clause<sup>20</sup> problems by allowing any health facility to impose its stated institutional beliefs on patients and individual health care providers. This provision also does not take into account the serious Establishment Clause issues that arise whenever sectarian institutions participate in, and derive benefits from, government-managed and regulated programs.

## V. FREEDOM OF SPEECH

The Clinton plan would impose a range of restrictions on consumer marketing by health plans and purveyors of long-term care insurance. While some of these restrictions are unobjectionable, several raise serious free speech problems.

The government may legitimately regulate commercial speech to prevent consumer fraud,<sup>21</sup> promote health and safety, and prohibit discrimination. The regulations, however, must be narrowly tailored to these ends. Several provisions in the Clinton plan cross this constitutional line. Most conspicuously, the requirement that health plans submit all marketing materials to their regional alliances for prior approval<sup>22</sup> constitutes an unconstitutional prior restraint on speech. If a health plan distributes marketing materials that contain false or materially misleading information, it can be punished for this misconduct after the fact.

Free speech concerns also arise from the absence of certain protections in the Clinton plan. For instance, nothing in it prohibits a health plan from excluding a provider based on political beliefs or from restricting the exercise of First Amend-

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<sup>18</sup> Health Security Act, *supra* note 3 at § 1162 (1993).

<sup>19</sup> *Id.* at § 1162 (1993).

<sup>20</sup> U.S. CONST. amend. I.

<sup>21</sup> *Edenfield v. Fane*, 113 S. Ct. 1792 (1993).

<sup>22</sup> Health Security Act, *supra* note 3 at § 1404 (1993).

ment rights as a condition for participation. Similarly, the Clinton proposal contains no protections for health plan employees who expose improper practices by their employers. Federal whistleblower protections should be extended to such people.<sup>23</sup>

### CONCLUSION

We must monitor any health reform effort to be sure that it strengthens, rather than weakens, civil liberties. Properly designed, a reform effort could enhance personal autonomy and equality of opportunity. If not properly designed, health care reform could pose many threats to these rights as well as to privacy and First Amendment freedoms.

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<sup>23</sup> See Whistleblower Protection Act of 1989, 5 U.S.C. § 1201 (1988).