

The 2010 “Patient Protection and Affordable Care Act”: A Failing Grade

Donald J. Palmisano, MD, JD, FACS

Danger invites rescue. The cry of distress is the summons to relief. Those words by Justice Cardozo in an opinion in 1921 certainly apply to the health law recently passed in Congress. It will be a disaster. It will not save money. It will put more bureaucrats between the doctor and the patient and it will reduce access to care. Certainly quality is not improved if one can't find a doctor in the hour of need.

The “Patient Protection and Affordable Care Act,” PPACA, (P.L. 111-148) was enacted on March 23, 2010, and amended shortly thereafter by the “Health Care and Education Reconciliation Act of 2010” (P.L. 111-152) as enacted on March 30, 2010. Because of the surprise win of Senator Scott Brown of Massachusetts, the majority in Congress rushed through a bill filled with flaws, backroom deals, and lack of transparency rather than risk new debate in the Senate. Another example of the arrogance of power over common sense.

The over 2,400 pages of this legislation is just the start. For every page in the law there is the possibility of at least 10 pages of regulations! When Speaker Nancy Pelosi made her widely quoted statement (on her website at <http://www.speaker.gov/newsroom/pressreleases?id=1576>), “But we have to pass the bill so that you can find out what is in it, away from the fog of the controversy,” that was an understatement. Only now are the burdensome flaws and extra administrative costs coming to light, and we don't even have all of the regulations! Imagine doctors tied up with thousands of strands of regulations, unfathomable & contradictory. Imagine Gulliver tied down by the Lilliputians! Swift relates how Gulliver tried to break the stands that bound him to the ground, “*But the harder he fought for freedom, the more the little men shot arrows into him, and some of them even tried to run their spears into his sides.*” We must not let this happen to medicine!

This law will be in the courts for years if not repealed sooner. Note that in the rush to pass this law, the advocates of it failed to add a “severability clause” in the Senate version that passed into law. Thus, one part ruled unconstitutional could void the entire law. And remember, adding millions of people to the failed Medicaid system is not a solution. Having an insurance card is no guarantee that you can find a doctor willing to take payment below the cost of delivering the care. A voucher that would allow those patients to select from an array of choices in the private market is a solution

that can work. After all, that is what Congress does for itself with the Federal Employees Health Benefits Program (FEHBP)! But the approach of Congress is reminiscent of Orwell's classic book, *Animal Farm*, where “All animals are equal but some animals are more equal than others.”

I did many interviews during this Congressional debate on the proposed law, both on national TV and radio. I made the point over and over again, including in an Op-Ed in the *Wall Street Journal* with two other AMA former presidents, that the problems in the healthcare delivery system could be fixed without destroying the best medical care the world has ever seen. In that article on October 5, 2009, we stated, in part,

“There are many other ways to expand access to health care for uninsured Americans. We could strengthen incentives to purchase low-cost health savings accounts, provide tax credits for individuals and families buying health policies on their own, and extend subsidies for those who need financial help.

“Also, the right of patients to privately contract with physicians to ensure they have the medical care they want, without penalty—regardless of what the government pays—must be recognized and protected. Today, if a doctor wants to bill a patient for additional payment over the Medicare reimbursement, he has to withdraw from Medicare entirely for two years. A patient who agrees with this arrangement can't receive any Medicare money for that service, either.”

We also said,

“One easy reform would be to enable individuals to buy policies offered in any state, not just where they live. This will enhance competition. But more government-run health insurance will only lead to disaster.”

We further emphasized the lost opportunity to fix the broken medical liability system that only benefits plaintiff attorneys armed with contingency fees:

“Finally, the nation needs comprehensive medical malpractice reform. It is the surest and quickest way to slow down the rising cost of health care. Statistics from private insurers, as well as a Justice Department report of 2007, indicate that upwards of 80% of malpractice cases are closed without payment—and when there is a trial, the physician-defendant wins 89% of the time. Yet these lawsuits, even when dismissed or closed without payment, cost doctors time and money, and encourage defensive medicine.

