



The Inadvertent Violation of the Civil and Constitutional Rights of Physicians by the Federal Government

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Editorial

In 1986, the US Congress passed the Health Care Quality Improvement Act of 1986 (HCQIA).⁽¹⁾ HCQIA was designed to protect the health and safety of the public by 1) enhancing the Peer Review process through protection for peer review members from lawsuits, and 2) providing a national repository for reported information regarding medical malpractice payments and adverse actions involving physicians.

HCQIA became law as the medical system was undergoing a significant organizational change. In 1986, most physicians were private practitioners who practiced in hospitals by virtue of holding “privileges” at that hospital. In the 1980’s, there was effectively an organizational and administrative wall between Medical Staff Office Governance and the Hospital Administra-

tion. Fast forward to the drastic changes in the health care system since 1986. In 2023, healthcare has been consolidated into increasingly larger Hospital Organizations, payment for health care services has become consolidated under more powerful governmental and private insurance carriers, and the majority of physicians are now “employed”. In 2023, in most hospital organizations, peer review committees are appointed by the medical staff offices which are part of the hospital administration, the proceedings are conducted in secrecy and under the immunity provisions of HCQIA, and the presiding judge and jurors are selected and paid by the hospital administration. As a result, many have voiced concerns about anticompetitive behavior by some hospitals which can potentially engage in “Sham Peer Review” under the protection of HCQIA.



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While “Sham Peer Review” is a subject of vigorous debate, it concerns part of the provisions under HCQIA. However, it is the Consequences of reporting of adverse actions by the National Practitioner Databank (NPDB) which has resulted in violation of the Constitutional and Civil Rights of physicians [2-10].

NPDB is an agency of the Federal Government under the jurisdiction of the Department of Health and Human Services (HHS). NPDB publishes the reports from hospitals without an independent Federal investigation. The framers of HCQIA did not foresee that in 2023, hospitals and employers will invariably deny employment and/or hospital privileges based on an NPDB report outlining loss of hospital privileges or relinquishment of hospital privileges under investigation. Such an adverse report by NPDB results in the inability of the physician to obtain employment or practice in a hospital. Therefore, in 2023, the unintended consequence of mere reporting by NPDB without further investigation or “Due Process” by HHS, an agency of the Federal Government, violates the constitutional and civil rights of physicians.

The NPDB reporting provision of HCQIA violates the 5th, 8th, 9th and 10th amendments of the Constitution.

1. 5th Amendment: Right to “Due Process”

Under HCQIA and state laws, the Peer review proceedings are confidential and privileged. In the context of all this secrecy, the peer review process often lacks reasonable and fair procedures, does not provide any discovery for the physician, does not allow the accused to compel witnesses to testify, places the burden of proof on the accused, and ignores conflict of interest. Since HHS does not perform an independent investigation, the NPDB report is in violation of the 5th Amendment.

2. 8th Amendment: Cruel and Unusual Punishment

In 2022, over 1000 US physicians had a report filed in the NPDB indicating their hospital privileges were revoked. This action officially blacklists a physician as untouchable by all other hospitals, medical boards, insurance carriers and other entities important to the career of a physician. Without the ability to obtain privileges at other hospitals, a physician’s career is terminated. A report of revoking privileges without “due process” which results in the termination of a physician’s career, amounts to cruel and unusual punishment in violation of the 8th amendment.

3. 9th Amendment: Rights that were granted by state laws, cannot then be preempted by federal laws under the Supremacy Clause

The Physician is licensed to practice medicine under State Law. The effect of adverse reporting by NPDB, a Federal Agency, is to prevent the physician from exercising his rights authorized by the State Medical License.

4. 10th Amendment: The powers not delegated to the Federal Government by the Constitution, nor prohibited by it to the States, are reserved to the States respectively

As in the case of 9th Amendment, adverse reporting by NPDB, a Federal Agency, which prevents the physician from exercising his rights under the state license represents a violation of the 10th Amendment.

There is a dire need for legal action and a corresponding insurance product to reclaim the constitutional rights for all physicians. After all, protecting the physician community ultimately translates to better care for the public.

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