EXECUTIVE COMMITTEE MEETING TO CONSIDER

HEALTH CARE REFORM

WEDNESDAY, SEPTEMBER 23, 2009

U.S. Senate,

Committee on Finance,

Washington, DC.

The hearing was convened, pursuant to notice, at 9:34 a.m., in room 216, Hart Senate Office Building, Hon. Max Baucus (chairman of the committee) presiding.


Also present: Democratic Staff: Russ Sullivan, Staff Director; Bill Dauster, Deputy Staff Director and General Counsel; Liz Fowler, Senior Counsel to the Chairman and Chief Health Counsel; Cathy Koch, Chief Tax Counsel; Andrew Hu, Health Research Assistant; Scott Berkowitz, Fellow; Alan Cohen, Senior Budget Analyst; Tom Klouda, Professional Staff, Social Security; and David Hughes, Senior Business and Accounting Advisor.

Republican Staff: Kolan Davis, Staff Director and Chief Counsel; Michael Park, Health Policy Counsel; Chris Condeluci, Tax Benefits Counsel; Mark Hayes, Health Policy Director and Chief Health Counsel; and Randoe Dice, Detalee.
Also present: Thomas Barthold, Chief of Staff of the Joint Committee on Taxation; Thomas Reeder, Senior Benefits Counsel; Tony Clapsis, Professional Staff; Chris Dawe, Professional Staff; Neleen Eisinger, Professional Staff; Shawn Bishop, Professional Staff; Athena Schritz, Archivist; and Josh Levassuer, Deputy Chief Clerk and Historian.
OPENING STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM MONTANA, CHAIRMAN, COMMITTEE ON FINANCE

The Chairman. I would like to just review tentatively, generally, the order of the day. We are going to begin with Senator Lincoln, who will give her opening statement. Then we will return to the amendment offered by Senator Nelson of Florida. After that, we will return to amendments on the list that was distributed.

I might say that Senators may want to modify their amendments, but if they do wish to modify their amendments, Senator Grassley and I have agreed we want Senators to give Mark Hayes of Senator Grassley's staff and Liz Fowler of my staff copies of those modifications before they bring them up, because I like to have some sense of what the modifications are in advance, some advanced notice what they might be. We just want to ensure that we have that notice.

So now we are working through delivery system reform amendments this morning. Later on today, I hope to move to coverage amendments, and I also look forward to a very productive day.

Okay, Senator Lincoln.
Senator Lincoln. Well, thank you, Mr. Chairman. I want to especially thank you for allowing me to deliver my statement this morning after being in Arkansas yesterday. I thank you particularly for your leadership, the hard work of your staff and all the staff on the Committee have spent these past 20-plus months as we have worked together and they have worked with all the members of the Committee in a bipartisan way to find real solutions to this enormous problem we face in this country in terms of health care reform. I appreciate the hard work and diligence that Senator Grassley has put into this effort, and we are looking forward to coming up with something that is really good.

Yesterday, I was home in Arkansas to attend a funeral service for my husband's grandmother who was about a week shy of turning 112, which is pretty amazing. To us, Mama Ruth was an extraordinary woman. As I mentioned, she was just shy of turning 112 and was the oldest documented living person in our State of Arkansas and was the 14th oldest living person in America. And through the years, she had continued to amaze us with her vitality and active lifestyle.
She used to say that one of the keys to her long
life and her longevity was that she continued to keep her
mind active. She was blessed with amazing genes,
obviously, and my husband has inherited those, so I am
excited about that. But I cannot recall her—probably
counting—I can count on one hand the number of times she
was in the hospital or even the pharmaceuticals that she
took. She really worked hard at maintaining her own
health, and she did say that her mind was the key to
that. And although we would all like to be so lucky to
live as long and such a healthy life as Mama Ruth, she
was definitely the exception and not the norm. She would
tell you, though, it was clearly the mind that could keep
you alert, and she did three or four crossword puzzles a
morning. She played bridge three or four times a week,
was a ferocious reader, and really paid attention.

For most Americans, however, Mr. Chairman, access to
affordable, quality health care services is absolutely a
necessity, and without a doubt, the current track that we
are on with regard to health care in this country is
completely unsustainable, both in terms of our outcome
but also in terms of cost.

In the current system, average costs of health
insurance coverage for a family cost just below $10,000
in Arkansas in 2006. The cost of that same plan is
projected to jump by more than 100 percent to over $21,000 by 2016. Our families in Arkansas and families across this country cannot sustain this current rate of growth in their health care costs. And our Government cannot sustain this current rate of growth with respect to expenditures in Medicare and Medicaid.

I firmly believe health care reform is a key component to facing our Nation's economic challenges and our Government's budget imbalance.

For some time I have said I cannot support any health reform proposal that the Congressional Budget Office cannot certify as reducing the deficit and bringing down the costs of health care over the long term and in the out-years.

Under the Chairman's amazing leadership, the mark as proposed does meet these very important goals. It actually bends the cost curve downward in the years ahead, resulting in approximately $1.3 trillion in health care savings for our Nation in the next decade, setting us on a sustainable path for the future. And, Mr. Chairman, we want to thank you for that, thank you for all that hard work that has brought us to that point.

In addition, throughout this process, it has been my goal to ensure that health insurance reform works for small businesses and the self-employed so that they have
quality health care options just like we do as Federal employees. And I am very pleased that the mark establishes Small Business Health Options Program, a SHOP exchange, such as those included in the bipartisan SHOP Act that I introduced with Senator Snowe and Senator Durbin. It will allow enhanced choice and competition along with lower costs for our small business employees who make up approximately half or better than half of the uninsured in America.

I am also very supportive of the important provisions included to cut the annual estimated $700 billion in inefficiencies, waste, fraud, and abuse in the current system. Now more than ever, the American people are looking to us to help create Government they feel like they can trust. Eliminating fraud and abuse is exactly the direction we must go.

Also, the policies that will require insurance companies to change the way they do business regarding pre-existing conditions, rating, and portability. People work hard, hard-working Americans out there across this land, to try to ensure that they can maintain health insurance. Ensuring that the insurance industry is doing their part is critical as well.

These changes can and must be made without harming those who have health insurance and are content with
Mr. Chairman, thank you again for your great work to advance comprehensive health care reform and to all the staff that has put tireless hours into this over the 20-plus months. We have worked hard on it. The problems in our health care system did not occur overnight, and we cannot expect to solve them with just any one silver bullet. It is going to take time, and it is going to take a very large dose of patience in this bill to understand that over the next 10 years we are going to shift our Nation and the Government environment we have created around health care from one that is focused on quantity to one that is focused in value and quality and making sure that we are using all of the efficiencies we know how in our health care system to ensure that all Americans get the health care that they need.

I look forward to continuing work within this Committee over the next several days, and I hope that at the end of the process we will produce a fiscally responsible product that reins in rising health care costs, that provides stability to those who have and like their current health care coverage, and better options for those in need of affordable coverage.

Thank you, Mr. Chairman, and I appreciate your allowing me to give my statement today.
The Chairman. Thank you, Senator, very much, and we are all inspired by your husband's grandmother. You told me earlier about her and how her belief was if you keep an active mind, your active body follows. You just keep active. That is good advice for all of us.

The pending amendment is the amendment offered by Senator Nelson. Is there any further discussion on that amendment?

Senator Grassley. Mr. Chairman, I would like to defer action on this until Senator Nelson and Senator Rockefeller are here because I have got something to say about the amendment.

The Chairman. All right. It sounds a little ominous there. Okay.

Is there any other discussion on the amendment?

Senator Grassley. Well, I hope you will set it aside and not make a decision on the amendment until they are here.

The Chairman. In the meantime, are there other Senators--

Senator Grassley. Oh, other amendments you are talking about.

The Chairman. No. Other statements on--

Senator Kerry. Well, Mr. Chairman, I want to engage in that discussion, but likewise I will wait.
The Chairman. Maybe we ought to defer then until Senator Nelson is present, and Senator Rockefeller and more Senators. Are there any other Senators who wish to speak on the bill generally?
[No response.]
Senator Kerry. Let's vote.
[Laughter.]
The Chairman. Well, seeing none, my predilection—yes, Senator Lincoln.
Senator Lincoln. Well, Mr. Chairman, I would just like to say a special thanks. I was keeping up with what you all were doing as I was traveling and in Arkansas, but thank you so much for the Committee's accepting of several amendments that I thought were very important. Senator Hatch is not here, but it goes back to Senator Chafee as well as Senator Breaux, the hard work that has gone into the Elder Justice Act, which was included as one of the amendments. And I am extremely appreciative of that.

I also wanted to let you know how appreciative I was of the inclusion of the amendment I had on DEXA and bone scanning, which I think is critically important as a diagnostic tool and one that is virtually non-existent anymore because of the lack of reimbursement. I think
these are some good amendments--the Medicare Advantage, the lemon law amendment that we also had.

So I just wanted to thank you so much for the acceptance of those amendments, and I feel like that they will certainly benefit and improve the bill.

The Chairman. I think I am going to temporarily set aside the Nelson amendment so we can now bring up other amendments, and I will ask other Senators if they wish to bring up their amendments. We have a list here. Senator, you are at the top if you want to offer your amendment. Senator Bunning?

Senator Bunning. I am ready.

The Chairman. Sure. Go right ahead.

Senator Bunning. We do not have very many Senators here to--

The Chairman. We need eight for a quorum. One, two, three, four, five, six, seven, eight.

Senator Bunning. Okay. Thank you.

The Chairman. You bet.

Senator Bunning. First of all, I would like to add Senator Hatch as a cosponsor of this amendment. My amendment is C-4 in case anybody did not get a copy. I think they did.

The amendment is, as I believe, very simple--
modification. Is that correct?

Senator Bunning. That is correct.

The Chairman. Okay.

Senator Bunning. As you required.

The Chairman. Right, and we are looking at it now.

Senator Bunning. Shall I--

The Chairman. I am now advised we need to take a little time to look at this modification.

Senator Bunning. Okay.

[Pause.]

The Chairman. Okay, Senator. We--

Senator Bunning. All set?

The Chairman. Well, we are getting set. Let me just ask if you are willing to make further modifications. As I read your modification--I will read it in its entirety--this amendment requires that before the Finance Committee can vote on final passage of America's Healthy Future Act of 2009, the legislative language and a final and complete cost analysis by the Congressional Budget Office must be publicly available on the Finance Committee's website for at least 72 hours.

Senator Bunning. That is correct.

The Chairman. Here are the modifications to the modification that I would ask if you would agree to.

The second line, the word "legislative," change--
Senator Bunning. The "legislative language"?

The Chairman. Yes. Change that to "conceptual."

In addition, in the third line strike the word "final."

And--

Senator Bunning. I cannot agree to that.

The Chairman. I am sorry?

Senator Bunning. I cannot agree.

The Chairman. Well, in effect, then what you are doing here is--

Senator Bunning. Well, let me at least explain why I am doing it.


Senator Bunning. I think the amendment is fairly simple. It requires that before the Committee can vote on final passage of this bill, the America's Healthy Future Act of 2009, legislative language and a final and complete score by CBO must be publicly available on Finance Committee's website for at least 72 hours.

I realize that this is a very big change for the Committee since we normally use only conceptual language. But this is not a normal bill for us or the American people, and an exception should be made today.

For people listening to me, let us take a minute to describe the way the Finance Committee usually operates. When we consider a bill like we are today, we do not
actually have legislative language in front of us. In fact, we have not seen the language, and some of it probably has not even been written yet. Instead, we have a description of the changes the Chairman wants to make. It is called the Chairman's modified mark.

The way we draft amendments to the chairman's mark is, again, conceptual. We just describe what we want to do in our amendment. Once all of the conceptual amendments and conceptual bill have passed the Committee, the legislative language is produced before the bill is considered on the floor of the U.S. Senate.

This probably sounds a little crazy to most people that we would be voting on something where we have not actually seen legislative language. Well, they would be right. It is a little crazy, particularly when you consider that with legislation the devil is in the details. The way legislative language is written, you could have a large impact on the way the policy is actually implemented and even the cost of the provision. That is why I modified my amendment slightly to require CBO to also provide a final and complete score at least 72 hours before the Committee votes on final passage.

It is critically important that we know the true cost of this legislation before we pass it, particularly because the CBO Director just seemed to indicate
yesterday that after this conceptual bill passes, CBO may begin to shift their focus on providing cost estimates for the merged package between the Finance Committee and the Senate HELP Committee bills, which means we may never know what the real cost of this bill is.

