

The Vaccine Agent

David P. Currie

BROWSING IN THE Statutes at Large the other day, I came across the following Act of Congress, adopted February 27, 1813:

[T]he President of the United States ... is hereby authorized to appoint an agent to preserve the genuine vaccine matter, and to furnish the same to any citizen of the United States, whenever it may be applied for, through the medium of the post office

Packages of vaccine dispatched by the agent, and letters to or from him on the subject of vaccination, were to “be carried by the United States’ mail free of any postage.”¹

News to you? News to me. Where did this remarkable provision come from? Where did Congress imagine it got the authority to enact it?

Medical historians have answered the first question.² Edward Jenner published his famous paper on the efficacy of cowpox inoculation in 1798; Benjamin Waterhouse performed the first vaccination in the United States two years later. James Smith, a Baltimore physician, opened a vaccination clinic there in 1802. In 1809 he was made vaccine agent for the state of Maryland. In 1811 he petitioned Congress for “patronage and aid ... in a plan to introduce [the genuine vaccine matter] into general use, in the District of Columbia.”³

Nothing came of this modest proposal, but two years later Smith hit paydirt when President Madison appointed him Vaccine Agent for the whole country under the 1813 law.⁴

The second question is not so easy to answer, for the Annals of Congress contain no

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1 2 Stat 806, §§ 1, 2 (reprinted following this article, at p. 252).

2 Whitfield J. Bell, Jr., James Smith and Public Encouragement of Vaccination, 1940 *Annals of Medical History* 500, reprinted in the same author's *The Colonial Physician and Other Essays* 131 (Science History Publications, 1975). See also Donald R. Hopkins, *Princes and Peasants: Smallpox in History* 267 (Chicago, 1983); Joel N. Shurkin, *The Invisible Fire*, chs. VI, VIII (Putnam, 1979).

3 22 *Annals of Congress* 839 (Jan 30, 1811) [hereafter cited as *Annals*].

4 It has been said that ex-President Jefferson helped to promote this legislation. Hopkins, *Princes and*

record of debates on the bill. Reported to the House by the Committee on Post Office and Post Roads, it was endorsed by the Committee of the Whole House and passed over unspecified objections. The Senate approved it within five days.⁵

Subsequent history casts a little light, but not very much, on the question of congressional authority.

In 1816, three years after his appointment, Dr. Smith petitioned Congress for additional legislation “to give that further and more ample encouragement to vaccination which the welfare and happiness of our country so imperiously demand.” A select committee reported a bill requiring the agent to furnish vaccine free of charge to anyone writing to request it and providing for the first time that he should be paid a salary. An amendment from the floor made it the duty of the Secretaries of War and of the Navy to vaccinate soldiers and seamen. In light of the impending end of the session and “the doubt whether Congress could constitutionally appropriate money for such purposes,” however, the bill was indefinitely postponed.⁶

Undaunted, Smith renewed his petition the following December, asking that he be empowered to provide free vaccine to Army and Navy surgeons and to all other citizens who might apply.⁷ Another committee obliged

with another bill, complete with salary.⁸ There was no reported constitutional objection as the House debated the amount of compensation.⁹ On third reading, however, Representative Daniel Cady of New York

opposed the passage of the bill, as contemplating an interference by the United States in the duty of the States. He had never heard, he said, that the State of New York, or any other State, had been so unmindful of the health of the people, as that Congress ought to take it into their charge. So far as respected the Army and Navy, the United States ought to act on the subject; but, for the rest, it ought to be left to the State Legislatures.¹⁰

Charles Atherton of New Hampshire echoed Cady’s objection a few days later. Army and Navy doctors needed no help from a special agent to vaccinate their men. When it came to providing vaccine for the general public, the difficulty was more serious:

He believed the people would view it with some degree of jealousy and alarm; they would inquire, with some surprise, what article in the Constitution gave to Congress the power of levying taxes for the support of agents in the different departments of the healing art?¹¹

John Jackson of Virginia agreed that Congress had no authority to enact the bill.¹² The Annals then report as follows:

Peasants at 267 (cited in note 2). It is known that Jefferson was an enthusiastic cowpox supporter who vaccinated his entire household himself (see Dumas Malone, *Jefferson the President: First Term, 1801-1805* at 65, 185 (Little, Brown, 1970)), but I have found no direct evidence yet of his involvement with Smith’s proposals.

