
GUADALAJARA!

A Case Study in Regulation by Munificence

Antonin Scalia

THE STORY of the recent travail of U.S. medical schools over the requirement that they admit foreign-trained U.S. citizens to their third-year classes presents an interesting case study in the dynamics of regulation, and merits preservation as a *memento mori* for all beneficiaries of federal munificence.

The Facts

One of the concerns addressed by the Health Professions Educational Assistance Act of 1976 was the large and increasing influx of foreign-trained doctors. Statistics showed that in each year since 1970 the number of foreign medical graduates entering the country had exceeded the number of U.S. medical school graduates, that the foreign graduates constituted more than 20 percent of all physicians practicing here, and that the percentage would rise to one-third by 1990 if current trends continued. Finding that "there is no longer an insufficient number of physicians and surgeons in the United States," the 1976 act included provisions amending the immigration laws to eliminate the preference that foreign medical graduates had received. (The wisdom of this action is irrelevant here, but one must note an apparent inconsistency between the assertion that these physicians were not needed and the un-

questionable fact that they readily found employment.)

Some of the foreign medical graduates, however, and even a greater proportion of the foreign medical students, are U.S. citizens. Indeed, in recent years the tide of disappointed applicants to U.S. schools has overflowed the traditional alternative schools in Western Europe (some of which no longer admit foreign students), and now reaches to more than sixty schools in more than twenty foreign countries. The Rumanian universities at Bucharest and Cluj, for example, reportedly boast almost ninety U.S. medical students; and new medical schools have sprung up in the Caribbean as an apparent market response to the Yankee student dollar. By far the largest and best-organized contingent of emigré medical students, however, is to be found at the Autonomous University of Guadalajara in Mexico.

Given the finding that there was no doctor shortage (as opposed to maldistribution) and given the criticism of foreign medical education with which the legislative history was replete, one might have expected the Health Professions Educational Assistance Act to take steps which would reduce the incentive for U.S. citizens to undertake or continue medical training abroad. In fact, however, as a result of pressure from a small but effective lobby of parents of foreign medical students, the act did just the opposite.

Each year a large number of U.S. foreign medical students (FMSs) seeks admission to the third year of American medical schools. In 1976, only 400 were successful—a relatively small proportion of the 6,000 now estimated to

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be studying abroad. The so-called "Guadalajara clause" of the act sought to compel an increase in the acceptance rate. In fact, it sought to guarantee entry into U.S. medical schools of all FMSs who had completed at least two years of study abroad and had passed Part I of the National Board of Medical Examiners' examination. This was achieved by conditioning each school's receipt of the per-student subsidies funded by the act (so-called "capitation funds," currently \$1,400 per student) upon its agreement to accept a number of the qualifying FMSs to be "equitably apportion[ed]" by the secretary of health, education, and welfare (HEW). The condition was to be applicable during the academic years 1978-79, 1979-80, and 1980-81, and, the legislative history solemnly announced, would not be renewed.

The critical provision was this: a medical school whose assigned quota remained unfilled was permitted to refuse enrollment to a federally qualified FMS only if "the individual does not meet, as determined under guidelines established by the Secretary [of HEW] by regulation, the entrance requirements of the school (*other than requirements related to academic qualifications or to place of residence*)" [emphasis added]. In other words, no FMS meeting the federal requirements could be denied admission to an assigned slot remaining unfilled, no matter how unqualified academically the medical faculty might consider him to be. In practice, what was envisioned was a computerized "matching program," in which the schools and the qualifying FMSs would list their preferences, and each school would be assigned particular individuals from the pool, on what might be termed a "take-it-or-leave-the-money" basis.

This was of course an impingement upon—many would say a blatant affront to—the academic independence of the institutions affected, dictating, in effect, their admissions standards. Fourteen medical schools announced that they would not comply, and would prefer to forfeit the total of about \$11 million in federal funds. (The schools were Baylor, five branches of the University of California [Davis, Irvine, Los Angeles, San Diego, and San Francisco], Case Western Reserve, the University of Chicago, Duke, the University of Illinois, Johns Hopkins, Northwestern, Stanford, and Yale.) Some schools cited financial

reasons; the University of Illinois, for example, noted that providing for the additional students would cost more than the capitation funds it would receive. Most of the schools, however, expressed substantial agreement with the sentiment most forcefully voiced by Johns Hopkins, which announced that it was "not prepared to abdicate to government the right to select its students, nor for that matter, its faculty, courses of study and degree requirements."