I strongly believe that this bill is too important for us to rely on conceptual language. Every member of this Committee and every member of the American public should have the opportunity to take a look, if they choose, at the legislative language and final cost before this Committee votes on final passage. I believe it is the right thing to do.

The bill before us is not a normal bill. With more than 17 percent of our gross domestic product spent on health care, the changes we are considering could have a tremendous impact on our economy.

America cares deeply about the issue of health care reform, regardless of what side of the debate they are on. The town hall meetings this summer were eye openers. Americans who had never been politically active were taking time out of their days to attend and voice their opinions. Americans have flooded our office with phone calls and letters about this conceptual bill, and Americans are talking about health care reform with their friends and neighbors. This bill will impact every
American, and I believe they realize it. Changes will be coming through the type of health care coverage they have and the amount of taxes they pay.

The bill is too big and too important for us to rely on conceptual language and a preliminary analysis of the cost. The amendment gives us a chance to be transparent with what we are doing. It simply requires the Committee to have legislative language and the final costs public for 3 days, only 3 days before the Committee can vote on final passage.

So let us go through all the amendments and get to a point where we are finished and about to vote on final passage of this bill. And then let us take a minute to get the legislative language and cost analysis finalized. Let us post it on the website so Members of Congress and members of the public can actually read it. Then vote on final passage.

Quite frankly, I think Americans are tired of us taking the easy way out, tired of us not reading or having time to read legislation before we vote on it. They expect more from us, and we should deliver it.

I hope everyone on this Committee can support my amendment, and I would like to add Senator Corzine as a cosponsor also—Cornyn.

[Laughter.]
Senator Bunning. That is a Freudian slip.

The Chairman. I do not know quite what to say to that one.

[Laughter.]

The Chairman. Okay. Senator Stabenow?

Senator Bunning. Sorry, John.

Senator Stabenow. Mr. Chairman, I wanted to just respond to my friend and indicate I think we all know that we have to have full costs and people have to have an opportunity to look at this. The public has to have an opportunity to evaluate this. There has been a tremendous amount of confusion around these various bills.

I guess what I would just offer is that we know that the Finance Committee's is not the final bill going to the floor. It is going to be merged. And so I would be concerned we would be adding to confusion by not waiting, as CBO recommended, to actually wait until they are merged and then see the final numbers and then give people an opportunity to see what, in fact, will be coming to the floor. Because while we will be an incredibly important part of the work, we are not the total work. And so it has been, I think, confusing for people because there have been a number of committees in the House, two committees in the Senate, and, Mr.
Chairman, I guess I would just suggest that rather than adding to that confusion, that from the public's standpoint merging the bills and then seeing all the final numbers and giving the public an opportunity to evaluate what, in fact, we have done as both committees would be more helpful to people and actually make more sense.

Senator Cornyn. Mr. Chairman?

The Chairman. Senator Cornyn.

Senator Cornyn. Thank you, Mr. Chairman.

Mr. Chairman, I--

The Chairman. Not Corzine. Cornyn.


I strongly support this amendment. I remember sitting on the dais when President Obama was inaugurated, gave his inaugural speech where he talked about the importance of transparency in Government. He said, "Transparency breeds accountability and builds public confidence." And I think this Committee has done a good job under your leadership putting the amendments that have been filed on the website on Saturday. I have gotten e-mails, I have gotten Tweets, I have gotten all sorts of communications about amendments that I have filed and other people have filed. And I would suggest to you that this legislation has captured the imagination
and certainly the attention of the American people. And there are a lot of people across America who are reading these bills. They have read the House bill. They have read the HELP Committee bill. And they are intensely interested in what this Committee is doing.

And I think that for a bill most of which will not be implemented until 2013, it is not an inconvenience, it is not, I think, something we ought to overlook, the opportunity to get the American people to be able to read it and get a full score.

I have heard a lot of discussion at town hall meetings and elsewhere, people made about Congress voting on things that we have not even read. I remember the stimulus bill was released on a Thursday night, and we had to vote on it less than 24 hours later. I voted no so that was not a particular problem, but I do not know how anybody can be held accountable or build public confidence if we do not have the information and the American people do not have the information to make their own evaluation, to ask questions and hold us accountable.

So I would encourage adoption of the Bunning amendment. Thank you.

Senator Kerry. Mr. Chairman?

The Chairman. Senator Kerry?

Senator Kerry. Mr. Chairman, this would be the
first time in the history of this Committee, which has considered some of the most complicated, most historical legislation in the country, that we have ever been required to provide the legislative language.

Now, I mean, let us be honest about it. The legislative language, everybody knows, is relatively arcane, legalistic, and most people do not read the legislative language. It is not what is of greatest concern to people unless it changes the conceptual language.

The conceptual language is the heart of what we are doing here. Are we going to allow dual eligible Medicaid-Medicare seniors to have low-cost access to drugs that they currently purchase at a much higher price? That is a very simple concept which people can understand. The conceptual language that translates to the legislation language is up to us to verify. But I would also offer this: This is fundamentally a delay tactic. It is a delay tactic because, in essence, it requires a long process of putting together legislative language before we could even move forward on what is not going to be the exact bill that we are going to vote on in the United States Senate.

Moreover, if you want to get technical here, the Finance Committee does not vote on final passage. We
report a bill out. So it is impossible for us to vote on "final passage of the act." And, secondly, we will not be able to get a final and complete cost analysis.

Now, I do believe the Senator is correct that we ought to have a cost analysis. It is not going to be the final one, but we should have a cost analysis of the bill that we are looking at. And I think the Chairman—I am confident the Chairman would probably agree that we ought to require that, and I think he is looking for that in the modification.

But I do not think there is anything that compels us, given the history of this Committee and the type of legislation we have considered, to do what is being required in this amendment. We have not done this for any of the complex pieces of legislation this Committee has considered, including the Tax Act of 1986. And I think that we can proceed forward, Mr. Chairman, on the conceptual language. I think you are correct to ask for that modification, and I will certainly vote with you to make sure that is what we do.

Senator Grassley. Mr. Chairman?

Senator Bunning. Mr. Chairman, may I respond?

The Chairman. Senator Grassley.

Senator Grassley. Mr. Chairman, members of the Committee, you know, a lot of things we do around here
are kind of mundane and maybe complicated, and you might not expect the American people to understand exactly what we are doing and assume some things that they would not otherwise assume. But when it comes to the American people asking us to sign petitions, would you read a bill before--promise that you are going to read a bill before you vote on it, or coming to our town meetings, as they did during August, and maybe even before then, would you pledge to read a bill before you vote for it, it is pretty simple for the American people to understand the issue that is before this Committee right now and before the entire Congress, and particularly in light of the fact that the President in so many different ways and on so many different occasions promised a great deal of transparency in American Government, that this is one of these things where you do not want to insult the intelligence of the American people because they understand what the issue is, because it is kind of what they expect us to do anyway--read a bill before you vote on it. Know what you are voting on.

And so I think that this is something that we better take very seriously because the American people understand this issue. Maybe they understand most of the issues we are working on, but some of them are kind of complicated. But this one is not complicated. This is
pretty simple. You know, what are you voting on? And they ask us for these pledges. They ask us to sign.

I know most of you are not interested in what went on in the Group of Six over the dozens of meetings we had over the last several months, but one issue that we Republicans kept bringing up in the Group of Six is that, even before a bipartisan agreement would have been voted out of our Group of Six, we would have the text and we would have CBO's estimate of what the bill costs.

Now, we did not end up with a bipartisan agreement, so that was not violated in the Group of Six by what the Chairman decided to move ahead on his own text. But at one point it was not a case of just doing it in this Committee. It was not a case of waiting until it is merged with the HELP bill or on the floor of the Senate. It was a case that when six people were done with it, we wanted to review the text and have a score.

So I hope that this is not considered inordinate. It might be considered inordinate on some sort of tax legislation that we deal with on a regular basis or other issues, but on restructuring one-sixth of our economy and health affecting life or death of every citizen, it is an entirely different issue and a very important issue that I think we ought to take consideration. And I do not consider it any effort to slow things up, because in the
final analysis, you know, there was some talk last week
that we would vote a bill out of Committee this week and
it would be on the floor Monday. Now, it looks like the
defense bill is coming up next week, but somebody had to
be ready to get this bill ready for the floor for next
week.

So I think this is a legitimate amendment and that
we ought to be supporting it, and it is something that we
on this side of the aisle had talked about for a long
time. I remember the Senator from Maine digging out of
her files a petition that she was carrying around that
she was asked to sign. I do not sign petitions, but it
is not difficult for me to tell my constituents that I am
going to read a bill before we vote on it.

Senator Kyl. Mr. Chairman?
The Chairman. Senator, I am about ready to vote on
this, but go ahead, Senator Kyl.

Senator Kyl. Well, I have something to say.
The Chairman. Sure. Go ahead.

Senator Kyl. Directly in response to what Senator
Grassley said, one of the reasons that this Committee
uses conceptual language in some of its bills is because
we deal with the IRS Code, and it is very difficult to
continually change amend provisions of the IRS Code with
tables and so on, and easier for us to discuss those
kinds of things in conceptual language.

But this is not that except for a few provisions. This is a major, substantive bill that changes, as some people have said, one-sixth of the economy. I prefer to talk about the change that it will have for the lives of the American people. It deals with a variety of complicated, significant subjects, and it is important to have the legislative language.

I spoke with one of the very helpful staff members last evening about the abortion language, and I said, "Would you show me where it says that no money in this legislation would be used to pay for an abortion?" And we went over the provisions that are going to be written, and it is very important for things like that that you see the actual legislative language, because, frankly, there is a big difference in interpretation between people who believe that it does and it does not. And I was persuaded that her intentions were exactly consistent with what we were saying yesterday, but that is an example of where you are going to want--you are going to have to see the legislative language to know precisely how it works.

So I think Senator Grassley makes a good point, that this Committee frequently needs to deal in conceptual language because of the nature of the tax legislation we
are writing. This bill is mostly not that.

Other committees, of course, use legislative language, and there is no reason why on a bill as substantive as this that we would not do that.

Now, I also note the American people are watching us here, colleagues, and they really do want to know that all of us know what we are doing, and they want to know what we are doing as well. And it is true, as Senator Kerry said, that it is easier to understand the conceptual language. We all appreciate that fact. But it is also true, as Senator Bunning said, the devil is in the details, and sometimes the way the legislative language is written can make a big difference. And there are people who go through this very carefully and then bring those matters to the light of the American people.

We even have laws--I know at least in my State we have a State law, and I think there are some Federal laws--that provide like a 3-day grace period when you sign a mortgage or certain kinds of real estate contracts. You have got 3 days to think it over. And I remember one of the things you have to sign, or at least initial, is that you have read the thing that says you have got 3 days to think it over. Well, there is a reason for that. There is a lot of legal language in those contracts, and it is important to talk to people
who can read the legal language and tell you what it really means. And if you decide that it is not what you thought it was, you have got 3 days to change your mind and say, "No, I am not going to go ahead with this contract."

Shouldn't the American people have that same 3-day period of time to take a look at what we write to know exactly what we said, to know exactly how much it costs, and, in effect, as our bosses tell us whether they want to sign on the dotted line or not? That is really all we are asking--3 days.

And surely as we are going through this markup, the lawyers in the back room can be putting in legal language the things that we have agreed to so that we are not looking at some huge long delay here. I appreciate it will take some time, but it is not that much time. And something that is this important surely we can wait a matter of a few days for the American people to, in effect, have that 3-day notice to take a look at what we are doing and whether they really want us to sign it.

A final comment, two parts. Our colleague, the Senator from Michigan, said this would add to the confusion. I do not think so. I think what would be confusing is if we make--you know, we spend a week or so in this markup, and we work very hard on almost 500
amendments, and we end up producing a bill that is very complicated, that is very long--it will probably be 1,000 pages--and it is not important for the American people or it would be confusing for them to know how much it cost and what we voted on? Simply because there is going to be another stage at which some unknown group of people take the HELP Committee bill and somehow or other meld it with this bill. I doubt that I will be a part of that process. My constituents are not going to have any representation in that room, will have no idea what--that is not transparency. And that is what gets the American people up in arms here. They see us doing a lot of stuff behind closed doors, and this is the argument that is made.

