

## Access to Medical Records of Presidential Candidates

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On October 3, 2008 a full page ad<sup>1</sup> ran in *The New York Times* which called for the complete release of all of the medical records of Presidential candidate Senator John McCain. The advertisement was signed by more than two thousand physicians. The center portion of the ad featured the pictures and credentials of the four primary sponsoring physicians, all of whom had affiliations with major medical schools as well as some degree of expertise in the management of malignant melanoma, the cancer Senator McCain has been treated for on multiple occasions.<sup>2</sup> The advertisement did not generate much publicity, negative or otherwise, nor was the political agenda of any of the signing physicians apparent from the advertisement.

A longer three-page follow-up article<sup>3</sup> in *The New York Times* on October 20, 2008 reminded viewers that significant gaps still remained in the public's knowledge about the medical and surgical history of all of the major Presidential and Vice-Presidential candidates. This second story highlighted the differences in the amount of medical information already disclosed to the public about these candidates. For example, Senator Barack Obama's campaign previously released a one-page letter from his personal physician last May stating that he was in "excellent health,"<sup>4</sup> though the fact that he smokes cigarettes is a matter of public record. Virtually nothing is known about Governor Sarah Palin's health record.<sup>5</sup> Senator Joseph Biden has had two serious brain aneurysm operations in the past twenty years and appears to be in good health, though his current neurological status is not known.<sup>6</sup> Senator McCain's battles with melanoma have been well-documented. Our current leaders are a study in contrasts: President Bush apparently is in excellent health but the same cannot be said for Vice-President Cheney, who has had a series of serious cardiac interventions since first taking office.

### The Slippery Slope of Inquiry

Given the fact that a President or Supreme Court justice's life could end abruptly even if they were in apparently perfect health (e.g. sudden heart attack, auto accident, plane crash, assassination), it is unclear why being able to compute actuarial survival based on age, medications, family history and co-morbid conditions such as cancer history should even matter. It is also unclear why access to private medical records of Presidential candidates should have become such an important issue during this election (only former Senator Robert Dole would have been older at the time he took office than Senator McCain), or why it should not be expanded to other individuals who might have an

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<sup>1</sup> Brave New Films, *2,768 doctors call on Senator McCain to issue a full, public release of his medical records*, THE NEW YORK TIMES, October 3, 2008 at A7.

<sup>2</sup> *Id.*

<sup>3</sup> Lawrence K. Altman, *The Doctor's World. Many Holes in Disclosure of Nominees' Health*, THE NEW YORK TIMES, October 20, 2008 at A1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

equally large impact on the lives of many Americans – the head of the Federal Reserve, the heads of major corporations such as Apple<sup>7</sup> or Microsoft, religious leaders, or the heads of major banks whose recent disastrous financial decisions have cost the citizens of the U.S. almost a trillion dollars in lost treasure.

Multiple motivations may be at work here. All of these individuals are prominent public figures. Perhaps such individuals waive an expectation of privacy for certain matters, both financial and personal, once they pass a certain point in the hierarchy of power. There may now also be a consensus that serious medical conditions a candidate has or had are a legitimate issue for serious inquiry; voters may want to factor expectations that a candidate may not serve out the full term to which they are elected. Lastly, medical reporters such as those at *The New York Times* may now simply be covering this issue more aggressively given Senator McCain's less than complete disclosure of information and concerns about whether his Vice-Presidential pick is qualified to be President.

The medical information the press is interested in at present is selective. None of the information being called for on Senator McCain has focused on psychiatric issues such as post-traumatic stress disorder (PTSD), an entity someone who spent six years being tortured as a prisoner of war might still be suffering from.<sup>8</sup> PTSD could also cause a seemingly stable person to react to stressful situations in an erratic manner<sup>9</sup> and result in dangerous behavior that could have disastrous consequences for our national security. At present though, we are merely talking about obtaining confidential medical information to find out if someone has a greater chance of dying from cancer during their first term in office. What is not clear is the point at which someone becomes an important enough public figure for presumed legitimate inquiry into otherwise private health concerns should be allowed to trump normal medical information privacy protection. And, if achieving a certain position of decision-making power constitutes a waiver of privacy rights over health information, whether this means all information, or only select types of information, can be made public.

### There is Precedent

Controversy over the non-release of Senator McCain's full medical records aside, the issue of full disclosure of normally protected, confidential medical information for important public figures is not a new one. Chief Justice Rehnquist's visible public decline during treatment of his thyroid cancer in 2004 raised legitimate concerns about whether he was capable of carrying out the demands of his job.<sup>10</sup> Paul Tsongas, a potential Democratic candidate for President in 1992, cleared lied to the American public about

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<sup>7</sup> The somewhat emaciated appearance of Apple CEO and founder Steve Jobs created speculation that his rare form of pancreatic cancer had recurred; the result was a significant drop in the value of the company's stock until the rumor was dispelled.