Faced with this declination of funding by institutions that together account for some 13 percent of the medical students in the country, the Congress reconsidered the issue in 1977. The House of Representatives voted to amend the objectionable provision, the Senate to repeal it entirely. From the conference committee emerged a compromise that passed both houses and was signed into law by the President on December 19. It is, as a practical matter, substantially less onerous for the medical schools. Instead of being required to accept an indeterminate number of FMSs who pass the exam, they are merely required to expand their third-year classes by 5 percent—a much more predictable, and therefore more acceptable, imposition. The requirement is to apply for only one academic year instead of three; and the body of applicants from among whom the schools must, as a practical matter, select their 5 percent quota is expanded slightly beyond the FMSs eligible under the old law.

The Interpretation of the Facts

The Congress and the press have hailed the new provision as a vindication of academic freedom. In introducing the conference bill in the Senate, Senator Edward Kennedy (Democrat, Massachusetts) described it as "designed to restore to the Nation's medical schools the freedom to apply their own admission criteria"; and the *New York Times* concluded that the new law gives "American medical schools the right to set their own standards as to whom to admit." It may indeed work out that way, but it does nothing of the sort on its face.

To be sure, every skill known to draftsman's pen has been devoted to giving the new provision the appearance of respecting aca-

democratic independence. Thus, instead of specifying that a certain number or a certain proportion of FMSs must be admitted, the law merely requires a 5 percent increase in class size; and does not even require this quota to be filled from a particular "pool," though it does exclude certain categories of persons from counting toward the quota. It is only upon analyzing these exclusions that one discovers (of course) that there is almost no one left except FMSs who could conceivably be an acceptable applicant. The net effect of this change in statutory approach is the difference between telling a small boy that he must eat his carrots and telling him that he must eat what's on his plate. The sound is less harsh, but compliance just as unpalatable. Again, the new law carefully avoids the needlessly provocative language of the earlier version, which specifically prohibited a school from applying its requirements concerning "academic qualifications." That unfortunate phrase is never mentioned. The new version limits itself to setting forth what *will* constitute valid excuses for not meeting the quota, a list that does not include a school's academic qualification requirements. Finally, dust is thrown in the eyes of the guileless by a "good faith effort" provision, which reads as follows:

The Secretary [of HEW] may waive . . . the requirement [of increasing the third-year class by 5 percent] for a school of medicine . . . if the Secretary determines that such school has made a good faith effort to meet the requirement . . . but has been unable to meet [it] solely because there is an insufficient number of students who are eligible to be counted in determining if the school has met such requirement.

But for the fact that it was not intended to make any sense, this provision could be criticized as not making any sense. The draftsmen evidently forgot that there is, technically, no such thing as a defined pool "eligible to be counted" towards meeting the 5 percent requirement, since, as noted above, the new law proceeded not by defining eligibility but simply by declaring ineligible almost all candidates the schools *would be likely* to admit except FMSs. Theoretically, everyone—butchers, bakers, candlestick makers—*everyone* except the

relatively small number of defined ineligible, is "eligible to be counted." It is inconceivable that this "pool" would ever be "insufficient."

Since the literal text of the provision is so devoid of meaning, it can be argued that (making due allowance for what the courts politely call "legislative inadvertence") the "good faith effort" requirement and the reference to a non-existent standard of eligibility imply that the schools themselves are to be permitted to establish reasonable academic criteria—which may exclude not merely butchers, bakers and candlestick makers, but even some FMSs, and maybe even some FMSs who pass Part I of the exam. This interpretation is not inconsistent with the legislative history of the provision, because almost nothing is. The most pertinent portion of that history is contained in the following excerpts from the House debate on the bill, which read as though written by Lewis Carroll for Abbott and Costello:

MR. SATTERFIELD [Democrat, Virginia]. Reading the conference report, on page 11 it says, "In the view of the managers, this enrollment increase requirement in no way impinges on the academic freedom of schools of medicine to apply their own admission criteria. . . ."

I wonder if the gentleman might explain what is meant by that statement.

MR. ROGERS [Democrat, Florida, floor manager of the bill]. Well, . . . we are asking that they increase their enrollment a certain percentage in the third year. Their admission policies are left up to the schools. . . .

MR. SATTERFIELD. I invite the gentleman's attention to . . . the bottom of page 10, where it says, "The conferees do not intend the additional waiver authority to be used for schools who simply apply their normal admissions standards and find no student eligible to be counted can meet such standards."

In other words, reading those two together, it would seem to me that we are saying that if a school applies its normal admission standards and there are not enough people available to fill the quota, then the school has to lower those standards in order to meet the quota. Am I correct?