It would be confusing for the American people to hear--or to see exactly what this Committee is voting on after all this time and to know how much it would cost because some unknown group of people is then going to take this product, go into a back room, somehow combine it with the HELP Committee bill and, voila, come out with something that is going to be on the Senate floor, and we are going to be expected to immediately go to the Senate floor and start discussing this. And our constituents back home are going to say, "What on Earth happened?"

So, Mr. Chairman, I think this is a very important
amendment. The American people are watching this here. This is the least that we can do for the people that we represent. They are our bosses. They deserve to have some time to understand what we have done and how much it costs before this bill is mysteriously massaged into another bill and then brought to the Senate floor.

So I support the Bunning amendment, and I submit to my colleagues we would do ourselves all a big favor not to incur the wrath of our constituents by contending that it would be too confusing to let them know exactly what the CBO score is and what the legislation language is.

The Chairman. I would like to remind our colleagues what the actual effect of this amendment will be. The effect of this amendment will be this: that after we have completed action on the bill here, we have to wait another 2 to 3 weeks before we can vote on it. After we have completed action on our bill, we have to wait another 2 to 3 weeks before we can vote on it, and that is because this amendment is written to require legislative language, and it is at least 72 hours after we get that 2-week to 3-week delay.

I am reminded of what CBO Director Elmendorf said yesterday. He said that after we finish, he will then probably take about 3 days to get a preliminary analysis, about 3 days after we complete. And he also said that
then after that it is going to take 2 more weeks to look
at his final analysis looking at the legislative
language. We have never, ever, ever, ever done that in
this Committee. Nothing close to it in this Committee.

I might also remind my colleagues of the almost
excessive transparency that this Committee has utilized
in telling the American people what we are doing and what
we are working on. Let me just review what we have done
in this Committee.

First of all, the mark has been on the website since
last Wednesday. The modified mark has been up recently.
And all amendments are public. That is a new process.
All amendments are transparent. That is new. This
Committee started that. I do not know of any Committee
that has been more transparent than this Committee.

But let me go back further. When we started
thinking about health care, our Committee last November
put together an options paper, a white paper, which
basically is the framework and the foundation for most
health care reform legislation in all of the committees.
That was on the website for everybody to see it and work
on it.

Then we had a whole series of roundtables and walk-
throughs, all public, results on the website. We sat
here--one of them I think was in this room, one of the
first roundtables. We had experts, this whole Committee here, bipartisan, asking questions of all the experts of what health care reform should look like. We did that first on delivery system reform. Then we had the walk-through, same subject, delivery system reform, more and more details, let's figure out what it is that is going on here.

Then we moved to coverage, same thing. We had the roundtables, transparent, open, and then the walk-throughs. We moved on then to a third subject as well.

So this--and financing, again, roundtable, walk-through. In fact, one journalist, one very prominent journalist--in fact, I can see him right now sitting in the audience. He said to me, he said, "Senator, you are really starting something new here in Washington." His implication was that it was really good. "You are so open. You are so transparent, so bipartisan, working so hard to dig down and find out what the details are, what this legislation is all about."

Then we had that Group of Six, and I know some Senators were in on those meetings. Senator Enzi will tell you this. So will all the other members tell you this. Man, that was a really deep down drill to figure out what this legislation is all about. Three Republicans, three Democrats, and non-ideological.
Senator Conrad. Sixty-one meetings.

The Chairman. Sorry?

Senator Conrad. Sixty-one meetings.

The Chairman. Sixty-one meetings, of all things.

And we worked so hard to get this right, and, frankly, the mark we have here is in many respects the basis of that Group of Six meeting, and I am very proud of all those efforts.

But the main point I want to make is the effect of this amendment is that we have got to wait 2 to 3 weeks after we have completed everything before we can vote.

Senator Conrad. Mr. Chairman?

The Chairman. And I just do not think that is acceptable, and I frankly would urge the Senator to withdraw his amendment and maybe in the meantime figure out some other way to deal with it.

Now, my final--

Senator Kerry. Would the Chairman yield for one question?

The Chairman. My final point, my final point is this: As Chairman of this Committee, I am going to insist that we get numbers on the cost of this bill before we vote on it, good, solid numbers. I want that. I think every member of this Committee wants it. Every member of this Committee has insisted on it, as they
should. We are going to get those numbers. We are going
to get those numbers. But the reading of this amendment
has the effect that we cannot vote for 2 to 3 weeks after
we have completed—I do not think the Senator intends
that. And if the Senator does not intend that, then I
suggest that he withdraw the amendment so we can rewrite
it in a way that accomplishes our objectives, which is
that we have got numbers, and good, solid numbers, before
we vote on this bill.

Senator Bunning. Let me counter some of your
arguments, because some of them are misleading.

The Chairman. They are all accurate.

Senator Bunning. Some of them are misleading
because what the CBO Director said and the reason he
would take time is the merger of the two bills--

The Chairman. No, not a merger.

Senator Bunning. I listened to him the same as you
did yesterday.

The Chairman. That is not what he said.

Senator Bunning. Well, we also understand that if
all this openness is so apparent, why is Congress'
approval rating at 12 percent? I mean, this is not what
the American people expect of their leaders. They expect
them to be open, completely open, and put things--every
other Committee that I work on, Banking, Energy, whatever
it might be, always has legislative language, and the
scoring of this bill before we merge with the HELP bill
ought to be known by the American people.

Now, you are telling me it will take 2 or 3 weeks.
Well, if it takes 2 or 3 weeks and we get it right, is
that more important than taking less time and getting it
wrong?

See, we have a difference of looking at the bill.
The bill is the most important bill, and I have only been
here 24 years, so it is the most important bill that I
have seen in 24 years.

So I can tell you that if it takes this extra 2
weeks to get it right--and I know that the Chairman wants
to get it right for the American people's sake.

The Chairman. Senator Snowe?

Senator Snowe. Mr. Chairman, I certainly support
this amendment because I think it represents a common-
sense, practical, pragmatic, good government approach to
understanding the totality and the collective impact of
all that we do. And I know during the course of the
Group of Six discussions, we thoroughly analyzed and
reviewed every aspect and facet of the components of this
document that is before us.

But what was, you know, overriding in all of those
discussions in working hand in glove with the
Congressional Budget Office Director, Dr. Elmendorf, is that legislative specifications matter. And he reiterated that on a number of occasions, and in a document on July 28th and a preliminary analysis of our coverage specifications, he indicated, "We have not received any legislative language to translate those specifications into law. A review of that language could have a significant effect on our analysis."

And then more recently, regarding his analysis on the document that is before us today, he said, "Important caveats regarding this preliminary analysis." He said, "There are several reasons why the preliminary analysis that is provided in this letter and its attachments does not constitute a comprehensive cost estimate for the proposal." And he lists several of them, one of which, of course, is the review of the legislative language that would translate those specifications into law could have a significant effect, and the assumptions that are made, and they have not yet had a complete review of the legislative language that could affect those cost estimates in modeling all the specifications to capture their principal effects on Federal spending, so we have not taken into account all the proposal's effect on spending for other Federal programs.

So, obviously, it matters to the Congressional
Budget Office. It ought to matter to us. These are unprecedented times that require unprecedented measures, and I do believe that the American people are rightly entitled to see exactly what we are doing, what we are legislating. We should not be afraid of having a better and complete understanding of exactly what we are doing.

I think we all know as legislators—and I have been in the legislative arena for more years than I care to admit. But the fact is words matter and so do the numbers. And we want to be sure that we are absolutely confident in the integrity and the product that we are going to be voting on in the final analysis. It requires that language. It matters to the Congressional Budget Office; therefore, it should matter to us.

Time is our ally, not our enemy. And people in this country are rightly worried as to whether or not we can possibly get this right. That it represents 17 percent of the gross domestic product does unnerve people because they have already seen a cumulative impact of what we have done with TARP and TALF and auto bailouts, Cash for Clunkers, the stimulus package, and the list goes on.

So why wouldn't people be concerned about whether or not we would get it right in reordering or reorganizing $2.4 trillion in health care expenditures in one year, let alone over 10 years?
So I would urge the Chairman and members of this Committee to support this effort. That we did not do it before is not a rationale for saying we should not be doing it now.

President Obama said in his address before a joint session of Congress on September 10th that, "Our health care problem is our deficit problem." So we also should be able to agree that any legislation we report would not aggravate those problems. We are facing and experiencing record deficits, $7.1 trillion over the next 10 years alone.

Last December, our long-term fiscal shortfall was estimated by the Treasury Department at $56 trillion. So the fact that we are not attempting to address what will represent $33 trillion over the next 10 years in health care expenditures, I think it does require prudence on our part.

So, Mr. Chairman, I do think that we should move in this direction: one, that we should have the language. Irrespective of whether or not the Committee has not historically developed legislative language, there are many facets to this bill that does require legislative language, and the CBO Director has reiterated that fact, that it makes--has a material effect on the bottom fiscal line.
So I would hope that we would adopt this amendment.

The Chairman. Senator Carper?

Senator Carper. Thanks, Mr. Chairman. I want to thank Senator Bunning for offering this amendment and really causing us to think about this issue and to have a chance to discuss it.

Let me just ask a question, Mr. Chairman, if I could. Do I understand that we have or we will have a preliminary estimate from CBO on your modified mark by the end of this week?

The Chairman. That is my understanding.

Senator Carper. As each of us offer amendments to the modified mark, if our amendments cost money, take away revenues or whatever, we have to have an offset for that, do we not?

The Chairman. That is correct.

Senator Carper. So when we come to the end of the week when we hopefully will have a chance to vote on an amended package, we will have, first of all, the CBO estimate for your modified mark, we will essentially have--on an amendment-by-amendment basis, we will know what our amendments cost, if they cost anything, or if they generate money, and we will have to have an offset. And so we will have, I think, a pretty good idea at the end of the week when we--
The Chairman. From my understanding, that is correct, but remember, Director Elmendorf is also saying there are interactive effects. So it is not a 100-percent correlation. But I think common sense dictates it is pretty close.

Senator Carper. Okay. The other thing I want to mention, conceptual language and legislative language. I was talking to somebody back home recently, and they said, "What is this conceptual language deal in the Finance Committee?" I have only been on the Finance Committee about 7 or 8 months, and none of the committees I have worked on before in the Senate use conceptual language. They use legislative language. And at first I thought it was sort of strange, and then I tried to read the real legislative language, which is--it reminds me--I said to my friend back home, I said, "Do you ever get one of those credit card disclosures that say, 'This is your disclosure,' and you try to read it, and it is like 40 pages long?" You read it and say, "What did that say?" That is like reading legislative language in many cases.

What we would like to tell the banks, and what we have told them, is to give us--pardon? Yes, plain language. Plain language so that even I can understand it. And that is basically where we have gone. That is really, I think, in part what we are talking about here.
Before we vote on this bill at the end of the day on the floor, after we have merged this bill together with the HELP bill, do we want legislative language? Of course we do. Do we want to have a final CBO score of the merged bill before we actually vote--

The Chairman. I am sorry, Senator. I missed that.

Senator Carper. Do we want legislative language when we take the bills to the floor, merge the bills? Do we want that? Yes, we do.

Do we want to have from CBO in hand their final numbers, if you will, on the merged bill? I think we do. And I think we ought to be able to get it.

Let me just walk through this timeline and tell me if I am wrong.

We hopefully, God willing, will report out a bill at the end of this week, maybe this weekend, and sometime next week our leadership, you, hopefully some folks on the other side will have a chance to talk about what should be in the bill that is going to be merged and come to the floor for a debate a week from maybe Monday, a week from next Monday.

My guess is that we are not going to finish debate on that bill in a week. It is going to take a couple of weeks, at best. During that period of time, CBO will have the opportunity before we vote on the bill, the
final bill as amended in the Senate, and we will have not only the legislative language, but we will have CBO's down-to-the-dime kind of estimate.

The final point I want to say. I mentioned this yesterday in my opening statement. A lot of people are focused on how important this debate is in this Committee, and it really is. I would like to paraphrase Churchill, and I did it yesterday and I am going to do it again. What we are doing here today is not the end. This is not the beginning of the end. When we finish up our markup and report out a bill at the end of this week, it will be the end of the beginning. It will be the end of the beginning.