⁵ See 25 Annals at 844, 958, 1080, 1081 (House); id at 95, 96, 98, 101, 106, 107 (Senate).

⁶ 29 Annals at 719, 940, 1408, 1455, 1457. The Representatives reported as urging postponement were the venerable Timothy Pickering of Massachusetts and one Daniel Webster, of New Hampshire. Neither was known as a strict constructionist when it came to congressional powers.

⁷ 30 Annals at 253-54.

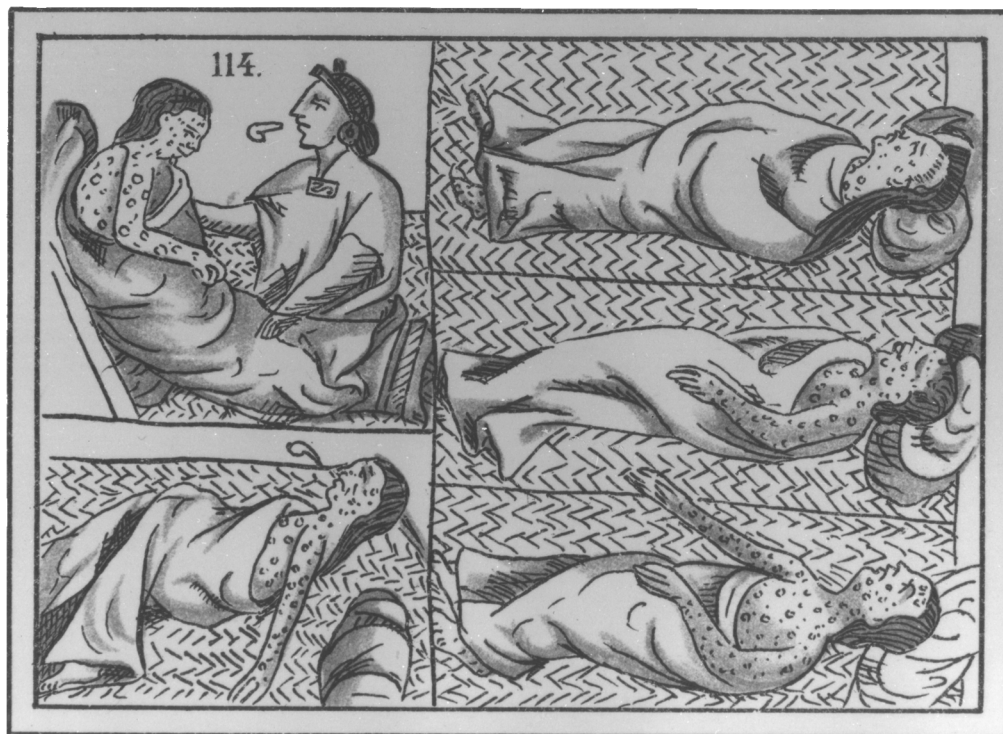
⁸ Id at 266, 361.

⁹ Id.

¹⁰ Id at 364.

¹¹ Id at 468-69.

¹² Id at 470.



Sixteenth-century Aztec drawing of smallpox victim in the Códice Florentino.
Courtesy Peabody Museum, Harvard University.

Mr. Condict and Mr. Wright replied to this objection – the first inferring the Constitutional authority for the act from its connexion with the Army and Navy; the latter from the charge of the general welfare given to Congress, to which this measure certainly would contribute.¹³

The bill was then defeated by a vote of 57 to 88.¹⁴ No attempt was made at this time, however, to repeal the original statute creating the

vaccine agency, although the arguments of Cady, Atherton, and Jackson seemed to cast doubt on the constitutionality of that provision as well.

It is a pity that the speeches of Messrs. Condict and Wright were not reported more fully, for they seem to have been the first attempts to explain the source of federal authority in this field.¹⁵

In 1820 Dr. Smith tried a new tack, asking

¹³ Id. Lewis Condict was a Representative from New Jersey, Robert Wright from Maryland.