This adds billions to the cost of medical care. It also increases malpractice insurance premiums, the costs of which get passed on to patients. In too many cases, the malpractice environment forces doctors to leave communities, depriving patients of their trusted medical advisers or specialists whom they might need in an accident or other crisis."

The AMA made a serious mistake supporting this bill, and I explained that on *The Journal Report* in a lengthy TV interview with Paul Gigot, editor of the *Wall Street Journal* editorial page.

Also, in interviews I repeatedly quoted Aldous Huxley's "Facts don't cease to exist because they are ignored" and Louis Pasteur's "Imagination should give wing to our thoughts but we always need decisive experimental proof...." Congress ignored these words of wisdom and gave America a system doomed to failure.

For another example of the ineptness of Congress, Congress recently failed to fix the price-fixing formula known in Washington, DC, jargon as the sustainable growth rate formula (SGR). Instead it did a six-month patch to stop the 21% cut in physician payments beyond the November mid-term elections, and once again Congress has demonstrated lack of leadership, politics over liberty, and the disregard of the free enterprise system. There will be serious consequences as Americans are fed up with politics as usual.

What should have been done about the SGR?

First, realize that Congress must be a good fiduciary, even though recent events demonstrate poor performance as a fiscal fiduciary. Congress should have said the price-fixing SGR is abolished as it is an abysmal failure and leads to loss of services. Throughout history, price-fixing leads to loss of the product or the service, especially when the price is set below the cost of making the product or delivering the service.

Second, state that Congress will pay what it can afford but patients and physicians can privately contract or enter into balance-billing without penalty to either party. That is the hallmark of the free enterprise system. And that gets patients involved in payment issues where they can be prudent purchasers. Patients also can give THEIR views to Congress if payment is unreasonable for promises made. Patients are now engaged, and physicians become competitive rather than quitting medicine. In Australia, where I recently lectured on my book, *On Leadership – Essential Principles for Success*, I learned that they allow patients and physicians to negotiate the "gap" in any government payment. That is the way it should be.

Patients and physicians are not stupid. Give both parties the information, opportunity, and freedom and you will see the problems in access disappear. That is why the Kindle e-reader dropped significantly in price when the Barnes & Noble Nook and the Apple iPad came out. Free enterprise trumps government micromanagement every time!

Physicians and patients need to open the gates of the prison that government put them in. Just as the continued SGR payment formula is a mistake, the new health system reform law is a disaster that will not lower prices. Americans need to say NO to current actions and, if necessary, replace those in Congress. We need more individuals akin to "Mr. Smith Goes to Washington." My first testimony to Congress on this topic of health system reform was in 1976 and obviously eternal vigilance and action continue to be needed. It is time for all of us to get involved. Ethical science-based medicine hangs in the balance.

For more discussion of this law, read DJP Updates posted at: http://intrepidresources.com/djp_update/ and in tweets at www.Twitter.com/DJPNews.

Dr. Palmisano is a clinical professor of surgery and clinical professor of medical jurisprudence at Tulane University School of Medicine, adjunct professor in the Department of Health Systems Management at Tulane University School of Public Health and Tropical Medicine, and a former president of the American Medical Association (2003-2004). He is author of *On Leadership – Essential Principles for Success* with a foreword by Governor Bobby Jindal.

LSMS CALENDAR - 2010

November 5-9, 2010

AMA Interim Meeting
San Diego Marriott

November 19, 2010

Deadline for Community Service & Hall of Fame Awards

December 10, 2010

Board of Governors Meeting
TBA

December 11, 2010

LSMS Strategic Planning Retreat
TBA

December 21, 2010

Resolution Deadline for the HOD

February 4-5, 2011

Annual Meeting of the House of Delegates
Hilton Capitol Center

Visit www.LSMS.org to access the online *Calendar of Events*.