And for the end of the beginning for me, conceptual language is, I think, better frankly in some ways than legislative language. And for me, having CBO's preliminary estimates on the Chairman's mark as modified, and then step by step amendment analysis of cost and effect, that is not bad. And for me that is sufficient. The last point. I have said--and some people are tired of hearing me say it--I am not going to vote for a bill in the Senate at the end of the day, I am not going to vote for a bill out of this Committee that I think unbalances the budget, increases the deficit. I am not going to vote for a bill in this Committee that I believe
fails to rein in the growth in health care costs. And I
sure am not going to vote for a bill after a couple of
weeks of debate that does not bend the cost curve, does
not restrain the growth of health care costs, and that
increases the budget deficit. I am not going to vote for
that bill. The President says he is not going to sign
that bill. I am not going to vote for it. So we are on
the same wavelength here.

And my guess is that, frankly, none of the rest of
us will want to vote for that bill if it is out of
balance, if it increases the deficit, if it fails to rein
in the growth of health care cost.

Again, Senator Bunning, I want to thank you for
bringing this to our attention. I think it has given us
a good issue to discuss and to think about, and
hopefully--in fact, I am sure that by the time we
actually have a chance to vote on a final merged package
within the next month, we will have what you are looking
for and what I think we need.

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad.

Senator Conrad. Mr. Chairman, listening to this
debate--and I, too, want to thank Senator Bunning for
raising this because as the Chairman of the Budget
Committee, one thing I have insisted on throughout is
that this be a package that we can say with certainty will reduce the deficit, will reduce long-term costs in health care from what they would otherwise be. And I have said in closed and open meetings, if we fail to meet those tests, we will be condemned in history, because we are at a point in time where the United States is on a totally unsustainable budget path. The deficits are too large, the debt is growing too rapidly, and we simply cannot permit that to continue.

Reforming health care is a key part of a strategy to rein in deficits and debt, because the largest unfunded liability of the United States is in Medicare. The unfunded liability in Medicare is seven times the unfunded liability in Social Security. We have an unfunded liability in Medicare of more than $35 trillion. That is over 75 years. But that is the reality of what we confront, and it is absolutely imperative that we pass a package that reduces deficits and debt.

The Chairman's mark does that, according to CBO. What we know is that revisions are being made, and what we have got to be certain on before we cast a final vote in this Committee--which, as the Senator from Delaware says, very appropriately, is the end of the beginning, because there are many steps in this process. But what we are going to be faced with is CBO's looking at this
entire package before we are done and having an assurance
that we know what CBO's analysis is before we vote. That
is what Senator Bunning has described.
I would ask the Chairman, can you assure us that we
will see a CBO analysis before we have a final vote in
this Committee?
The Chairman. I say to my good friend from North
Dakota, absolutely yes, because I think that is the only
responsible thing to do. That is certainly what I want
to see. I think it is what each member of this Committee
wants to see.
Senator Conrad. And will that CBO analysis be
available on the Committee website?
The Chairman. Absolutely.
Senator Conrad. And the language that we would be
voting on--talk about conceptual language. That has been
the history of this Committee for more than 30 years.
What is conceptual language? It is plain English. That
is what we are talking about--plain English.
I am not a lawyer. A key reason this Committee
writes its bill in plain English is so that members can
understand it and so the public can understand it. And
it is absolutely--Senator Roberts says that is going too
far?
[Laughter.]
Senator Conrad. No, I think in fairness, if you read a bill that comes from this Committee in legislative language and you read a bill that comes in plain English, plain English is a lot more transparent than the legislative language, because the legislative language refers to different places in the law that are being amended, and so it reads like—I do not even know how to describe it. It is gobbledy-gook to most people. That is why this Committee writes its bills in plain English so that people can actually understand what is being done. It is not just a bunch of references to various parts of the Code.

Now, the issue was raised: Could there be a difference between the plain English of the bill and the legislative language that ultimately must be voted on? Certainly that is the case. And what has always happened in this Committee in the years that I have been on it is once we vote on the plain English and then the translation occurs to the legislative language, if anybody feels that there is a discrepancy, if anybody feels that the plain English that we voted on has not been captured in the legislative language, the Chairman then offers a Chairman's amendment to restore the integrity of what the Committee has done.

So what will happen here is we will have, before we
vote, an analysis by the Congressional Budget Office that will be on the website that says what the cost is. We will have in plain English what the bill contains. That is transparent. That is in the interest of the people of this country and certainly in the interest of the members of this Committee.

I think the Senator from Kentucky's impulse here is absolutely the right one. It should be transparent. It should be clear. I think his language in a couple of respects creates a problem that perhaps is unintended. But the basic impulse here is the right one. There ought to be transparency, there ought to be a complete and clear CBO analysis of the cost, and the language ought to be in plain English. And then when the legislative language is prepared, if there is a discrepancy, as sometimes there is, there has always been in my experience on this Committee a manager's amendment to restore the integrity of the action taken by the Committee.

The Chairman. I would just like to follow up on that point. Some are asking why conceptual language, why do we do that in this Committee. Senator Kyl explained part of it is because we tend to deal with tax issues and if we voted on the statutory language, it would be just impossible to understand. Section 426, refer to subpart
D, then further subpart Q, whatever it is, and what the heck is that? And so on and so forth. I mean, we would not know what the heck is going on here. So that is--

Senator Kyl. It is music to the ears of we lawyers.

The Chairman. I am sure it is. But it just does not work.

Second, though, it has been stated here that conceptual language is more plain English and people understand, et cetera. It also helps us at our Committee to debate issues. If it is conceptual language, we have a better idea what we are talking about. We may not know all that we are talking about, but at least it is a better idea of what we are talking about. It helps the spirit of comity. It helps develop trust. We see the language that we think we understand. It is in English. It is conceptual language, not statutory but conceptual. And it does very much help us reach agreement in this Committee, and this Committee has a tradition of comity, a tradition of bipartisanship, a tradition of working together, I think by far more than any other Committee.

I might also just remind ourselves, to my knowledge this Committee has never had legislative language, and we should not, in my judgment. Don't forget, when we offer amendments, if we required legislative language always,
we would have to write them in legislative language and we would not understand them as well. They would be harder to draft, harder to modify. But since we are doing conceptual language, it is easier to draft amendments. It is easier for us to understand what it is that the author has in mind.

I want to underline again the point that Senator Conrad made. Whenever we report a bill out of this Committee and it goes to the floor and we have voted on the conceptual language, not legislative language, whenever there has been a mistake, a drafting error, when we write the legislative language we have always corrected it, and to my knowledge, in the 30 years I have been on this Committee, it has never been abused—never, ever been abused. It is all good faith, and it is good faith because we have a conceptual language tradition here. It is based on comity. We work together. We trust each other. We trust each other, and that has worked very, very well.

The argument we have to have statutory language here is based on a premise that because this is a bigger bill it should be transparent. Well, does that mean in smaller bills we do not care? If it is only maybe 10 pages long, we do not care? I do not think that is a valid premise, to say the premise being that larger bills
are more important than bills that may be of fewer pages. I just think basically a bill is a bill, and we follow a procedure that has worked for us. Otherwise, we are going to get this terrible question: Well, does the size of this bill require conceptual or does the size of this bill require statutory? I do not think we want to go down that road.

A few reminders here. The Tax Reform Act of 1986 and the Deficit Reduction Act of 1997, not only the tax provisions but the Medicare, it is all conceptual language. The tax cut of 2001, that was introduced in the House on May 15, 2001, marked up by this Committee the same day, passed the House 1 day later and then 1 week later passed the Senate. And that was a bigger bill. That was, I think, a $3 trillion bill. That is bigger that this $900 billion bill. And yet we did not—and that was used by--this process of conceptual language has been used by both parties, not just Republican, not just Democrat, and it has worked very, very well uniformly on both sides, and it just allows us to do our work.

At the proper time I am going to offer a side-by-side amendment which I think more accurately reflects and more efficiently helps us get to the goal we want, namely, know what the Congressional Budget Office
estimate is on this bill, but in a way that lets us do
our work, in a way that does not unnecessarily strangle
us, in a way that does not unnecessarily cause a couple
of weeks of delay. But we still want to make sure we are
doing our job. We want the numbers. Senator Conrad
asked the right question, if we could have numbers, at
least preliminary analysis, by CBO prior to the vote, and
the answer is absolutely yes. We are going to make sure
we have those numbers.

Senator Roberts. Mr. Chairman?

The Chairman. Senator Roberts.

Senator Roberts. Well, thank you, Mr. Chairman,
and I want to go on record as saying that I do not think
with this amendment, although it has raised the question
of the Committee's integrity in the eyes of some, that is
not the issue. And it is certainly not the issue of the
Chairman or the Ranking Member or any member here.

And like Tom, I am a new member for about 2 to 3
years, and you have had to put up with my rants over
oxygen tanks and everything else. And I am struck by the
bipartisan nature of the Committee and the fact that
Republicans meet, Democrats meet, we meet together, then
try to work things out. And so the Chairman--I would
hope that you would not take this amendment personally,
and there is not anybody on the Committee that does not
respect your integrity and your dedication to this.

I would like to vote for this because of what happened in the HELP Committee, and that was the predecessor here. The HELP Committee did not work on concepts. It just worked on an incredible amount of legislation. But the problem was that we were trying to amend a bill that we admit we had never seen. And I had an amendment on CER, my favorite topic, and CMS, and what they should be doing in regards to cost containment and what CER meant and to prohibit them from just simply using CER as cost containment without regard to care. And we got into a great debate on what the word "prohibit" means. I think that is pretty clear. If you are going to prohibit something, you are going to say, "Hey, you cannot do that."

But we got into a rather lengthy deal, and then they said, well, let's take a look at it, and we will get back to you tomorrow. And I said, well, what is the problem with the meaning of "prohibit"? Well, we have some problems with it. And then, of course, it just got tossed out, and that was that. But we at least had a vote.

Now, I am going to do my usual thing here and say in my previous life I was a reporter, editor, so on and so forth. If you look in the bio, it says that Roberts is a
journalist. Actually, that is an unemployed newspaperman. But at any rate, I know the press is here and I know national press is here, and I think the thing is that if you just read this, this amendment requires that before the Finance Committee can vote on final passage of America's Healthy Future Act of 2009, the legislative language and the final and complete cost analysis by the CBO must be publicly available on the Finance Committee's website for at least 72 hours. If you ask the American people to vote on that, never mind the great debate between concepts, or legislative language, that is not the issue. And the integrity of the Committee is not the issue. The issue is just four lines here—or three and a half lines here that will get a 90-percent vote in regards to the American people. I think we ought to vote for it, and I think you are going to provide those numbers anyway. Why don't we go down the road and just vote for this, and you have already indicated to the Committee that that is exactly what is going to take place.

Senator Snowe. Mr. Chairman?

Senator Roberts. And the Chairman has disappeared—no, he has not. There he is.

Senator Grassley. He asked me if I would chair, so Senator Snowe and then Senator Hatch.
Senator Snowe. Thank you.

Senator Grassley. Then Senator Lincoln.

Senator Snowe. The American people are nervous about our attempt at health care reform and overhauling, but it represents 17 percent of the GDP. And they are nervous about it because they are concerned that we will not get it right. And it is an issue that affects each and every American, as I said yesterday, personally as well as financially.

Legislative specifications matter to the Congressional Budget Office. That is a fact. It is a fact that has been stated and restated. And it is certainly something that Dr. Elmendorf had indicated to us during the course of our meetings in the Group of Six. So if it matters to the Congressional Budget Office, it should matter to us. It is not second-guessing whether or not, who can read it, and how they will interpret the legislative specifications. But it is important and central to the final number on this legislation, and that should concern all of us, and that is exactly what concerns the American people. You can have conceptual language. That is fine. But the legislative language is ultimately what becomes law. That is what affects the bottom line.

Now, if the Director of the Congressional Budget
Office in these monumental times and truly consequential
to the fiscal health of our country on an issue that
could have a profound and influential effect in terms of
trillions of dollars—we are not just talking billions,
we are talking trillions—then it ought to be of
paramount concern to each and every one of us. If the
Congressional Budget Office Director is saying
legislative language could have a significant effect on
our analysis, then we ought to be concerned. We ought to
oblige that.

We are legislators. We deal with legislative
language. That is what it is all about. And I just do
not understand, frankly, why we would be so disconcerted
about the notion of having legislative language that
could have a material impact on the fiscal costs of this
legislation.

If this document before us has a $28 billion
surplus—it might not—wouldn't we want to know that?
Wouldn't we want to know that it would have a collective
effect over the next 10 years that could turn something
into the trillions? I think so.

