

### 3. HEALTH CARE AND THE CONSTITUTION #1

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#### Former Senator Schmitt Outlines Constitutional Health Care Improvement for America

The current Administration and Congressional leadership, by word and deed, believe in overriding the separation of State and Federal powers embodied in the 10<sup>th</sup> Amendment to the Constitution. They desire to eventually impose national socialist control over the health care of every American. In so doing, they would further erode American liberty and pass massive increases in national debt and future economic distress to present and future generations.

A Constitutional path exists, on the other hand, for health improvement through freeing all individual patients to work directly with health care providers. That path can significantly and rapidly reduce problems and improve care in America's health environment.

Given a choice, most people in the world would come here for health care. Is our health environment perfect? Obviously it is not; but surveys indicate that the health care Americans receive has reached broadly acceptable levels, particularly during the last 60 years. Most Americans clearly oppose radical changes in their current health care.

On the other hand, a formidable list of problems exists for some individuals and in the runaway State and national costs of Medicaid and Medicare. Nonetheless, most wish to address health care inadequacies in a

constitutional and historically American way—relying on individuals far more than government.

Although statements to the contrary are common, the Constitution of the United States cites no right to “health”. Rather, preservation of health clearly lies within the activities **not** enumerated as functions of the Federal Government. Indeed, the people or the States have control of such activities by virtue of the 10<sup>th</sup> Amendment's statement that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

The current Congressional leadership argues that Congress' power to “provide for the...general welfare” found in Article I, Section 8, permits practically any form of federal healthcare legislation. Congress needs to view the Article I clause in the context of the inclusion of the comparable phrase “promote the general welfare” in the Preamble to the Constitution. That phrase's inclusion in the Preamble was one of several basic reasons for establishment of this form of government and subordinates the Article I Congressional power to other constitutional provisions. Of particular note in this regard are (1) the lack of any Section 8 enumeration of health care among many other proper areas for Congressional intervention and (2)

the combined effect of the 5<sup>th</sup> and 14<sup>th</sup> Amendments making legislative imposition of reward or penalty on some individuals and not others unconstitutional by depriving those other individuals of “equal protection of the law.”

The Constitutional path exists for health improvement, and it begins with tax incentives that re-enforce the traditional patient-doctor relationship and allow most individuals to improve their health without government involvement. For example, tax-exempt and inheritable Health Savings Accounts would force down costs by encouraging price-conscious shopping and health-conscious life styles while discouraging unnecessary access to health care providers. HSAs could rapidly replace Medicaid and Medicare if annual vouchers, issued by the States solely for health care as needed, allowed individual responsibility to substitute for bureaucratic irresponsibility.

Tax reform also could increase the supply and quality of future health care professionals. Multi-year tax-deductibility of educational expenses (tax loss carry-forward) would make medical and other professional careers more attractive. Tax-deductions also could apply to insurance purchased by individuals not covered by employers. Such tax-deductions should include coverage of pre-existing conditions, catastrophic and home health care, annual medical examinations, wellness counseling, and vaccinations.

Corporate tax incentives could assure that insurance becomes portable across state lines for American citizens and legal guest workers. For this purpose, insurance should be considered a commodity in interstate commerce under Article 1, Section 8, Clause 3. Discriminatory State insurance policies should not be allowed. Tax policy also

should encourage private research, development, availability and cost reduction in pharmaceuticals, vaccines, devices, and collection and coordination of outcomes data. This policy should include a total restructuring of the federal approval process to emphasize sound science and eliminate political and tort interference.

Tort reform, of course, would go a long way to increasing the supply of health professionals. Threats of continuous streams of lawsuits reaching far beyond rare cases of actual negligence face current and future providers. Clearly, this litigation environment causes many to either leave medicine or reject it as a career choice. Reform, in turn, would reduce insurance costs, waiting times for treatment, and the use and costs of defensive medical procedures. Access to advance treatments also would be encouraged by tort reform. Similarly, costs of drugs, vaccines and devices, and delays in their availability to patients in need would be significantly reduced. Plaintiff compensation, if warranted, must be limited to actual damages to avoid unjustified “lottery” awards. Judicial Standards must encourage Judges to throw out frivolous lawsuits and employ expert panels to advise evaluating the scientific and medical merits of complex suits. Huge fines should be levied on the filing of such suits, if found to be frivolous.

Biomedical research, a traditional American strength, must continue and be further enhanced. In the private sector’s drug and device arena, science, feasibility, and consumer and physician demand, not politics or litigation risk, should drive investment decisions. Also, fundamental biomedical research within the government-funded research community should continue at a steady pace as constitutionally supported by Article I, Section 8, Clause 8. Challenges presented by concentrated populations, ag-

ing, changing battlefield injury and disease profiles, bio-terrorism, drug resistant and species-jumping diseases, and genetic screening justify this promotion of the constitutional “general welfare” through scientific research.

In summary, we do not need an expansion of the heavy hand of government in health care. Rather, we need a major reduction of such interference so that health care availability can be expanded in an environment of free choice. Americans should note that the “unalienable rights” stated in the Declaration of Independence include “life” as well as “liberty and the pursuit of happiness.” “Life,” however, implies something very different than “health.” The right to life coexists with the “liberty” of individual choice of how that individual’s life shall be lived in “the pursuit of happiness.”

No unit of government can constitutionally or morally place itself between the citizen and individual choices relative to health. Government steps on to an unconstitutional, slippery slope when it inserts itself into individual decisions on birth and death. Such “authoritarian” use of age to select who lives or dies far to closely resembles selection on the basis of race, ethnicity, or any other arbitrary criteria.

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