Nò. 18

THE CAMBRIDGE GLAUCOMA LETTER

published by THE CAMBRIDGE GLAUCOMA FOUNDATION, INC.

Rex non Potest Peccare

I

It was one of those days which had been under-booked, or on which patients had failed to show up, or for some other reason, I had some free time in the office and was making notes for a coming issue of the Glaucoma Letter, when my secretary came in with the mail. "You need to read this," she said as she placed a letter from our Medicare carrier on my desk. I shook my head. For some years now, I have, as a matter of policy, delegated to my secretary the task of reading the correspondence that is addressed to me from Medicare. I have observed for a long time that government agencies, and Medicare is no exception, themselves comply with the laws and regulations they are committed to enforce only when it suits their purposes. Whenever I realize that I must obey a law which they may flout with impunity, I feel humiliated and I become angry, and quickly turn to another subject in order not to waste my efforts in profitless controversy. Several years ago, in attempting to clarify certain of the ambiguities in its regulations, I wrote a series of letters to Medicare to none of which I received an answer. I infer that my letters were never read, and it seemed to me but simple justice that if they did not read my letters, I would not read theirs.

"If you won't read it," my secretary said, "I will have to read it to you. Listen to this:" "Dear Doctor: On July 18, 1984, the Deficit Reduction Act of 1984 became law. This law establishes a freeze on Medicare reimbursement for physician services, creates a participating physician and supplier program, and prohibits certain physicians from raising their charges to Medicare beneficiaries after June 30, 1984." "You had better leave it here," I said. "I will look at it." I tried to resume my writing but the spell had been broken. None of my words seemed right any more, and worse, I could not make them right, no matter how many times I rephrased my sentences. I gave up. I read through the letter from Medicare and started to think about its implications. My secretary was right. I had better find out myself what was going on.

"If you need more information, please call us." is the courteous invitation extended by the Medicare carrier, and since information is exactly what I do need, I dial the number that is given. The line is busy, so I try again, several times, but all I get is a busy signal. Perhaps, I say to myself, they do not really know the answers and to avoid embarrassment they have taken the telephone off the hook. They have my sympathy. The rules and regulations that are promulgated by government are so complex that it requires the full concentration of an astute legal mind to untangle them. Therefore we who spend our lives trying to practice medicine or optometry, or in some other useful and honorable pursuit, are doomed to be law breakers, not from ill intent, but from ignorance, and in constant fear of punishment, since ignorance of the law is no excuse. That rule of thumb was clearly drafted by and for lawyers, since it places everyone else in their debt. But never mind ignorance, what are we to do, when we have the words of the law before our eyes, and the law itself does not make sense?

The government has it easier. Almost daily we read in the newspaper that one agency or another of the government itself has failed to comply with the law. It is an ancient tradition that government should be above the law and should not be answerable for its own law-breaking to the citizen from whom it exacts obedience and taxes. The premise "Rex non potest peccare", the King can do no wrong, is so deeply engrained in the nature of human society that all the declarations that would subject government to constitutional limitations are washed away like inscriptions in the sand, each time the tide of political expediency comes in.

After the sun has set, curiosity, or is it anxiety, gets the better of me. From my desk drawer I scoop up a collec-

tion of dimes for the copying machine and and walk over to the law library to try to find out what the new directives are all about. I readily find what I was looking for. It is called the Deficit Reduction Act of 1984. I had expected only a thin pamphlet, but what I hold in my hands is a book of over eleven hundred pages. At the front are long lists of names of officials responsible for framing the statute, beginning with the President of the United States. Since I know all about them, I turn to the back of the book, the place where from grade to graduate school I have become accustomed to look for the answers. This book is true to form. The very last provision of the statute is an expression of the sense of the Congress adverse to the mining of Nicaraguan waters. Rex non potest peccare, I murmur to myself. The government is above the law. Somewhere in the last third of the volume, on page 1070, sandwiched between "Payment for Clinical Diagnostic Laboratory Tests" and "Payment for Services of Teaching Physicians" in Section 2306, under the Title "Limitation on physician fee prevailing and customary charge levels; participating physician incentives," I find the paragraphs for which I was looking.

A participating physician, that is what the government wants me to become. To participate is Newspeak for being put in harness, and in the government's dictionary the oxen will participate in the plowing of the field. As a reward for bending to its yoke, the government offers to advertise my services. It promises to publish my name, along with that of all the other physicians who have capitulated to its blandishments, and to broadcast it by means of a toll-free number. I am not sure that that would be good for me or for my practice. I rather suspect that very few, if any of my patients really want a government doctor. Most of them would prefer a doctor who is on their side, and my name being omitted from the directory is not likely to degrade me in their eyes. The government also threatens that if I do not become a participating physician, I will forfeit increases in allowable fees which I would otherwise receive. Considering the manner in which these determinations have hitherto been made, I suspect that I am better off on my own.

