

May 23, 2001

Thank you for your interest in revising the Department of Health and Human Services' (HHS) medical privacy regulations. I respectfully urge HHS to revise those sections of the bill that reduce medical privacy by allowing the government increased access to medical records.

According to a Gallop survey commissioned by the Institute for Health Freedom, 92% of Americans oppose allowing government agencies to have access to medical records without patient consent. The American people are more opposed to government agencies having unfettered access to medical records than they are to any private party, with the exception of financial institutions, having access to their medical history. Yet HHS's rule increases the power of government agencies to seize medical records without consent!

HHS should ensure that the regulation complies with the letter and spirit of the fourth amendment by requiring that law enforcement officials obtain a valid search warrant before seizing private medical records. The requirement that law enforcement officials obtain a warrant from a judge before searching private documents is one of the fundamental protections against abuse of the government's power to seize an individual's private documents. While the fourth amendment has been interpreted to allow warrantless searches in emergency situations, it is hard to conceive of a situation where law enforcement officials would be unable to obtain a warrant before electronic medical records would be destroyed.

HHS should also eliminate those sections which require physicians to provide the federal government with personal medical records for purposes of monitoring compliance with the rule. HHS should only collect information if the physicians or the federal government has obtained written permission from the patient allowing HHS to obtain their records.

HHS should also repeal those sections of the regulations that provide private parties with a right to access private medical records for reasons unrelated to treatment. Particularly offensive are those sections which allow medical researchers to access private records without individual

consent. While researchers claim to be able to protect the autonomy of their unwilling subjects, the fact is that allowing third parties to use medical records for research purposes runs the risk of inadvertent identification of personal medical information. I am aware of at least one incident where a man had his identity revealed when his medical records were used without his consent. As a result, many people in his community discovered details of his medical history that he wished to keep private!

I am also aware that some will make the argument that there is a "social good" in medical research that outweighs the individual's right to privacy. As a physician, I certainly recognize the value and importance of medical research. However, as a legislator, I also recognize that because people have a property interest in their medical information, forcing individuals to divulge medical information without their consent runs afoul of the fifth amendment's taking clause, which was designed to prevent sacrifices of individual liberty and property for the "common good."

In a free society, such as the one envisioned by the drafters of the Constitution, the federal government should never force a citizen to divulge personal information to advance "important social goals." Rather, it should be up to the individuals, not the government, to determine what social goals are important enough to warrant allowing others access to their personal property, including their personal information. To the extent these regulations sacrifice individual rights in the name of a bureaucratically-determined "common good," they are incompatible with a constitutional government that respects individual liberty.

Finally, Secretary Thompson, if HHS is going to collect private medical records, the medical privacy rule should then explicitly forbid the federal government from permanently storing any medical information on a federally maintained or funded database. Previous experience with federal collection of information demonstrates the need for an explicit ban on creating a database. For example, despite repeated assurances they would not do so, the Bureau of Alcohol Tobacco and Firearms is using their authority to conduct background checks under the Brady Law to compile a database of every gun owner in America!

In conclusion, I once again respectfully request that the Department of Health and Human Services amend the medical privacy rule to require a search warrant before government officials may seize medical records. I also request that HHS remove all sections of the rule that give private parties (particularly researchers) a federal right to access medical records without consent for purposes unrelated to treatment. Furthermore, if HHS is going to continue to allow the Federal Government to collect medical information for any reason, HHS must explicitly provide that none of the information collected under the authority given HHS, or any other

federal agency, will be stored in a federally maintained or funded database. Thank you for your consideration of my views, which, according to the Gallup poll, are shared by the vast majority of Americans.