¹⁴ Id.

¹⁵ A petition the Annals describe in similar terms was rejected the following year on the basis of a committee report repeating Atherton's argument that "vaccination can be efficaciously disseminated among the Army and the Navy ... by the surgeons thereof, without incurring any additional expense." 31 Annals at 710, 846. An observer who apparently unearthed the petition itself said that Smith had limited this proposal to "the Army and the Navy, the District of Columbia, and other territories under the control of the Federal Government," in order to meet the constitutional objection. Bell, *The Colonial Physician* at 138-39 (cited in note 2). A bill to extend the franking privilege to vaccine agents appointed by the states passed the House during the same session but was rejected by

Congress to grant a charter of incorporation to a "National Vaccine Institution," supported by private donations, that would provide the vaccine wherever it was needed.¹⁶ Defended on the ground that it would cost the Treasury nothing, the resultant bill encountered rough weather in the House, where New Hampshire's Arthur Livermore moved to limit its operation to the District of Columbia:

There was not a general agreement of opinion as to the power of Congress to establish corporations to pervade the United States; but there was no doubt of its power within the District, to which therefore he wished expressly to limit the corporate authority proposed to be conferred by this bill.¹⁷

Representative John Floyd of Virginia, a physician, saw no constitutional problem because "[t]he object of the bill was to aid in the eradication of the small pox from our country – an object which all must admit to be not only innocent but laudable."¹⁸ Joseph Kent of Maryland, the sponsor, added that there was no need for amendment because the bill already provided that the Institution was to be established in the District of Columbia.¹⁹ He made clear, however, that it would be authorized to provide vaccine to users throughout the country,²⁰ and Livermore was

not satisfied: "It was a question whether Congress had the power to extend a corporate authority into the States."²¹ When the proposal reached the Senate, Roberts and Talbot objected again "that the bill proposed to incorporate an institution without limiting it to the District,"²² and Roberts expressly doubted its constitutionality.²³ On Talbot's motion the bill was tabled,²⁴ and it never reappeared.

In 1821 Dr. Smith mistakenly sent smallpox scabs instead of vaccine to a deputy in Tarborough, North Carolina, and several people died.²⁵ Representative Hutchins Burton (of North Carolina) loudly demanded that a committee inquire into the expediency of repealing the statute under which the Vaccine Agent had been appointed.²⁶ Noting that vaccination had eliminated the disease in Denmark, Representative Floyd's committee concluded there was no cause for modifying the law.²⁷ Burton persisted, and a second committee, this time under his leadership, recommended repeal. The franking provision created a "monopoly"; a federal agency was necessarily swamped with orders and prone to terrible errors; the subject seemed, "in a peculiar manner, to appertain to the municipal authorities in the several States."²⁸

Burton expanded on the committee report

the Senate after Kentucky's John Crittenden argued that it was "unnecessary, a bad precedent, and subject in itself to abuse." See 31 Annals at 500, 542 and 32 Annals 1450, 1452 (House); 31 Annals at 281, 286, 292, 294, 299 (Senate).

16 36 Annals at 2445-49; 2 Am St Papers (Misc.) at 565-67.

17 37 Annals at 471.

18 Id.

19 Id at 471-72.

20 Id at 472.

21 Id at 473.

22 Id at 152.

23 Id at 243.

24 Id.

25 See Bell, *The Colonial Physician* at 141 (cited in note 2); 38 Annals at 951.

26 Id at 851-52.

27 Id at 1130-33.

28 39 Annals at 1544-46.

during the House debate. "The subject," he said, "was one strictly of internal policy, not properly within the province of this Government but of the several States, whose duty it was to regulate every thing relating to health and police generally."²⁹ Agreeing that "the State governments were the most competent to legislate upon these subjects," Conduct argued that Congress had the right to help them by distributing vaccine.

When the law now proposed to be repealed was first enacted, in 1813, it was the opinion of many respectable members that the best plan would be to give the agent a salary to compensate him for his services, and cause him to distribute the matter gratuitously to every applicant. Others, however, doubted the Constitutional power of Congress to apply the public money in this way, and the law now proposed to be repealed was passed.³⁰

William Eustis of Massachusetts agreed with Burton: The entire subject should have been left to the states.

