

March 29, 2004

The Honorable Reggie B. Walton
United States District Court for the District of Columbia E. Barrett
Prettyman United States Courthouse 333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Doe v. Thompson, Civ. No. 02-02193 (RBW)

IN SUPPORT OF PLAINTIFF

Dear Judge Walton,

We write on behalf of the Association of American Physicians & Surgeons, Inc. ("AAPS"), a nationwide organization of thousands of physicians founded in 1943. Our members are physicians in all specialties. We frequently file *amicus curiae* briefs before state and federal courts in defense of the practice of private and ethical medicine. In many cases, our briefs have helped reverse unjust decisions. See, e.g., *United States v. Dr. Jeffrey Jay Rutgard*, 116 F.3d 1270 (9th Cir. 1997) (overturning an unjust sentence of a physician, as urged by AAPS).

After becoming aware of this matter concerning Dr. "John Doe" and the National Practitioners Data Bank ("NPDB"), we feel compelled to inform Your Honor that this is not an isolated incident. Quite the contrary, the administration of the NPDB, which is the central issue in this case, wreaks havoc and injustice for many physicians. Our membership of active physicians, many in small private practices, is particularly concerned. Unfortunately, the NPDB is increasingly used by hospitals to terrorize physicians by threatening them with a career-ending entry. Hospitals and unscrupulous administrators are misusing this database to silence or even destroy whistleblowers. The government should not allow itself to be a party to this injustice. It should correct the errors in the NPDB pursuant to

its obligations under the Privacy Act.

A single adverse entry against a physician, even one that shows no harm to any patient, can injure the physician for the rest of his career. Prospective employers use the NPDB to reject job applicants; hospitals use it to deny applications for hospital privileges. In reality, the NPDB can wield more power over physicians than the entire federal and state court systems. In court physicians and everyone else have a right to due process. Such basic protections are lacking for the NPDB, even though it is administered by the government. This cannot be lawful under the Privacy Act, or the Due Process Clause.

The case of Dr. John Doe tragically illustrates the growing trend of manipulation of the NPDB to harm the reputations of good physicians. Here, as has occurred elsewhere, the hospital placed misinformation into the NPDB as a way of punishing a physician who would not remain silent about negligence at the hospital. Initially, the hospital entered an extremely damaging report in the database claiming that Dr. Doe had a “positive” psychiatric examination. This was completely false. This fits an all-too-familiar pattern: hospitals using the NPDB to intimidate physicians, compelling a silence that protects negligent administrators or even outright hospital malfeasance.

The government should not disseminate misinformation through the NPDB while simultaneously pretending to be incapable of correcting errors that destroy a physician and deprive thousands of patients of care. The NPDB should not be, and is not, exempt from the requirement of the Privacy Act that government agencies conduct due diligence in checking for accuracy, completeness, timeliness and relevance with respect to the information that is sent to it about doctors. In one extreme case, we even saw a hospital network demand a million-dollar payment by a doctor in order to clear his name in the databank. Usually the demands for favors are less direct, but equally pernicious. Hospitals use the NPDB to prevent doctors from testifying against them in malpractice cases, as in the case here of Dr. John Doe. Lies have no entitlement to official imprimatur, and when the government disseminates statements through the NPDB it has an obligation to avoid injustice.

Disingenuous manipulation of the NPDB has no rightful place in its administration. We have reviewed the Amended Complaint, filed last

summer here. It sets forth in persuasive detail the same type of misuse of the NPDB that is being repeated against other doctors nationwide. The Privacy Act must entitle the victim of government misinformation to clear his name in its files. A citizen in a free society must have, at a minimum, this basic right against an omnipresent government.

Plaintiff Dr. John Doe stood up for patients who were being needlessly injured by a colleague protected by the hospital that profited from his operations. Ultimately, Dr. Doe's courageous stand in favor of the patients led to their protection, and the negligent doctor left town. But Dr. Doe should not suffer at the hands of a government database for defending patients. He and others who have honorably defended patients and sought improvements in care should not be forced to endure career-threatening damage by the actions of the NPDB. Dr. Doe is fully entitled to protection by the Privacy Act against misinformation in official files. There is no justification for allowing incorrect information about Dr. Doe or anyone else to persist in databases maintained by our government.

More generally, the peer review of doctors, with the results going into the NPDB, has increasingly become a game for unscrupulous competitors trying to drive a good doctor out of business. Known as "sham peer review," this corrupt practice was recently featured in a set of articles in the *Pittsburgh Post-Gazette* entitled "The Cost of Courage." Without meaningful due process or impartiality, peer review committees can take action against a competitor or whistleblower and then destroy his career by entering false or misleading information into the NPDB. The manipulation of this database against a doctor is now all too easy. Those who misuse peer review hide behind confidentiality and immunity that generally shield their conduct from scrutiny. The tragedy is that even if the reported physician is ultimately vindicated, a single entry can cause catastrophic damage as it is reviewed by every hospital, insurance company and prospective employer obligated to query the databank. The government should not be facilitating this behavior by disseminating false information.

Many members of our organization have witnessed firsthand the intimidating effect of a government database that stores and disseminates hurtful and inaccurate information. The mere threat of an entry in the NPDB is enough to silence good doctors who would otherwise speak out

against negligence or corruption in the hospital environment. There must be a mechanism for physicians to protect themselves and their careers against the storage and dissemination of knowingly false or misleading information. They must be able to stop the use of this database as a tool for retaliation against whistleblowers and competitors. The Privacy Act provides that means, and the integrity it would bring to the NPDB is long overdue.

False information in a government database is an injustice in need of a remedy. The Privacy Act provides that remedy. The career of a doctor who blows the whistle on wrongdoing or stands up for patients harmed in hospitals should not be ended by government-propagated slander. We respectfully request that Your Honor hold in favor of the plaintiff Dr. John Doe in this action.

Respectfully submitted,

Jane Orient, M.D.

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