MR. ROGERS. What we are saying there is that we do not expect them to manufacture unusual conditions to try to avoid the requirement of the law to increase 5 percent in the third year. For example, if a school attempted to apply its first year require-

ments to the third year class, that would, in my view, not constitute a basis for a waiver.

MR. SATTERFIELD. If they apply their normal admission standards, I would not think that would be unusual action.

MR. ROGERS. It depends. And, also, the normal admission might not even include a 5 percent increase.

MR. SATTERFIELD. That is the point. In other words, you make the 5 percent quota, and if your normal admission standards are too stringent to provide that 5 percent, you must fulfill your quota by reducing your standards?

MR. ROGERS. No. What we are saying is that we expect a group of students who qualify to be considered. They must be the normal, fair standards of the school. But we do not expect them to manufacture unusual standards or make a standard so high that they are able to say that, "We are not able to take 5 percent." . . .

MR. SATTERFIELD. I invite the gentleman's attention to the waiver provision. According to the report, it says that the Secretary may grant a waiver if he determines that the school has made a good-faith effort to meet the requirements but that there are not enough students eligible to be counted.

I am a little puzzled by the meaning of that, in light of the two provisions I just read.

MR. ROGERS. This is what we are trying to say— . . . that, if they make a good-faith effort in accepting the student under the 5 percent requirement, that is what is required. If there is an insufficient number of students eligible to be counted, then—and only then—would this particular provision attach. . . .

MR. SATTERFIELD. Then . . . I am to conclude that a school which applies its normal admission standards that it has applied through the years would not be making a good-faith effort?

MR. ROGERS. No. Normal admission standards might be that they do not admit students in their third year.

If they make a good-faith effort under the law, a good-faith effort but the total group eligible to be counted is not sufficient, and thus a school simply cannot get enough students, it would be entitled to get the waiver.

MR. SATTERFIELD. You emphasize the word "normally," am I to understand then that the word "normal" really does not apply to academic standards.

MR. ROGERS. It could, because if they make an artificial academic standard in order to simply avoid the requirement they

also would be blocking what we are trying to do, to get them to increase class size in the third year by 5 percent.

MR. SATTERFIELD. Would a school, then, which applies its normal academic admission standards . . . be exercising good faith?

MR. ROGERS. If it is not blocking the 5 percent increase.

MR. SATTERFIELD. In other words, the 5 percent controls, and if you cannot reach the 5 percent with your normal academic standards, you have to reduce them in order to reach the quota?

MR. ROGERS. Not necessarily. If they make a good-faith effort but there is an insufficient pool, they are entitled to a waiver.

MR. SATTERFIELD. I thank the gentleman.

There was of course no reason for the gentleman from Virginia to thank the gentleman from Florida, since the matter under discussion had skillfully been left in the same degree of obscurity it enjoyed when the exchange began. Beyond vigorously affirming the obvious points that a school which intentionally increases its normal standards in order to avoid taking the 5 percent *is* in violation, and that a school which, in applying its normal standards, admits the 5 percent is *not* in violation, Mr. Rogers had said nothing. Mr. Whitten (Democrat, Mississippi) was no more successful in pinning the matter down:

MR. WHITTEN. The gentleman is saying what we do not count on [the schools'] doing. Would the gentleman tell us what we do count on their doing?

MR. ROGERS. To obey the law and admit 5 percent of the people who are qualified to be counted.

MR. WHITTEN. What is the meaning of "good faith"?

MR. ROGERS. . . . It is exactly that, good faith in carrying out the law.

MR. WHITTEN. And the law is what?

MR. ROGERS. The law is that they shall admit 5 percent of qualified students based on the admissions criteria of that particular school.

MR. WHITTEN. So the "good faith" matter is just a come-on for doing as they wish?

MR. ROGERS. Not at all. It is to let them out if they have made a good faith effort, and an insufficient number of eligible students are available such that the school is unable to comply.

The rest of the discussion is no more illuminating.

I have gone into the House floor discussion at such length (there was no Senate floor discussion) in order to bring home to the reader the important truth that the provision in question not only is unclear, *but was meant to be unclear*. Judging from the floor debate, "good faith" does not mean the mere impartial application of bona fide academic standards designed without specific intent to sabotage the law—for otherwise the use of first-year standards would not be automatically invalid. Yet, apparently, "good faith" also does not mean the establishment of qualifications low enough to ensure that the quota is met. But what else is there between these two extremes? Nothing, of course, with any precision; only a vague idea that the schools are expected to bend a bit to help the law achieve its purpose.