This is all about good government, and we have an
obligation to understand that. And I do not understand
what is happening in 2 weeks that we need to drive this
on a legislative fast track. I do not understand it. I
do not know what is happening in 2 weeks that we cannot wait to get the final number if that is what it is going to take for the Congressional Budget Office Director to get it done. He said that very clearly yesterday. He was very precise, as he has been all along in this process.

We should not be afraid of it. We should not be afraid of sunshine laws. We should not be afraid of sunlight. We should not be afraid of transparency. We should not be afraid of accountability. We should not be afraid of the numbers and the facts, because the facts matter, the numbers matter. And if these numbers are wrong, wouldn't we want to come back as a Committee and work on it, revise our work, address those issues? Isn't that what this Committee is all about?

After all, the sole Committee that has the obligation to finance the entirety of health care reform is the Senate Finance Committee. It is central to the integrity of this process and to this Committee that we get those numbers right. That is what we are all about.

So I hope that we would defer to the Congressional Budget Office Director. When he says the legislative language matters, then it should matter to each and every one of us, and it matters to the American people, and we should respect that.
Senator Grassley. Senator Hatch and then Senator Lincoln.

Senator Hatch. Well, let me just say I would like to associate myself with the remarks of the distinguished Senator from Maine. I think she summarized this very well. Look, here is the conceptual bill, 220 pages. Now, we know that when we get a final bill with legislative language, it is going to be probably four times that much, probably five times that much.

We have some of the best staff on both sides who have ever served in the United States Senate. Our staffs understand legislative language, and many of us even do. The fact of the matter is--now maybe I have exaggerated that to a degree.

[Laughter.]

Senator Hatch. The fact of the matter is that we are talking about--you know, we are in September. I suspect that we will be in here through November. My gosh, that gives us a lot of time to go over this and to get the numbers and be able to know what we are doing. And I agree with the distinguished Senator from Maine. In this letter, just this last week or so, dated September 16th, from the Congressional Budget Office, Dr. Elmendorf, the distinguished Senator from Maine quoted this, the second paragraph in this one part of the
statement.

He said, "Second, CBO has not yet completed its review of legislative language that would translate those specifications into law. Review of that language could have a significant effect on the analysis."

Now, look, I think we ought to take the Congressional Budget Office Director at his word, that, you know, when you get this magnified four or five times, with legislative language that our staffs can understand—and like I say, some of us can understand it, too—having worked in the field of law for many years before I came here, the devil is in the details. It is in the words. It is how you do it.

And nobody denies that we would try to correct any deficiencies in the conceptual language that gets us to a final bill. The problem is that we are talking about such a large part of the economy, 17, 18 percent of the economy, that once we go that far, it is pretty hard to turn things around. It would be lots better for us to have the information, the language, the ability to be able to refine that language and to be able to help the Chairman and others to be able to get this right.

Look, I think the distinguished Senator from Kentucky has raised a worthy amendment. I really believe we ought to vote for it and get it over with.
The Chairman. Okay. Who else seeks recognition?

Senator Lincoln.

Senator Lincoln. Thank you, Mr. Chairman.

First of all, I just wanted to ask the Senator from Kentucky, I think, as Senator Carper and others have said, the premise is certainly right on target. And if the question is really the timing, maybe the gentleman would be willing to look at the multiplication of since you have got a complete cost analysis listed there, the final--and I do not know. The Chairman of the Budget Committee understands better how--the CBO scoring, but CBO has been unbelievably diligent through this process of negotiations and working through these 20-plus months that we have looked at what we have been doing and trying to be very, very helpful in providing us good numbers. And on record, I think their numbers are good, and basically what a complete cost analysis would give us would certainly be the usual thorough financial charts that we get in terms of, you know, what we need to really understand.

As others have said, this is a step in the process. We will still be going further. There will be more amendments on the floor, and there will be a merger with the HELP bill and others. So maybe if we just were to eliminate the word "final" and use "complete cost
analysis," it gives us those tables that we are so used to and that are so thorough and have a good track record. And then you would actually probably cut out the largest portion of the time that is going to really slow us down, or maybe perhaps we just want to hold this amendment until we can get Dr. Elmendorf here to tell us exactly what kind of time.

I mean, I do not think anybody argues that we want to have good information to work with, but maybe the idea of making sure that we are getting good information in reasonable time is something that you could do by eliminating "final," because final is what we need to know before we vote on a final bill when we get to the floor. The cost charts and the financial charts are--what do they call them, Mr. Chairman of the Budget Committee? The scoring charts that we get are very accurate and certainly very thorough in what we have been getting, and to me that seems like it would be something reasonable. I do not know, Mr. Chairman.

Senator Bunning. May I respond?

The Chairman. Yes, Senator.

Senator Bunning. I thought that Senator Snowe and Senator Hatch's response put it in perspective better than I can when they referred to the letter that the CBO Director sent and said conceptual language is fine, but
the devils are in the detail when you write, you know, the language, and then they have to score it.

Senator Lincoln. I am not talking about the legislative. I am talking about the final--where you have got--

Senator Bunning. See, the final cost analysis has to come from the legislative language.

Senator Lincoln. You can still get a complete cost analysis from legislative language. It is going to be extremely thorough and extremely accurate. It may not be--

Senator Bunning. Well, but it also could change the scoring from the conceptual.

Senator Conrad. Mr. Chairman?

Senator Bunning. The Budget Committee Chairman knows that as well as I do, because I am on the Budget Committee.

The Chairman. Senator Conrad?

Senator Conrad. Mr. Chairman, you know, this is almost a classic case, as I listen to this, of talking past each other. I have served on this Committee I think 17 years, and conceptual language is language that is in plain English. That is then scored on a preliminary basis by the Congressional Budget Office, and the Chairman has made clear that he would insist on that
scoring be available to the Committee before we vote. We
would also have the legislation in plain English before
us and before the American people before we vote.

    Senator Snowe has raised the issue of the
legislative language possibly being at variance with the
language that is in plain English. That is in the CBO
letter. And that is fair to do.

    The thing that I think where we are missing each
other is that always before what we have done in this
Committee is, when CBO has its final analysis based on
the legislative language, if there is any discrepancy
between what this Committee has done based on plain
English and the preliminary score, that the Chairman
reconciles that before it goes to the floor.

    So what the Chairman is asking is entirely
reasonable. It is to have language that is in plain
English before this Committee, and all of the legislation
and every amendment and the scoring of it all from CBO,
but not to have to wait for the legislative language to
be complete, with the understanding, as it has always
been in this Committee, that if there is any variance
between the interpretation of the plain language and the
legislative language, that the Chairman then reconciles
the two so that the CBO score is not damaged, and so that
the Committee has taken action that turns out to be
precisely what the legislation provides.

So, to me, the concerns raised are entirely reasonable, but they are also absolutely addressed by the way this Committee has always done its business.

The Chairman. I might say I am going to offer an amendment, and it will be a side-by-side so we can have two votes. I think my amendment is being circulated. My amendment basically modifies the Bunning amendment. Let me read it, as I have modified it.

"This amendment requires that before the Finance Committee can vote on final passage of America's Healthy Future Act of 2009, the conceptual language in plain English and a complete cost analysis by the CBO be publicly available on the Finance Committee's website ahead of the vote."

Senator Crapo. Mr. Chairman?

The Chairman. That is going to be the alternative that I am going to ask that we vote on.

Senator Crapo?

Senator Crapo. Thank you very much, Mr. Chairman. I had not intended to debate on this issue, but as I have listened to the debate I feel compelled to.

As we have done through the discussion here today, a number of reasons have been put forward for opposition to the Bunning amendment, including that the amendment
breaks with the precedent of the Committee; that the
utilization of legislative language would add to the
confusion; or that legislative language is too complex
and we need to be dealing in more simple language; that
the amendment would delay action on the issue by 2 to 3
weeks; that this would not be the final bill that we vote
on anyway and we should wait until the final bill is
merged with the HELP Committee before we see legislative
language; and that the plain English approach which
Senator Conrad has talked about is closer to the
realities of how the Committee ought to operate.

And I understand each of those arguments, but I do
not think that any of them overcome the very strong
principal and substantive reasons behind the amendment.
And let me just make a couple of observations.

With regard to the precedent of this Committee, I
actually was surprised when I became a member of the
Committee that we did not deal with legislative language.
And I believe that the Committee ought to change that
precedent, that this Committee should operate on
legislative language as we act, not just on this bill but
on all legislation. I think that is a much better way
for us to approach our job as legislating.

With regard to the question of whether the
legislative language is too complex, I also have received
those notices in the mail, the privacy notices from
different credit cards or bank statements, and I agree,
they are mind-boggling as you try to read them. But they
mean something. And, in fact, those are actually
summaries, somebody's attempt, I think, to try to make
plain English out of some legislative requirements. And
the fact is that even though this language, the
legislative language with which we deal, is complex and
is very difficult to read, it is very, very important.

And I believe that Senator Snowe and Senator Hatch
have particularly both made very eloquent and very clear
explanations as to why the difference between a summary
or a conceptual approach is very different than the
actual language. And, again, that is one of the reasons,
I believe, that it is important for us to adopt this
amendment.

In addition, the question of whether the action of
this Committee would be delayed by several weeks if we
adopted this amendment, it may or may not be. There has
been some disagreement about that. But assuming that it
did cause us to slow down for a couple of weeks, while we
and the American public reviewed carefully what the exact
language we were voting on was going to be, I think it
would cause the people of this country to breathe a
collective sigh of relief, if just for a few weeks, while
they saw the Committee and the Congress stepping back to
take a look at and to let the American public take a look
at and to vet the language that we are about to vote on,
on such an important piece of legislation.

So for each of the reasons that I have discussed, I
believe that the principle behind this proposed amendment
is far more important than the reasons that have been put
forward for why we should not adopt it, and because of
that, I believe that we should support the original
language in the Bunning amendment.

Senator Ensign. Mr. Chairman?
The Chairman. Okay. Senator Ensign?
Senator Ensign. Thank you, Mr. Chairman. I want
to make a couple of points.

I understand that this Committee has done things in
a different way than other committees. I felt the same
way as Senator Crapo did when I first became a member of
this Committee. When I found out this Committee
considered conceptual language, it was kind of a
surprise. It was one of those things where you go, okay,
well, I guess that is just the way the Committee does
things.

Mr. Chairman, we should not just do things one way
because that is the way we have done things for the last
20 years. We should ask: Is that the right way to do
it?

In this case, we are talking about a piece of legislation that affects every single American. It is the most complex, intricate legislation that any of us have ever dealt with in our political careers, by far. And the reason is because it is one-sixth of the economy.

Artificial deadlines get us in trouble around here. We have all seen it. I harken back to the stimulus package. Do we all remember the AIG bonuses and the little loophole that was allowed with AIG? Well, you remember we had a false artificial deadline with the stimulus package where something that was like that did not get caught because it was not out there for people to take a closer look at. That was rushed through because of an artificial deadline.

Mr. Chairman, when we are talking about one-sixth of the economy, we cannot afford to get this wrong. We need to have time to study and analyze the legislative language. It is critically important for us and others to have this language. I actually like the idea of having conceptual language alongside legislative language because the conceptual language is a good idea as it is in plain English, but then you also need to have people who understand legal language ensure that the conceptual language matches the legislative language. This is
critically important, particularly on the most complex, important domestic issue that maybe any of us will ever vote on. This is important not only for us, but it is important for the American people. It is important for all those who are out there in the health care industry, understanding that their livelihoods may be affected by this bill.

And the law that we pass up here in Congress that has the most impact is the law of unintended consequences. What are the unintended consequences of the legislative language that we may put into play?

Yesterday, Mr. Elmendorf indicated that when you change something in one part of the health care field, it changes everything else. Everything is interactive. Mr. Chairman, we need to know what those various effects are.

In addition, it is critical for Members, instead of just having a preliminary score, to have the final score that Senator Bunning has put in his amendment because the preliminary score may vary widely with all of the amendments, and with all of the technical changes. That is why the CBO Director has put it in there. The reason it takes more time is because legislative language can change it. If the preliminary estimate was good enough with the conceptual language, then they would just be able to basically rubber-stamp it when they put on the
legislative language.

   I do not think that this is something that the
American people should be expected to trust the Chairman,
to trust the staff, to trust any of us. They should have
complete transparency. And as Senator Snowed talked
about, let the sunlight in. Let everybody look at this
thing, have some time, slow it down so we get it right
before we vote on this bill.