This Government ... was instituted to collect revenue, to provide for the public defence, and pay the public debts. How far it had departed from that limited sphere he would not now inquire, but it was certainly at fault when it undertook to regulate any part of the practice of medicine.³¹

The House voted 102 to 57 to repeal the law, and the Senate agreed.³² President Madison had fired Smith a few weeks before.³³

Thus Congress's intrepid foray into the field of public health came to an ignominious

end. Balanced against a conspicuous handful of accidental deaths was the quiet saving of a great many lives; Conduct estimated that the statute had made it possible to vaccinate anywhere from 50,000 to 100,000 people.³⁴ Demagoguery was responsible for repeal. But demagoguery was supported, as it often is, by constitutional arguments. And this time the demagogues were right; Congress had exceeded its powers.

Let us take the easiest argument first. That the object of the legislation was "laudable," as Floyd said, did not bring it within congressional authority; the Federal Government is one of enumerated powers.

Conduct's invocation of the war powers was convincing enough in its place; authority to "raise and support armies" and to "provide and maintain a navy" plainly empowers Congress to keep soldiers and sailors healthy. It cannot justify providing vaccine to the population at large, however, without recourse to the embarrassing chain-of-consequences type of argument that led the Supreme Court a century later to uphold a prohibition of alcoholic beverages as a defense measure.³⁵ As sober workers produce better guns, healthy mothers produce more future soldiers, and healthy young men make better recruits. Such an argument, as the Court itself recently acknowledged, makes a mockery of the principle of limited powers.³⁶

A similar commerce-clause argument, which was never made, would encounter similar objections.³⁷

²⁹ Id at 1634.

³⁰ Id at 1637.

³¹ Id at 1639-40.

³² Id at 1640, 440. See 3 Stat 677 (May 4, 1822).

³³ See 39 Annals at 1636, 1637 (Reps. Burton and Conduct); Bell, *The Colonial Physician* at 142 (cited in note 2).

³⁴ 39 Annals at 1637-38.

³⁵ *Hamilton v Kentucky Distilleries & Whse Co*, 251 US 146 (1919).

³⁶ *United States v Lopez*, 115 SCt 1624 (1995).

³⁷ Id.

That the bill to establish the vaccine agency came from the Committee on Post Office and Post Roads underlines its connection to the postal power. Authority to “establish post offices and post roads” had long been understood to include setting postal rates, even at zero.³⁸ But the statute did more than confer the franking privilege on a private individual; it made him a federal officer and directed him to preserve and distribute vaccine. Congress’s power is to provide for carrying the mail, not for generating it; if it were otherwise, Congress could regulate the entire economy on the basis of this trivial grant of authority.

Representative Kent defended his unsuccessful incorporation bill on the ground that the proposed National Vaccine Institution was to be located in the District of Columbia. This was a familiar dodge; President Washington had urged Congress to set up in the capital both a national university and an agency to promote agriculture.³⁹ But Livermore was right to smell a rat. The power of “exclusive legislation” over the seat of government was meant to enable Congress to govern the District, not to evade the limitations of federal authority. Neither the incorporation bill nor the original statute was a local measure; their avowed purpose was to protect public health throughout the country.⁴⁰

We come at last to what the modern reader has been thinking of all along: the general welfare clause of Article I, § 8, which Representa-

tive Wright invoked in support of the unsuccessful attempt to pay the agent for his services. Even Alexander Hamilton conceded that this provision merely specified the purposes for which tax revenues could be collected and disbursed, since a general power to promote the general welfare would leave next to nothing beyond federal authority.⁴¹ President Monroe would soon accept, and the Supreme Court would much later endorse, Hamilton’s view that Congress could spend for anything that benefited the country as a whole, as vaccination did⁴² – although as Madison had argued a strong case could be made that the clause was intended only to designate the source of funds with which to finance expenditures authorized by other provisions, as similar language in the Articles of Confederation had unmistakably done.⁴³ But as both Kent and Condict insisted, neither the incorporation proposal nor the original statute involved the expenditure of federal funds; and thus neither could be justified as an exercise of the spending power. What both Representatives regarded as mitigating the incursion on state rights eliminated the sole plausible basis of federal authority.