There is one point, however, on which the statute and the legislative history *are* clear:

MR. WHITTEN. . . . I asked a simple question: Who will determine whether it is good faith or not?

MR. ROGERS. The Secretary of HEW.

MR. WHITTEN. Which leaves it in the hands of the Secretary of HEW to do whatever he pleases; is that correct?

MR. ROGERS. No.

MR. WHITTEN. Is it not based on his determination?

MR. ROGERS. Not entirely.

MR. WHITTEN. All right, what is the limitation?

MR. ROGERS. The schools must show that they have made a good faith effort and that an insufficient number of eligible students are available. . . .

MR. WHITTEN. To whom do they have to show it? Who makes the determination?

MR. ROGERS. The Secretary.

MR. WHITTEN. So the Secretary, in the final analysis, can say, "Yes" in this case and "No" in that case; and we have no guidelines pursuant to which he must act; is that correct?

MR. ROGERS. Who else is to determine it? Is a school to determine whether it has made a good faith effort?

MR. WHITTEN. That is the point. . . . The gentleman says that the Secretary will determine it to suit himself?

MR. ROGERS. This has always been done, as the gentleman knows. . . .

The Significance of the Facts

The saga of the Guadalajara clause is of immediate practical importance to medical school faculties and, in a somewhat lesser degree, to all of us associated with universities. For a number of reasons, it is also immensely instructive to those who are interested in the phenomenon of expanding federal regulation—and in particular that species of federal regulation which is characterized by broad discretionary authority in an executive agency.

Given the vagueness (not to say impenetrability) of the statutory language and the First Amendment overtones of the issue, it is possible that the courts will require the secretary of HEW to grant a waiver to any school that fails to meet its quota because it has applied genuine academic standards (other than extension of first-year standards to the third year). Whatever the outcome of the ultimate court test, however, it is clear that the first stretch of the long legal road for the medical schools will consist of the now familiar process of negotiation, ultimatum, and compromise with a Department of HEW that applies standards and criteria uninformed by any statutory guidance. And it is further clear that—despite the lawmakers' now ritual condemnation of agency arbitrariness and power—this is precisely what the Congress intended. Simply put, the members could not reconcile their differences, and so they adopted a provision that is quite literally meaningless, enabling both sides to claim victory and leaving it to HEW (and, if they wish to intervene, the courts) to sort out the pieces.

The advocates of broad delegation of discretionary authority to the agencies almost invariably base their case upon the sheer lack of time which the Congress has to devote its attention to the minute details of regulation. Increasingly in recent years, however, the genuine occasion for delegation has been not the absence of congressional time but, after the expenditure of congressional time, the absence of congressional agreement. The Guadalajara clause episode may not be typical, but it is far from the rare exception. Whatever one might think of broad delegation as a general matter, delegation with what might be termed acknowledged absence of congressional agreement is a deplorable distortion of democratic

processes. With the ordinary broad delegation, there is at least a genuinely assumed social consensus which it is the task of the agency to translate into specific detail. Delegation in acknowledged absence of agreement, on the other hand, intentionally confers upon the agencies or the courts that function of reconciling or subordinating conflicting private interests which is preeminently the task of the political branch.

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Another interesting feature of the Guadalajara clause saga—perhaps the most interesting feature from a “human interest” standpoint—is its David and Goliath character. The groups whose interests were infringed by the provision were surely substantial—all of the nation’s medical schools and, more broadly, the entire medical and university establishment. Moreover, they had on their side what would normally be a most inspiring rallying call for liberals and conservatives alike—academic freedom and the First Amendment. Arrayed against them was a lobby consisting almost entirely of the families of no more than 3,000 first- and second-year FMSs, the vast majority of whom were said to be from three states (New York, New Jersey, and California)—undoubtedly an affluent and politically influential group, but hardly formidable. Their cause, moreover, not only had none of the high tone of academic freedom and the First Amendment, but could scarcely be dressed in any cloth more noble than self-interest—or at most mother-love. Nonetheless, the FMSs won the first round completely, and managed to retain much in the rematch. The latter, of course (that is, their success in fighting off outright repeal), can be explained by a combination of (1) the sense in the Congress that the FMSs who are already in their second year, virtually tasting their impending admission to U.S. medical schools under the 1976 law, have something of a vested right in the continuation of that law, at least for the 1978–79 academic year; and (2) the usual human reluctance, felt

in the Congress (and especially in the House, which is quintessentially human), to admit to having been 100 percent wrong.