   Thank you, Mr. Chairman.

   Senator Conrad. Mr. Chairman?

   Senator Snowe. Mr. Chairman?

   The Chairman. Senator Conrad?

   Senator Conrad. Mr. Chairman, when I first came on
to this Committee, I replaced Lloyd Bentsen, who had been
Chairman of the Committee, when he was named Secretary of
the Treasury. One day Lloyd Bentsen, as Secretary of the
Treasury, called me and invited me to the Treasury
Department for lunch. And I readily agreed, and I
thought I would be there and it would be a big group of
people and other Senators, perhaps Congressmen. I got
there and I was the only one there.

   I said, "Mr. Secretary, this is really an honor.
Why did you invite just me?" He said, "Well, you know, I
am Danish and you are Danish, so you kind of inherited
the Danish seat on the Finance Committee." And he said,
"There are some things I wanted to share with you about the history of that Committee and how it is different from other committees."

And I remember this conversation. It made a very powerful impression on my, number one, to have been invited just to have lunch with the Secretary. And he said, "Number one, remember that this is a Committee that has functioned with a bipartisanship that is very rare in the United States Senate. This is a Committee that attempts to come to consensus and agreement across the party divide." Number one.

"Number two," he said, "this is a Committee that pride itself on professionalism, a professional staff not hired for their political connections, but hired for their substantive backgrounds and abilities."

He said, "Number three, this is a Committee that has tried very hard to make its work transparent to the people affected."

I said to him in the course of the conversation, "Mr. Secretary, why does the Finance Committee work from conceptual language, language that is in plain English, rather than legal language?" Because every other committee I had served on operated on the basis of legislative language. He said, "We made that change years ago because we concluded that for the members to
make decisions that were fully knowledgeable, they needed in plain English what the effect of the legislation is. And when it is in legal language"--and I wish I had an example here right now of what the language that comes out of this Committee reads like when it is in legal language. Anybody who thinks that is going to be transparent to the American people is really not telling it like it is.

You read the legal language of this Committee, there is not 5 percent of the American people who would understand what it means. That is the fundamental reason this Committee deals with plain English so that the members can understand, so the American people can understand.

On the question of whether or not there might be a discrepancy, as the Director of CBO has said, absolutely. And what is the guard against that? The guard against that is when the legal language is written, if it does not comply with the plain English that the Committee has passed, that the Chairman alters the mark through a manager's amendment to conform with what the Committee passed.

That is the history and tradition of this Committee, and it is a good one, it is a professional one, and it is a transparent one.
Senator Snowe. Mr. Chairman?

The Chairman. Senator Snowe.

Senator Snowe. Mr. Chairman, I assume that the CBO Director is familiar with the traditions of this Committee. The Director did not ask for plain English. He did not ask for concepts. He asked for legislative specifications. And in the letter that was addressed to you, Mr. Chairman, on September 16th, he said, "Important caveats regarding this preliminary analysis. There are several reasons why the preliminary analysis that is provided in this letter and its attachments does not constitute a comprehensive cost estimate for the proposal."

So it gets back to the crux of the question. He did not say "insignificant caveats." He said "important caveats." And he said "does not constitute a comprehensive cost estimate for the proposal." He could not have been more clear.

In fact, it seems to me that he was very precise in what he was requesting of us, and at least being very specific about the fact that he could not give us a final number because he did not have the legislative language. It was not conceptual language. It was not plain English language. He said "that could have a significant effect on the analysis."
Now, the CBO, as we all know, is the final arbiter of costs. We rely on the CBO. The Finance Committee relies on the CBO in determining the true costs of this legislation. So I do not understand the hesitancy or the reluctance. No one is saying we should not have conceptual language, but CBO must have the legislative language. And that is what this is all about. And I truly do not understand the skepticism about this request. I do not understand the reluctance, nor do I understand the resistance. This is about doing our jobs.

If it takes 2 more weeks, it takes 2 more weeks. I mean, we are talking about trillions dollars in the final analysis. I do not understand it. What is the rush. What is happening in 2 weeks? If it takes the CBO Director, who I thought was abundantly clear yesterday that it might take 2 weeks--maybe it will take less, maybe it will take more. Is there something happening in 2 weeks that we cannot wait? Is it the Columbus Day recess? What is it? Because I am not quite clear.

I want to do my job, and our job is to sit here and do it as long as it takes. And however hard it is, we better sit here. And, frankly, maybe we ought to get accustomed to reading legislative language.

When I started in the State legislature back in the 1970s, we did read the legislative language, because we
knew it mattered. And perhaps we ought to return to that
tradition, whether it is this Committee or the entire
United States Congress. But we ought to be very familiar
about what we do. And if the CBO Director is asking for
legislative language, then we ought to give it to him.
And we ought to know those true numbers.

I want to be able to know that before I vote on this
bill in the Finance Committee. That is the bottom line
here. It is not what happens later and not what happens
in the merger. We will have to deal with that, too, and
we will want to know those numbers.

Maybe it is because we do not have a requirement to
balance the budget. States do. Governors do. State
legislatures do. Maybe we do not think it matters. But
I want to know what the final number is on any bill that
I vote on in this Committee, and we should know it every
step of the way. There is no rationality other than this
one, is getting the number right with the right language.
And if the CBO Director says he needs it for the true
cost and the comprehensive cost, which tells me all of
the costs, then that should get our attention.

Senator Conrad. Mr. Chairman?
The Chairman. Senator Conrad.
Senator Conrad. Mr. Chairman, the Senator is
absolutely right that we should know the true cost. And
the Senator is also right that, before you know the final
cost, you have got to have legislative language. That is
absolutely the case.

But what has been the tradition of this committee is
to use language that is in plain English to get a score
from the Congressional Budget Office so we do know the
cost, and then if there is a variance between what the
legislative language, when it is ultimately produced, and
the plain English that is used so that everybody can
understand what is actually being discussed is used, the
Chairman makes an adjustment in a manager's amendment, so
that the legislative language reflects the plain English
the committee has considered.

Let me just read you some legislative language that
comes out of this committee. Tell me if this will help
the American people understand what we are really doing:
"MA benchmark based on plans' competitive bids. One, in
general, Section 1853, Sub J of the Social Security Act,
42 U.S.C. 1935W/23J is amended, A) by striking amounts
for purposes and inserting amounts. Number one, in
general, for purposes: B) by redesignating paragraphs one
and two as subparagraphs A and B respectively, and
indenting the subparagraphs appropriately. Section K1
for the area for the year and BB12 and BB 1/3rd of the MA
competitive benchmark amount determined under paragraph 2
for the area for the month.

IV, for 2013, the sum of \( aa \), \( \frac{1}{3} \)rd of the quotient of \( AA \), the applicable amount is defined in the subsection K1 for the area for the year, and \( BB_{12} \) and \( bb \) \( \frac{2}{3} \)rds of the MA competitive benchmark amount, as so determined for the area for the month. V, for 2014, the MA competitive benchmark amount for the area for a month, and 2013, as so determined, increased by the national per capita MA growth percentage described in Subsection C6 for 2013, Section K1 for the area for the year, and BB." I will not go further. Does anybody think that is transparent?

Senator Roberts. Would the Senator yield?

Senator Conrad. I would be happy to yield.

Senator Roberts. I have been in contact with Kansas providers to say, scour this bill and then tell our staff what is wrong with it. In other words, can you live with it? How many times--how many times--have we had people flood our office and come in and say, well, why did you put this in this bill? Why do we have to live with this? You are going to put us out of business. We said that was not our intent. That was not the legislative intent. This is the law of unintended consequences.

The other thing you have to understand is, how will CMS interpret this bill in terms of content, as well as
cost? If you get the legislative language out there, rest assured, everybody that has been burned and touched the stove about six times with CMS, they have got people hired that can read the legislative language and understand it, get back to us in the 72 hours, and say, whoa, wait a minute. Not only in terms of cost, but in terms of content, this is what it means. That is really what we are trying to do. Why can we not do this before we vote on things and get these things taken care of rather than afterwards? Because once you wire it, you cannot get it rewired. It is like pulling teeth.

Senator Conrad. But the regulations come after the legislation.

Senator Roberts. That is exactly my point. How many people here have been contacted by a health care provider about CMS regulations that make absolutely no sense and are about to put them out of business? Virtually everybody.

Senator Conrad. But that has nothing whatever to do with whether we use language that is in plain English here or legislative language.

Senator Roberts. No, the legislative language --

Senator Conrad. Let me finish. I listened to you. Let me have a chance to respond.

When you have a chance to write legislative language
and then the agencies write their regulations, which is always the case here, that is where you get the differential that you are applying. You are absolutely right. That is one of the greatest frustrations I think everybody here has. We write laws, thinking it does one thing, using legislative. Then the agencies put their lawyers to work in interpreting them and writing regulations which may then not reflect at all the will of this committee. That has nothing to do with the current dispute.

Senator Roberts. Well, it has everything to do, if the Senator would continue to yield for just a moment.

The Chairman. We have discussed this and discussed this.

Senator Roberts. I know, Mr. Chairman. One more point and I am through.

The Chairman. We are going to wind this discussion down pretty soon, but go ahead.

Senator Roberts. All right. Just one more point and I am through.

I think the Senator has made my point. You go first with the legislative language, and all the Senator from Kentucky is asking is for 72 hours to determine the cost. Senator Snowe has spoken eloquently about sunshine and openness, and the fact that the American people would
support this, 90 percent, 95 percent.

The thing I am trying to point out is that we would at least have 72 hours for the providers to say, hey, wait a minute, have you considered this? That is all I am asking for, is not only cost, but also the content of a bill. That 72 hours, I think, is highly, highly important. I thank the Chair.

The Chairman. All right. I think it is time to vote here, although I did see Senator Crapo seeking recognition.

Senator Crapo. I will be very brief, Mr. Chairman. I just wanted to say to the Senator from North Dakota, the language that you read to us, I think, does make the point. But it is also very important for us and the American people to have the conceptual language or the plain English approach that you have discussed. We are, to a certain extent, talking past each other here because I do not think anybody disagrees that we need to have experts, those who read and study the legislative language and go through and say, all right, what are they doing with this paragraph and that paragraph. We need to have them put that into simple, plain language for us to understand, those of us who do not have the time or the skill, necessarily, to go in and do it ourselves.

But that is not a replacement or a substitute for
having the actual legislative language, which is the 
binding, authoritative law available for experts and 
others to review and analyze before we vote on it. That 
is, again, the main reason why I made my earlier 
comments. I truly believe that not only with regard to 
this debate and this bill, but with regard to the general 
operations of our committee, we should change that 
precedent and we should operate off of the legislative 
language, even though it will cause us some delay in our 
deliberations.

I do not think that the artificial deadlines that we 
seem to be under in this committee are deadlines that the 
American people are concerned about, or even insisting 
on. What, instead, that they are insisting on is that we 
know what it is we are doing, and then be able to discuss 
it with them and explain it to them in plain English.

Senator Conrad. Can I just make the point, Mr. 
Chairman, that Senator Roberts thought the language I 
just read had something to do with home health. No. 
That language was all about Medicare Advantage. It just 
makes my point perfectly: members of this committee 
cannot recognize what the legal language is about. That 
is why it is critically important it be in plain English, 
so that members of this committee can understand.

The Chairman. All right. Let us vote. Let us
vote. Just, we have two votes. One is the amendment offered by Senator Bunning.

    Senator Bunning. But we have not discussed your amendment at all.

    [Laughter].

    The Chairman. I think you just made one of my points, too. This is a little dilatory here. Let us vote. I will just read my amendment again. I think it is before you anyway, but --

    Senator Bunning. But we have not discussed it.

    The Chairman. That is all right. I do not need a discussion. The amendment requires that before the Finance Committee can vote on final passage of America's Healthy Future Act of 2009, the conceptual language in plain English and a complete cost analysis by the CBO must be publicly available on the Finance Committee's website ahead of the vote.

    The main point here, very simply, is we are trying to find the right balance between a couple of competing dynamics here. One, is to make sure, as well as we can, know what we are talking about. That is, get the CBO analysis, get CBO's cost estimates so that we can do our work, know what it is that we are voting on.

