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An Opportunity for Mr. Schwellenbach

One of the first things Secretary of Labor Schwellenbach did after taking office in July was to issue a statement to the Department of Labor staff insisting that they give full recognition to the fact that it was the department's function to execute the laws, rather than to make or interpret them. Officers of the department were told pointedly that the fact they may think Congress should have written, or the courts should have interpreted a law differently would in no case justify them in ignoring or attempting to circumvent the law.

The statement, issued through the White House and with President Truman's approval, was widely hailed as signalizing the return of government by law instead of by men, so far as the Department of Labor is concerned. Mr. Schwellenbach stated at the time that he had no specific instances in mind where any Labor Department bureau head had ignored or wrongly applied a law, but that he knew from personal observation that it goes on in Washington all the time, and promised that he would not allow it in his department.

Now comes a decision by the Texas Supreme Court in a case wherein the Children's Bureau of the Department of Labor has done the very thing which Mr. Schwellenbach has said he would not permit. In justice to the new secretary it should be stated that the action of the bureau in circumventing the express will of Congress in this instance occurred before he took office. At that time the victims of the Children's Bureau's arbitrary ruling were seeking relief in the state courts. The Texas Supreme Court has just told the victims, in effect, that it is powerless to grant them relief because the Children's Bureau is beyond its jurisdiction.

The decision affords Mr. Schwellenbach an opportunity to right a grievous wrong and at the same time give his policy statement a practical application.

The litigation in Texas arose over administration by the State Board of Health of funds allotted to this state by the Children's Bureau under an appropriation voted by Congress for the emergency maternity and infant care of the wives and infants of certain grades of service men, popularly known as the EMIC program.

As passed by Congress, the law provides that the funds are to be disbursed under "plans developed and administered by state health agencies and approved by the Children's Bureau." The law also carries the stipulation that "no part of any appropriation contained in this title shall be used to promulgate or carry out any instruction, order or regulation relating to the care of obstetrical cases which discriminates between persons licensed under state law to practice obstetrics; provided further, that the foregoing proviso shall not be so construed to prevent any patient from having the services of any practitioner of her own choice, paid for out of this fund, so long as state laws are complied with."

The administrative plan approved by the bureau for Texas is an utter absurdity, perpetrates a rank discrimination and does a grave injustice to the wives of service men by effectively denying them the practitioners of their own choice.

Evidence of the absurdity of the plan lies in the fact that the expectant mother may have the services of any physician licensed by the state at the birth of her baby and during the first two weeks of its life, but for any medical attention which the infant may require after it is 14 days old she is limited in her choice of physicians to one who has graduated from a school approved by the Council of Education of the American Medical Association.

The effect of this, and no doubt its very purpose, is to preclude osteopaths and many other physicians and surgeons licensed by the State of Texas from participating in the EMIC program. It gives a select group of physicians—those graduated from schools approved by the American Medical Association—a practical monopoly of the large sums allotted to Texas under this program. Worse still, however, is the injustice which it does to the wives of service men. They may have osteopathic physicians, or any other of their choice, provided they are licensed by the state, during the first two weeks of the life of their babies, then they are compelled to switch to another doctor, however unavailable or less desirable, simply because the American Medical Association does not approve the schools from which osteopathic physicians are graduated.

Dr. E. W. Wilson and a group of other physicians and surgeons thus discriminated against sought to protect themselves and the wives of service men by taking the matter to court. They sued for an injunction to prevent the State Board of Health from operating under the discriminatory plan until it could be so amended as to remove the discrimination. They won their case in the district court, which heard all of the pertinent facts.

The case was appealed by the State Board of Health at the instance and under the guiding genius of a solicitor for the Children's Bureau whom Secretary Schwellenbach has since removed from office for reasons not directly connected with this case.

The district court's decision granting the injunction was attacked in the appeal to the Third Court of Civil Appeals at Austin on jurisdictional grounds. The appellate court reversed the decision, dissolved the injunction and dismissed the case because of the showing that in its participation in the EMIC program the State Board of Health was acting merely as an agency of the federal government, and that the administrative plan under attack was in fact made by the Children's Bureau in Washington and not by the State Board of Health.

Despite the fact that this was clearly contrary to the law and the evident intent of Congress, the appellate court found it and the district court were powerless to grant relief since state courts have no jurisdiction over activities of the Children's Bureau, or any other federal agency. The Texas Supreme Court now has denied an application for a writ of error in the case, the effect of the denial being to uphold the decision of the Court of Civil Appeals.

It will be noted that neither the Third Court of Civil Appeals nor the Texas Supreme Court went any further into the case than the question of jurisdiction. It was only in the district court, where the complainants won, that the merits of the case were considered.

But that ends the matter, so far as the state courts are concerned. It does not, however, end the discrimination and the injustice which are involved. The general public has more than a passing interest in the matter, as a bill is now pending in Congress which would extend the benefits of the EMIC program, now restricted to the wives of service men of certain grades, to all wives.

Because of this Dr. Wilson and his associates should be encouraged to take the case to Washington. There are two ways in which this may be done: By suit for injunction against the Children's Bureau in a federal court, or by direct appeal to Secretary of Labor Schwellenbach, the executive authority under which the Children's Bureau functions. The court route is long and tedious and involves expense which the complainants should be spared.

Secretary Schwellenbach can and should spare them this expense by re-examining, on his own initiative, the law governing the EMIC program and the discriminatory plan for its administration now in effect in Texas. As a former lawmaker in the United States Senate and as a former federal district judge, Secretary Schwellenbach is well qualified for such a task, and he should undertake it since it is a strained interpretation of a law by a bureau under his jurisdiction that is the cause of the trouble and the complaint.

By the requirement limiting use of EMIC funds for medical services to physicians graduated from schools approved by the American Medical Association, the Children's Bureau in effect delegates to a private corporation the right to determine whom service men's wives and infants may have serve them professionally in order to receive the benefits of the federal appropriation. If Secretary Schwellenbach elects to examine the case he naturally, being a lawyer, will look first for some authority in the law which authorizes, permits or condones the delegation of such a right to any private agency by either the Children's Bureau or the states. But he will search for such authority in vain.

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