It is ironic that President Madison signed the vaccine bill barely four years before his celebrated veto, for want of congressional power, of a bill to establish a fund for the construction of roads and canals⁴⁴ – a bill supported by respectable arguments under the

38 See David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801* at 151 (Chicago, 1997).

39 See *id.* at 71, 222.

40 The statute did not even purport to make the Vaccine Agent an officer of the District of Columbia.

41 Report on Manufactures, 1 *Am St Papers* (Finance) 123, 10 *Hamilton Papers* at 230 (Dec 5, 1791).

42 See *id.*; Monroe’s 1822 veto message on the bill to establish tolls on the Cumberland Road, James D. Richardson, 2 *A Compilation of the Messages and Papers of the Presidents* 142 (US Congress, 1900) [hereafter cited as *Richardson*]; *United States v Butler*, 297 US 1 (1936).

43 2 *Annals* at 1946; 3 *Annals* at 386-87. See Currie, *The Federalist Period* at 79 n.196, 169 (cited in note 38); Articles of Confederation, Art. VIII: “All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, ... shall be defrayed out of a common treasury, which shall be supplied by the several States”

44 1 *Richardson* at 584 (Mar 3, 1817).

commerce, postal, and war powers as well as by Hamilton's interpretation of the spending power.⁴⁵ Like Congress, the normally eagle-eyed guardian of state interests seems to have been asleep at the switch in 1813. But the Tarborough disaster, which brought about

repeal for all the wrong reasons, reduced the Vaccine Agent from a precedent to an aberration. Congress ended by recognizing that its enthusiasm had outrun its authority, and many moons would pass before it would leap so boldly into the field of public health again.



⁴⁵ See Irving Brant, *James Madison: Commander in Chief, 1812-1836* at 417 (Bobbs-Merrill, 1961): "Had Madison's repeated recommendations of a federal system of roads and canals been based on imperative economic necessity or the urgent requirements of humanity, the constitutional authority probably would have seemed as adequate to him as it did in the cases of the national bank and the scourge of smallpox."

CHAP. XXXVII. – AN ACT TO ENCOURAGE VACCINATION.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he is hereby authorized to appoint an agent to preserve the genuine vaccine matter, and to furnish the same to any citizen of the United States, whenever it may be applied for, through the medium of the post-office; and such agent shall, previous to his entering upon the execution of the duties assigned to him by this act, and before he shall be entitled to the privilege of franking any letter or package as herein allowed, take and subscribe the following oath or affirmation, before some magistrate, and cause a certificate thereof to be filed in the general post-office: "I, A. B. do swear (or affirm, as the case may be) that I will faithfully use my best exertions to preserve the genuine vaccine matter, and to furnish the same to the citizens of the United States; and also, that I will abstain from everything prohibited in relation to the establishment of the post-office of the United States." And it shall be the duty of the said agent to transmit to the several postmasters in the United States a copy of this act: and he shall also forward to them a public notice, directing how and where all application shall be made to him for vaccine matter.

SEC. 2. *And be it further enacted,* That all letters or packages not exceeding half an ounce in weight, containing vaccine matter, or relating to the subject of vaccination, and that alone, shall be carried by the United States' mail free of any postage, either to or from the agent who may be appointed to carry the provisions of this act into effect: *Provided always,* that the said agent before he delivers any letter for transmission by the mail, shall in his own proper handwriting, on the outside thereof, endorse the word, "*Vaccination,*" and thereto subscribe his name, and shall previously furnish the postmaster of the office where he shall deposit the same with a specimen of his signature; and if said agent shall frank any letter or package, in which shall be contained anything relative to any subject matter other than vaccination, he shall, on conviction of every such offence, forfeit and pay a fine of fifty dollars, to be recovered in the same manner as other fines or violations of law establishing the post-office: *Provided also,* that the discharge of any agent, and the appointment of another in his stead, be at the discretion of the President of the United States.

APPROVED, February 27, 1813.