    The second, is to make sure that we can go ahead and proceed. Frankly, if we take the first extreme, we could
require CBO analysis, we could require all the
regulations be out first by CMS. If we get all those CMS
regulations first, all the CER stuff first -- I mean, I
can think of all kinds of areas where, to really do our
work, we want to make sure that it is all out there in
public view so, before we vote on the legislation, we
know what it all is. Now, clearly that is too much. We
cannot operate. So I am just suggesting with my
amendment--and I will read it again--basically that
before the Finance Committee can vote on the final
passage, the conceptual language -- and Dr. Orszag said
that it would take three days to get.

Senator Conrad. Elmendorf.

The Chairman. Excuse me. Dr. Elmendorf said that
it would take three days, in plain English, the complete
cost analysis by CBO, publicly available on the Finance
Committee's web site before the vote. Sitting here,
clearly, I know that Dr. Elmendorf said, in plain
English, it would take him two weeks to get a final out
after he got the legislative language, which is
afterwards.

Senator Bunning. Mr. Chairman?

The Chairman. I am sorry, we are going to vote.

Senator Bunning. Mr. Chairman, at least we ought
to be able to discuss at least counter what you have
said.

The Chairman. I am sorry, Senator. It is time for a vote.

Senator Bunning. Well, that is interesting. That is the way to run a ship.

The Chairman. We discussed this. We discussed this.

Senator Hatch. Mr. Chairman? Wait just a second. Look, this is the sponsor of the amendment you are going to amend. He wants a few minutes.

The Chairman. All right.

Senator Hatch. Make it a few minutes just to discuss why --

The Chairman. We will discuss that for a few minutes, but it has been out there. It is the same subject. It is the same subject. But go ahead, Senator.

Senator Bunning. It will take me very few minutes.

The Chairman. All right.

Senator Bunning. If you vote for the Baucus modification, it guts the intention of my amendment. It does not give us, or the public, legislative language or a final cost. It is simply keeping the status quo of this committee, relying on concepts to base our votes. Regardless of what the other side said, legislative language is important. That is why every bill that the
full Senator considers, and every other committee
considers, is written in legislative language. That is
why CBO needs the language for a final cost.

Senator Snowe is absolutely right: what is the rush?
Taking a few extra weeks will not kill me, I hope, and
anyone else on this committee. In fact, it will give us
time to take really what is in the bill, understand what
we are voting on, and the true cost.

Thank you.

The Chairman. All right. Let us vote.

The first vote will be on Senator Bunning's
amendment, the second will be on my amendment. Before we
vote, I just want to say I believe in getting these cost
estimates as much as anybody on this committee before we
vote. I will make that very clear.

The Clerk will call the roll on the Bunning
amendment.

The Clerk. Mr. Rockefeller?
Senator Rockefeller. No.
The Clerk. Mr. Conrad?
Senator Conrad. No.
The Clerk. Mr. Bingaman?
The Chairman. No by proxy.
The Clerk. Mr. Kerry?
The Chairman. No by proxy.
1 The Clerk.  Mrs. Lincoln?
2 Senator Lincoln.  Aye.
3 The Clerk.  Mr. Wyden?
4 Senator Wyden.  No.
5 The Clerk.  Mr. Schumer?
6 The Chairman.  No by proxy.
7 The Clerk.  Ms. Stabenow?
8 Senator Stabenow.  No.
9 The Clerk.  Ms. Cantwell?
10 Senator Cantwell.  No.
11 The Clerk.  Mr. Nelson?
12 Senator Nelson.  No.
13 The Clerk.  Mr. Menendez?
14 The Chairman.  No by proxy.
15 The Clerk.  Mr. Carper?
16 Senator Carper.  No.
17 The Clerk.  Mr. Grassley?
19 The Clerk.  Mr. Hatch?
20 Senator Hatch.  Aye.
21 The Clerk.  Ms. Snowe?
22 Senator Snowe.  Aye.
23 The Clerk.  Mr. Kyl?
24 Senator Kyl.  Aye.
25 The Clerk.  Mr. Bunning?
Senator Bunning. Aye.
The Clerk. Mr. Crapo?
Senator Crapo. Aye.
The Clerk. Mr. Roberts?
Senator Roberts. Aye.
The Clerk. Mr. Ensign?
Senator Ensign. Aye.
The Clerk. Mr. Enzi?
Senator Enzi. Aye.
The Clerk. Mr. Cornyn?
Senator Cornyn. Aye.
The Clerk. Mr. Chairman?
The Chairman. No.
The Clerk will tally the vote.
The Clerk. Mr. Chairman, the tally is 11 ayes, 12 nays.
The Chairman. The amendment fails.
Now we will vote on the Chairman's amendment. A recorded vote has been requested. The Clerk will call the roll.
The Clerk. Mr. Rockefeller?
The Clerk. Mr. Conrad?
Senator Conrad. Aye.
The Clerk. Mr. Bingaman?
The Chairman. Aye by proxy.
The Clerk. Mr. Kerry?
The Chairman. Aye by proxy.
The Clerk. Mrs. Lincoln?
Senator Lincoln. Aye.
The Clerk. Mr. Wyden?
Senator Wyden. Aye.
The Clerk. Mr. Schumer?
The Chairman. Aye by proxy.
The Clerk. Ms. Stabenow?
Senator Stabenow. Aye.
The Clerk. Ms. Cantwell?
Senator Cantwell. Aye.
The Clerk. Mr. Nelson?
The Clerk. Mr. Menendez?
The Chairman. Aye by proxy.
The Clerk. Mr. Carper?
The Clerk. Mr. Grassley?
Senator Grassley. No.
The Clerk. Mr. Hatch?
Senator Hatch. No.
The Clerk. Ms. Snowe?
Senator Snowe. No.
The Clerk. Mr. Kyl?
Senator Kyl. No.
The Clerk. Mr. Bunning?
Senator Bunning. No.
The Clerk. Mr. Crapo?
Senator Crapo. No.
The Clerk. Mr. Roberts?
Senator Roberts. No.
The Clerk. Mr. Ensign?
Senator Ensign. No.
The Clerk. Mr. Enzi?
Senator Enzi. No.
The Clerk. Mr. Cornyn?
Senator Cornyn. No.
The Clerk. Mr. Chairman?
The Chairman. Aye.
The Clerk. Mr. Chairman, the tally is 13 ayes, 10 nays.
The Chairman. The amendment is adopted.
All right. The next amendment I have on the list is an amendment offered by the Senator from Arizona, Senator Kyl.
Senator Kyl. Mr. Chairman, I believe that the amendment is Amendment Number D1. There is a modification.
The Chairman. That is correct.

Senator Kyl. Is the modification -- it is being passed out right now.

What this amendment does, colleagues, is to strike certain provisions of Title 3 of the bill and the modification will illustrate that. As soon as that is passed out, I will go through each of those items.

Let me just begin preliminarily by noting that this year marks the 44th anniversary of Medicare. To commemorate that occasion, the President spoke at an AARP town hall event. I am going to quote what he said.

The Chairman. Senator, has this amendment been passed out, do you know?

Senator Kyl. My understanding is, the modification is being passed out right now.

The Chairman. And this is a modification?

Senator Kyl. Yes.

The Chairman. And did you give this to us prior to now calling it up and passing it out?

Senator Kyl. I am not sure what the staff --

The Chairman. Because what Senator Grassley and I requested is that modifications would clearly be in order, but we need a little advance notice.

Senator Kyl. Sure. Sure. You can characterize them as significant or not for yourself.
The Chairman. Why do we not go ahead? I have it here. Make sure other Senators have it, too.

Senator Kyl. Yes. I inquired. Maybe you were not here. I inquired as to whether it was being passed out, and I thought I was told that it was being passed out.

The Chairman. All right.

Senator Kyl. So I said I will start some preliminary remarks, and then I am happy to describe the specifics of it after I am done with this part.

The Chairman. All right.

Senator Kyl. Here is what the President said: "I think there's a misperception that's been out there that somehow there's any discussion on Capitol Hill about reducing Medicare benefits. Nobody is talking about reducing Medicare benefits," the President said.

What I hope to achieve by this amendment is to ensure that what the President assured the people in AARP is, in fact, true, that in fact we do not reduce Medicare benefits. Part of Title 3 will reduce Medicare benefits, and this amendment attempts to strike the parts that would reduce Medicare benefits for seniors.

America's seniors are not wrong, they are not confused about this. They have reason to be worried that portions of this bill could affect their care. That is clear. They are expressing those concerns to us. I have
opinion surveys here that I can quote which reveal that fact, but I think we can stipulate that a lot of American seniors are worried that portions of this bill, particularly in Title 3, will adversely affect their medical care. This title does, in fact, have provisions of it that could dramatically and significantly affect seniors' care.

If you just take a quick glance at the CBO score sheet to see that the mark takes nearly $400 billion for Medicare -- now, let me let these numbers sort of speak for themselves, but here they are: $210.9 billion in cuts to hospitals, nursing homes, home health, and hospice. What senior would not be concerned that cutting over $210 billion by cutting payments to hospitals, nursing homes, and home health and hospice might not adversely affect their care?

And $125.4 billion in cuts to private Medicare plans known as Medicare Advantage. We talked about that earlier with Dr. Elmendorf, who noted that about 20 percent of America's seniors that currently rely or would rely on coverage by Medicare Advantage plans will not have that coverage because of the reductions in the payments to the Medicare Advantage plans.

Then there are $22.6 billion in savings from a Medicare rationing commission. Now, when Medicare sets
up a commission to figure out whether it is spending too
much money and it is too costly to provide certain
services and CBO says we are going to say $22.6 billion,
something had to give there. There is $22.6 billion less
care being given. Maybe some of that can be justified on
grounds that it is not really going to affect anybody's
care. We cannot know that today. America's seniors are
right to be concerned about it.

There are $4.6 billion in cuts to imaging services,
wheelchairs, and physician-owned hospitals. The same
point. Maybe there are some savings to be gained there
that would not adversely affect a senior's care. We
cannot know that today. Seniors have a right to be
concerned about that.

I think, Mr. Chairman, that it is disingenuous to
say that Congress can cut this much spending from
Medicare without having an adverse affect on seniors'
access to health care. It is just absolutely
counterintuitive. We all support health care reform. I
am very much supportive of improving Medicare solvency.
Of course, if we were to do that we would apply the
savings that are achieved, if there are any, back to
Medicare. We would not go buy somebody else insurance
with that money and leave Medicare in the financially
strapped condition that it is in.
I also believe strongly that we have to strengthen the quality of care provided to Medicare beneficiaries. But Medicare savings, as I said, if there are any, should be used to preserve and strengthen Medicare, not shift it to pay for a new entitlement program. When seniors really understand what is in store, as we have already begun to see during the town hall meetings and other meetings and visits that we had with our constituents during the August recess, they will rightly give Congress a failing mark for not upholding the President's promise of "not reducing Medicare benefits".

I simply find it unthinkable that the President could make that commitment and then support taking almost $400 or $500 billion out of Medicare. So my amendment gives every member of the committee an opportunity to be on record. Should seniors foot the bill for the uninsured? Should a program scheduled to go bankrupt in 2017 be leveraged to spend nearly $1 trillion? My response is, of course, no.

The amendment is very simple. It strikes the main provisions of the Medicare title, Title 3, that contain most of the cuts that we have been talking about. It would strike the arbitrary payment cuts and the Medicare commission which are being used primarily to fund the program for the uninsured. I think that the reform
should focus on providing high-quality care so we would preserve the quality improvement provisions, the annual Medicare extenders, the rural protections, and other provisions, as the modified amendment makes clear.

The amendment does not have an offset. It should not need an offset if you believe, as I do, that Medicare should not be the piggy-bank for new non-Medicare spending. In other words, if you take the status quo today and the President says we are not going to reduce seniors' care with Medicare, we should not have to -- in order to say, good, let us make sure that that does not happen by taking out the key provisions that would put that issue in doubt. We should not have to somehow have an offset when those savings were not going to help Medicare in the least. They are being used to fund this new entitlement, as I said.

So, Mr. Chairman, if you want, we can go through some of the specific provisions of the modification. The exemptions to the striking--in other words, things that are not stricken, and I will put this in plain language, the conceptual language rather than legislative language so that it is easy for people to follow here--there are basically 14 things that are not taken out there: the value-based purchasing and quality reporting, reducing hospitals' acquired conditions; a national strategy to
improve health care quality; accountable care organizations; CMS's innovation center. We are going to have an amendment to that later that ensures there is no rationing of care that comes from that, so I left it in, hoping that we could agree on that amendment that would protect against rationing by the innovation center.