<sup>8</sup> American Chronicle, *Cindy McCain Single-handedly Sets Back Progress on PTSD*, October 22, 2008, available at <http://www.americanchronicle.com/articles/78619> (last accessed October 26, 2008).

<sup>9</sup> Charles S. Milliken, Jennifer L. Auchterlonie, and Charles W. Hoge, *Longitudinal Assessment of Mental Health Problems Among Active and Reserve Component Soldiers Returning from the Iraq War*, 298 JAMA 2141 (2007).

<sup>10</sup> Susan Okie, *Illness and Secrecy on the Supreme Court*, 351 N. ENGL. J. MED. 2675 (2004).

whether his cancer was in clinical remission;<sup>11</sup> he later died from his malignancy before he would have finished his first term in office had he been elected.

There is also good reason for a politician actively campaigning for office to resist a call to make psychiatric treatment, past or present, public. The case of former Vice-Presidential candidate Thomas Eagleton, whose political career ended following the publicizing of his treatment for depression with electro-convulsive therapy, is a good example.<sup>12</sup> The danger that the public will misinterpret the information and the biases/stigmas surrounding certain kinds of information, e.g. treatment for depression, is a real one. Knowledge about treatment for psychiatric disease might create a situation where candidates for office might be unfairly and incorrectly judged unfit based on lay interpretations of a nuanced medical condition. The privacy concerns aside, this may be the best reason for having a standard which only suggests but does not require the release of information.

### Current Standards and Rules Governing Disclosure

There is no legal basis for demanding access to privileged medical records of a Presidential candidate or any other citizen in the absence of a very narrow set of criminal circumstances (e.g. to prevent a murder).<sup>13</sup> The argument for full disclosure of medical information for Presidential candidates and other public figures (though no one knows where the line would be drawn) is thus not a legal one but a public policy one. For diseases such as AIDS and HIV status, where medical information already has solid statutory and case law protection against un-consented release to the public,<sup>14</sup> a public policy argument may be harder to make.

One unresolved issue is where the medical profession fit into all of this. How do any of these ostensibly medical-profession sponsored advertisements affect the image of the medical profession and the critical role confidentiality plays in any physician-patient relationship? Given the clear risk to the physician-patient relationship upon the release of otherwise privileged medical information to the public for a political figure, or any citizen for that matter, it is more than ironic that some of the writing on access to medical records, and calls for release of such records for important political figures – Presidential candidates, Supreme Court justices<sup>15</sup> – is coming from physicians and medical journals. As a rule, physicians have a fiduciary duty<sup>16</sup> to patients to protect the confidentiality of the medical information of their patients. Physicians also have a duty to obey any special

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<sup>11</sup> Altman, *supra* note 3.

<sup>12</sup> *Id.*

<sup>13</sup> *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425 (Cal. 1976).

<sup>14</sup> Some courts have found that HIV-related disclosures by public entities violate a constitutional duty to maintain confidentiality. See *Norman-Bloodsaw v. Lawrence Berkeley Lab*, 135 F.3d 1260 (9<sup>th</sup> Cir. 1998).

<sup>15</sup> Susan Okie, *supra* note 6.

<sup>16</sup> American Medical Association, CODE OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION (2007-2008), available at <http://www.ama-assn.org/ama/pbu/category/2512.html> (last accessed October 21, 2008).

HIV-confidentiality statutes enacted by the state they practice in<sup>17</sup> as well as federal laws such as HIPAA governing public release of confidential patient medical information.<sup>18</sup> Although physicians have a right to be political and take out private advertisements, medical journals and other bully pulpits must be careful that taking a health policy position on confidentiality of medical information on Presidential candidates does not cause them to overlook basic fiduciary duties all physicians have.

*Health Law Perspectives* (October 2008), available at:  
<http://www.law.uh.edu/healthlaw/perspectives/homepage.asp>

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<sup>17</sup> WILLIAM E. ADAMS, MARY ANNE BOBINSKI, MICHAEL L. CLOSEN, ROBERT M. JARVIS, AND ARTHUR S. LEONARD, *AIDS. CASES AND MATERIALS* (3<sup>RD</sup> ED. 2002).

<sup>18</sup> HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA), 71 Fed. Reg. 8389 (Feb. 16, 2006), available at <http://www.hhs.gov/ocr/hipaa/enforcerule06.htm> (last accessed October 1, 2008).