For those who choose not to become participating physicians, the law poses yet another potential problem. I will let the statute speak for itself.

> "(j)(1) In the case of a physician who is not a participating physician, the Secretary shall monitor each such physician's actual charges to individuals enrolled under this part for physicians' services furnished during the 15-month period beginning July 1, 1984. If such physician knowingly and willfully bills individuals enrolled under this part for actual charges in excess of such physician's actual charges for the calendar quarter beginning on April 1, 1984, the Secretary may apply sanctions against such physician in accordance with paragraph (2).
>
> "(2) Subject to paragraph(3), the sanctions which the Secretary may apply under paragraph(1) are -
>
> "(A) barring a physician from participation under the program under this title for a period not to exceed 5 years, in accordance with the procedures of paragraphs(2) and (3) of section 1862(d), or
>
> "(B) the imposition of civil monetary penalties and assessments, in the same manner as such penalties are authorized under section 1128A(a)."

We note in passing that the invitation to become participants in the Medicare program by agreeing to accept assignment for all charges is extended to all suppliers to the program, laboratories, dentists, optometrists, the purveyors of medical equipment, as well as physicians. The freeze on charges, however, applies to physicians alone. Why should physicians be treated differently from all other Medicare suppliers? Are there any facts to justify such discrimination? In their absence, it would be plausible to to argue that the singling out of physicians was unreasonable and invidious and violated their 5th Amendment rights to due process.

In addition to imposing the freeze on actual charges selectively against physicians, Congress has seen fit to vest the Secretary of Health and Human Services with virtually total discretion as to the imposition of penalties. The Secretary is given discretion to levy fines upon and/or to exclude from the Medicare program non-participating physicians who make excessive charges to Medicare beneficiaries. As prosecutrix she decides whom to place on trial, as jury she decides whether or not he is guilty, and as judge she imposes sentence. She is not required to prosecute any offenders, but if it suits her, she may prosecute them all. Anyone who is familiar with the working of the courts is aware of the pivotal role of prosecutorial and judicial discretion in our judicial system, an undeniable but ironic fact, when so much rhetoric is expended trying to persuade us that ours is a government of laws rather than of men. It is, however, unusual that so little effort is made to camouflage the arbitrary and capricious manner in which justice is

dispensed, and it is precisely because they feel a need to maintain an appearance of "due process" and are jealous of their prerogatives of "judicial discretion" that the courts might be sympathetic to a constitutional challenge on these grounds.

A more specific ambiguity inheres in the chronology of the statute. It is clear that the monitoring period extends from July 1, 1984 through October 31, 1985, but the statute does not specify the duration of the freeze on actual charges. The Health Care Financing Administration construes the freeze on charges as being coterminous with the monitoring period. The monitoring period began July 1, 1984; the law was enacted July 18. Where a pattern of charges is in issue, a physician's conduct in those 17 days prior to the enactment of the statute cannot be excluded in determining his compliance. According to the government, he will be judged according to the pattern of charges during a fifteen month period of which the initial 17 days are an integral part. During those 17 days the statute did not exist. The physician therefore is to be penalized for doing something that was not a misdemeanor at the time that he did it. If the Health Care Financing Administration has its way, the statute is ex post facto, and as such is specifically proscribed by the federal constitution. Therefore, if it is to be immune from a collateral challenge of unconstitutionality, the freeze on charges must be independent of the monitoring period. By this interpretation, the freeze became effective upon enactment of the law, and since no termination other than that of the constitutionally impermissible monitoring period is suggested, one must assume that the freeze will remain in effect indefinitely, until this provision of the law is rescinded.