Securing enactment of the original 1976 law, however, surely represented an amazing accomplishment. In part, it was attributable to legislative technique. The Guadalajara clause appeared in neither the House nor the Senate bill, nor even in the committee recommendation in either house; it emerged, newborn, from the House-Senate conference, leaving opponents little time to mobilize their forces, and placing them in the very difficult position of asking each house to repudiate the conference committee’s work in order to repair a very small piece of the entire package. So easily can a few senators or representatives on the conference committee—or perhaps even a few staffers—if sufficiently committed to what seems to the rest a minor point, affect the entire outcome of legislation. Or at least, so easily can they do so when what is at issue is the addition of one more condition to a federal grant.

And this is perhaps the major lesson to be drawn from the story: that regulation through munificence is likely to be the most arbitrary and the most severe regulation of all. Both

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legally and psychologically, a condition attached to a governmental gift or benefit is easier to support than an outright governmental prescription or prohibition. Legally, for example, the government almost surely could not require all hospitals to perform abortions; but it probably could condition their receipt of federal subsidies upon their agreement to perform abortions. (This is not to say there are no unconstitutional conditions; there assuredly are, particularly when the condition bears little or no relation to the purpose of the grant or benefit, and infringes a highly protected right such as freedom of speech. But the range of unconstitutional conditions is much more limited than that of unconstitutional prescriptions or prohibitions.) Even more important than the *legal* distinction, however, is the unquestionable psychological fact that a

legislature will not exercise as much restraint in imposing conditions upon receipt of its beneficence as it will in enacting positive law. The context, after all, is vastly altered. It is the difference between saying "Son, paint the house this weekend" and saying "Son, if you spend the weekend painting the house I'll pay for a ski trip to Aspen." Requesting a quid pro quo is quite different from laying down, without any compensation, an absolute rule. Thus it is that much of our modern social regulation has appeared first not as generally binding legal requirements, but as conditions attached to federal benefits—of which I shall say more later.

It follows, then, that the institution which has placed itself in the position of not being able to refuse federal funds has subjected itself not merely to regulation, but to regulation of a particularly intensive and relatively unrestrained sort. Most of the nation's medical schools, if not most of its universities, are already in this position. The significant statistic is not that 14 medical schools rejected federal funding under the demeaning terms of the 1976 law, but that 106 did not.

There is, moreover, another phenomenon of legislative or social psychology worth noting here—one that gives regulation by munificence a vital role in the gradual extension of regulation by law. When a condition has been attached to a governmental beneficence that is widespread (for example, to all federal contracts) or to a governmental beneficence that is, or becomes, indispensable for the particular class of recipients (for example, to renewals of broadcasting licenses), the distinction between a condition and a positive legal prescription becomes increasingly theoretical, and increasingly blurred in the public and legislative mind. What first wins acceptance only as a condition to the receipt of governmental funds or benefits eventually comes to be regarded as an appropriate provision of direct prescriptive regulation. Thus, social and legislative attitudes towards the appropriate scope of governmental prescription—and, consequently, judicial attitudes towards its constitutional limits—are continually stretched. Federal minimum wage provisions appear first as conditions to obtaining federal contracts, later as requirements binding upon the entire society; safety assurances required of federal contractors evolve in-

to the Occupational Safety and Health Administration; anti-discrimination conditions upon federal grants become anti-discrimination laws; the federal requirement that a broadcast licensee permit time for reply to a "personal attack" leads to state statutes which seek to apply a similar rule to newspapers. And, yes, the

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regulation by munificence that *all* the medical schools have been willing to endure to a substantial degree (no school balked at the capitation funding condition of the 1976 law that 50 percent of each school's residency positions be in the three so-called "primary care" specialties by the academic year 1980-81) may mutate into straight-out prescription.

Indeed, the latter event may even have been hastened by the impudence of the fourteen schools in daring to reject what the Congress thought was an offer they could not refuse. The legislators obviously were not amused, as the following excerpt from the conference committee report not too delicately demonstrates:

The decision of several schools to forego capitation support unless the conditions for receipt were altered raises a significant question about the utility of this funding mechanism as a vehicle for accomplishing public policy objectives. Capitation support is an economic necessity for many schools. Other schools are not economically dependent on these funds. These schools would thus always retain the option of refusing capitation funds because of the attendant conditions, while the poorer schools could not afford to do so. This places the burden for implementing capitation related policies exclusively upon those schools which cannot survive without capitation support. Federal policy, however, is intended to apply to all schools.

Thus the conferees have agreed to reexamine the manpower legislation early next year, and will pay particular attention to evaluating alternative approaches to the funding of medical education.

I would guess there are hard times ahead for academic freedom. ■