Even more perplexing is the issue of what exactly it is that physicians are not permitted to do. Let us read the text again: "If such physician knowingly and willfully bills individuals enrolled under this part for actual charges in excess of such physician's actual charges for the calendar quarter beginning on April 1, 1984, ..." The term "actual" is a felicitous pleonasm whereby the authors of this sentence endeavor to distinguish what happens in the real world from the fantasy land of usual and customary charges that is their normal habitat. Yet I do not believe they succeed. One must read their sentence without any preconception of what it should mean. It says a physician may be punished if he bills individual Medicare patients in excess of his actual charges for the control quarter beginning 04-01-84. To illuminate the prohibition we insert some figures. Assume the physician's actual charges for the control quarter were $20,000. He is now prohibited from billing individuals enrolled under Medicare for actual charges in excess of $20,000. One cannot determine from the language whether it is a charge in excess of $20,000 to any one individual or an aggregate of charges totalling $20,000 to all Medicare beneficiaries which is prohibited. Even more ambiguity is introduced by failure of the law to specify the period during which the limitation applies. Construed literally, the statute states that the physician may never bill charges to Medicare beneficiaries in excess of the control value, $20,000 in our example. Once the control limit has been reached, he is left with no choice, if he wishes to continue to care for Medicare beneficiaries, but to donate his services. He might, alternatively, consider leaving the profession to give Congress much needed help in drafting intelligible legislation.

I have given the statute its literal construction, not because I believe it should be so interpreted, but because I wished to show that the statute does not make sense. In interpreting it, we can be sure of only one thing, and that is that the statute doesn't mean what it says. But if it doesn't mean what it says, does it mean anything at all? And if so, then how, short of a court's declaratory judgment, are we to ascertain what that meaning might be? In our predicament, the government once more comes to our aid. They know exactly what it means. According to the Health Care Financing Administration "Medicare will enforce this requirement by comparing your pattern of charges for each service during the 15-month freeze period to your pattern of charges for each service during the quarter beginning April 1, 1984."

The government clearly proposes to go beyond the text of the statute, first in defining the freeze period as being of 15 months duration, and secondly in translating the phrase "actual charges to individuals" as "pattern of charges for each service". The government's plausible interpretation that the law mandates a 15-month freeze on actual charges serves to buttress our suspicion that it intends to apply the law in an unconstitutional ex post facto manner. A second, and even more interesting facet of the government's interpretation is the translation of "actual charges" into "pattern of charges for each service." The words "actual charges" are too indefinite to permit any application. Their replacement with the words "pattern of charges for each service" is, as we have shown, only one of a number of possible judicial constructions of the original. In formal legal proceedings the government would seek to demonstrate that

this interpretation reflected the intention of the Congress. To us, the mind of Congress is a phenomenon of perennial embarrassment, and we choose not to hazard any guess as to what preoccupied that mind when it enacted those words into law. We will leave that task to the government and content ourselves with the demonstration, in a future issue of the Glaucoma Letter, that the government's interpretation is not susceptible to rational or equitable application.

* * * * *

The Cambridge Glaucoma Letter is published at unpredictable intervals by the Cambridge Glaucoma Foundation, Inc. If you wish to receive the Glaucoma Letter, it is free of charge, and if your address label bears a request date, such as "RQD 12-1-80", prior to 1982, or none at all, please write to us, or complete the coupon below and mail it to:

The Cambridge Glaucoma Letter
1679 Massachusetts Avenue
Cambridge, Mass. 02138
(Telephone: 617-868-9307)

I would like to continue to receive the Cambridge Glaucoma Letter.

_____
name

_____
street

_____
city, state, ZIP

Notwithstanding the patent ambiguity of the law, and its possible unconstitutionality for failure to provide an ascertainable standard of conduct, for impermissibly delegating judicial discretion to the Secretary of Health and Human Services, for unreasonable and invidious discrimination against physicians as a class, and for violation of prohibition of the constitution against ex post facto legislation, I would urge my readers, as I myself have done, to make a deliberate effort to comply with the 15-month freeze on charges on the terms stipulated by the Health Care Financing Administration. While it seems not unlikely to me that a physician represented by able counsel would be vindicated in court, such an outcome is by no means certain and would at best prove to be a Pyrrhic victory. One fourth of the freeze-period has, after all, elapsed already, and the entirety of it will soon be behind us. Here is our chance to become knowledgeable in the intricacies of governmental regulation, for new laws are on the drawing board which may well make the Deficit Reduction Act of 1984 look like a work of genius.

Ernst J. Meyer, M.D.

* * * * *

On July 1, 1983, the Cambridge Glaucoma Foundation was accorded tax exempt status as a public charity under Section 501(c)(3) of the U.S. Internal Revenue Code, for a period of 30 months. At the end of this period we must provide evidence that we have public as distinct from private support. Readers who would like to help us demonstrate to the Internal Revenue Service that the Foundation has public support may do so by mailing us a contribution of one dollar. Larger sums, though of course welcome, are probably unnecessary for this purpose.

The Cambridge Glaucoma Letter
1679 Massachusetts Avenue
Cambridge, Mass. 02138

NON-PROFIT
ORGANIZATION
U.S. POSTAGE
PAID
BELMONT, MASS.
PERMIT NO. 58290