The bundling demonstration project; the project regarding readmissions, to reduce care there; the primary care and general surgery bonus; national workforce strategy; the physician payment update; all of the other Medicare extenders; all rural protections; the special rule for widows and widowers so that they do not lose low-income assistance under Part D; and, finally, the funding, outreach, education of low-income programs.

So all of those things are retained. The other portions of Title 3 are stricken. That is, as I said, primarily the provisions that would obviously directly have an impact on the number of seniors that would be insured under Medicare Advantage and the nearly $400 billion that allegedly is saved for Medicare.

The Chairman. All right. First, the Medicare trust fund is projected by the latest trustees report to go broke in the year 2017. The mark before us addresses that challenge and improves Medicare solvency. In fact, it will extend Medicare insolvency, the Chairman's mark,
by four to five years, so it protects seniors, helps seniors, extends insolvency four or five more years. Those who support this amendment essentially are harming seniors. They are hurting the solvency of the trust fund. I do not think seniors want to do that.

These provisions in the bill are recommended by MedPAC and policy experts, generally in like with the historic commitment made by major health care industries to reduce health care costs. But the main point is, the effect of this amendment is to hurt seniors. It does not allow us, as we are in the mark, to extend the solvency of the Medicare trust fund.

So I ask my good friend from Arizona, does this amendment have an offset? I ask that because when notice was put out a week ago on the mark, I also said that amendments that cost would require an offset. So I ask the Senator, is this amendment offset?

Senator Kyl. Mr. Chairman, I know that is what you told us that we had to do. I just explained why I believe, in this situation, that is not required. It is also not required because, first of all, what you are talking about that MedPAC recommended -- first of all, much of what MedPAC recommended to help the solvency of Medicare is retained in my amendment. This mark does not improve the solvency, it takes savings to fund a new
entitlement, which is why I do not think there needs to be an offset because I am not taking the money from Medicare.

The Chairman. Anyway, it is not offset.

Senator Kyl. Second, I do not think it is accurate to say that MedPAC recommended Title 3. Thee are portions of Title 3 that were included in MedPAC recommendations. It did not recommend that we create a new entitlement with savings that they recommended. Again, that is the reason why no offset should be required in this case.

The Chairman. Well, again, this amendment, first, does hurt seniors. But second, because it is non-germane, it is out of order.

Senator Kyl. Well, Mr. Chairman --

The Chairman. I rule the amendment out of order.

Senator Kyl. And I would ask to appeal the ruling of the Chair, and would ask for you to explain how it is that you can make the statement that this amendment would hurt seniors' care under Medicare, especially counterposed to my point, confirmed by Dr. Elmendorf of the CBO yesterday, that about 20 percent of seniors who will rely on Medicare Advantage will not have that coverage available to them as a result of the fact that Medicare Advantage plans are going to reduce their coverage.
I think it is from -- what is the number? They are reduced from $42 from $135. So here is what hurts seniors. Today, Medicare Advantage, a $132 value, they are going to go down to $42. That is 90 bucks' reduction in the value off of $132 base. That is what hurts seniors. So I really do not understand how you can argue that taking out the provisions that reduce the value of care to seniors is not good for seniors, whereas leaving it in will help seniors.

The Chairman. Well, essentially this amendment is not offset. It hurts seniors because the effect of the underlying bill is to help reduce health care costs generally, which extends insolvency of the trust fund. I rule the amendment, because it is non-germane, out of order.

The Senator has his right to appeal the ruling of the Chair. According to committee rules, that takes a two-thirds vote. The Clerk will call the roll.

Senator Kyl. And Mr. Chairman, I will appeal the ruling of the Chair again on the grounds that the reduced costs fund a new entitlement, they do not help seniors who rely on Medicare.

The Chairman. I will just read the committee's rules: "Under Rule 2A of the Committee rules, for the committee to consider the amendment, notwithstanding the
ruling of the Chair, two-thirds of the members present must agree. Thus, for this purpose, proxies are not in order." The question before the committee is, shall the committee consider the amendment, notwithstanding the rule of the Chair? A "yes" vote would allow consideration of the amendment, a "no" vote will sustain the ruling of the Chair.

The Clerk will call the roll.

The Clerk. Mr. Rockefeller?
Senator Rockefeller. No.

The Clerk. Mr. Bingaman?
Senator Bingaman. No.

The Clerk. Mrs. Lincoln?
Senator Lincoln. No.

The Clerk. Mr. Wyden?
Senator Wyden. No.

The Clerk. Ms. Stabenow?
Senator Stabenow. No.

The Clerk. Ms. Cantwell?
Senator Cantwell. No.

The Clerk. Mr. Carper?
Senator Carper. No.

The Clerk. Mr. Grassley?
Senator Grassley. Aye.

The Clerk. Ms. Snowe?
Senator Snowe. Aye.
The Clerk. Mr. Kyl?
Senator Kyl. Aye.
The Clerk. Mr. Bunning?
Senator Bunning. Aye.
The Clerk. Mr. Roberts?
Senator Roberts. Aye.
The Clerk. Mr. Ensign?
Senator Ensign. Aye.
The Clerk. Mr. Enzi?
Senator Enzi. Aye.
The Clerk. Mr. Cornyn?
Senator Cornyn. Aye.
The Clerk. Mr. Chairman?
The Chairman. No.
The Clerk. Mr. Chairman, the final tally is 8 ayes and 8 nays.
The Chairman. Two-thirds of the Committee not having voted in the affirmative, the ruling of the Chair is sustained.
The next amendment is Senator Roberts’. I believe, Senator Roberts, you are next on the list.
Senator Roberts. Thank you. Mr. Chairman, my amendment, D9, strikes the Medicare cuts in Title 3, Subtitle E. This is the famous market basket that we are
talking about, the reimbursement rate to our providers—I think most members are familiar with this—and the cuts that are in the Chairman's mark. Basically, this is going to be sort of a repeat of what Senator Kyl has indicated, except instead of his amount, the $227 billion in reimbursement updates to hospitals, doctors, home health care agencies, and all other providers, I think will have a very negative effect on the Medicare beneficiaries.

Now, I am not going to go into a long speech about this, except to say that I will try to be very succinct.

The Chairman. Senator, just to clarify here. I have Amendment Number D9 of Title 3. I am informed you have a modification. Or is this the one here that just says "Description of the amendment" and then --

Senator Roberts. Yes. As modified.

The Chairman. All right. Modified. Have we seen the modification earlier? We may have to take a little time. Again, modifications are fine, but we need a little advance notice on modifications.

Senator Roberts. I understand that, Mr. Chairman.

The Chairman. And second, what is the offset here?

Senator Roberts. What is your prerogative?

The Chairman. Let me hold it.

Senator Roberts. I would be happy to give --
The Chairman. The reason why a little notice, because right here you say, "offset to be provided". So I am asking, have you specified your offset?

Senator Roberts. It would be a repeat of the basic argument that you just had with Senator Kyl, which I think he stated so eloquently, if that is the proper word.

The Chairman. This will also be non-germane, therefore out of order.

Senator Roberts. It would be exactly the same situation. That is why I am trying to be as succinct as possible.

The Chairman. All right. Why do you not go ahead and explain your amendment?

Senator Roberts. All right.

The Chairman. And then be ruled out of order.

Senator Roberts. Story of my life.

[Laughter].

Senator Roberts. I do not understand why the President, and why some on this committee, and why the administration have refused to admit that the fact that this bill is paid for by cutting--I think maybe a better word would be slashing--Medicare by nearly $500 billion. Now, the amendment that I have is $227 billion in the reimbursement updates, so I do not want any confusion
over that. But the total is $500 billion.

I think that taking $500 billion from Medicare and using it to establish this new entitlement program, which is what I think it is, I do not think that makes much sense. I want to reiterate again that my amendment strikes one section of these cuts, that is the market basket cuts of $227 billion.

The CBO report, I would refer members to that, or listing -- we are talking about skilled nursing facilities, long-term care hospitals, inpatient rehabilitation, hospitals paid under the inpatient Prospective Payment System, the inpatient psychiatric facilities, hospice, hospice outpatient services, DME, durable medical equipment, all other Part B fee schedules, home health care updates in subsequent years, and a temporary adjustment to the income-related premium for Medicare Part B, and then also the Medicare commission.

That is what I am trying to save, because I think that sometimes we lose sight of the fact that it is the health care provider and their patients who are really affected by this. We can have the best insurance in the world, but if you do not have a doctor within about a 50-mile radius, you are in trouble. If you do not have a hospital that is still operating, you are in trouble.
How many times have we seen this market basket cut by 1 percent, or 2 percent, or 0.5 percent, or 3 percent, and then you have every hospital administrator in your State and every doctor in your State, nurses, home health care folks, not to mention the pharmacists and the clinical lab people, saying, wait a minute, we cannot absorb these cuts. This time around, the cuts are significant, $227 billion. My amendment would simply strike those cuts.

The other thing I would say is that I have a little problem with what we are doing here from the standpoint of, Medicare is under terrible stress. It is going broke. It has around $90 trillion--$90 trillion--in projected future unfunded liabilities. Senator Conrad speaks eloquently of the need to reform our entitlement programs. He is right. This is a huge, crushing entitlement program that threatens to bankrupt this country.

So instead of owning up to this and this enormous threat to our financial future, instead of considering a Medicare reform bill to address this threat to future generations of Americans--and I am sure that Senator Conrad could come up with a Medicare reform bill probably in five minutes--but instead of guaranteeing that the government-run plan that we currently have remains solvent, we are cutting $500 billion from the program in
order to start this new entitlement program that I think everybody has to admit, we have some serious questions about it. That is probably the least I can say. That just does not make any sense to me.

So if Medicare needs to be reformed, and I believe it does, then we should be considering a Medicare reform bill right now instead of this new entitlement program, we should not be cutting Medicare for the purpose of financing this new program.

So for this reason, I did not include the offset for the amendment. I disagree with the new spending. I disagree with the failure to prioritize the solvency of Medicare over the establishment of new government programs, and I do not want to be supportive of financing these government expansions by bleeding the Medicare program dry.

As the President is fond of saying, "let me be clear". This bill is funded on the backs of our seniors and on the backs of our providers. I think that is a very serious, serious problem and can have some egregious results. So I hope my colleagues will join me in opposing these cuts by voting for Amendment D9, which strikes the market basket cuts.

I thank the Chair.

Senator Kyl. Mr. Chairman, might I just a question
of Senator Roberts?

The Chairman. Briefly, because I am about to rule the amendment out of order.

Senator Kyl. A brief question. I am just asking for the amount of money.

Senator Roberts. It is $227 billion.

Senator Kyl. So, $227 billion in cuts to providers --

Senator Roberts. That is correct.

Senator Kyl. [Continuing]. Would be restored under your --

Senator Roberts. Your doctors, your nurses, your home health care people, your pharmacists, your clinical labs, your ambulance drivers, all the people that have come in to see you every year and all of a sudden we are faced now with $227 billion in cuts. They are the people that provided the service, and I do not think it is a proper thing. We ought to be doing Medicare reform as opposed to doing this.

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad?

Senator Roberts. And I ask for a vote.

The Chairman. Senator Conrad? Yes, we will have a vote. Senator Conrad wanted to speak.

Senator Roberts. Fine.
Senator Conrad. Mr. Chairman, actually, these changes in Medicare will extend the solvency of Medicare by an estimated four or five years. We all know, the trustees have told us, Medicare is going to go broke in eight years. So it is critically important that we address the coming shortfall. The Chairman has laid down a mark that does precisely that, extends Medicare solvency by four to five years, makes Medicare more affordable for beneficiaries and taxpayers, and improves quality and safety for seniors in the long run.

The Chairman's mark makes all these improvements without making any changes to coverage, to benefits, or cost sharing for America's seniors. The vast majority of the provisions in this bill are recommended by MedPAC and from policy experts from respected institutions across the political spectrum, from Brookings, to AEI, and many others. These changes are in line with the commitment made by the major health care providers to reduce health care costs by $2 trillion over the next decade.

Now, why have these providers indicated a willingness to slow the rate of growth in their reimbursements? They have made that commitment because they know, with 30 million additional people being covered, that they are going to get a lot more new business. They are going to have a lot less
uncompensated care. So they have come forward, hospitals, nursing homes, and all the rest, and indicated they are willing to reduce their rate of growth in reimbursement in order to be on a more solid and stable long-term footing.

So I think the amendment by the gentleman from Kansas is well-intended, but I think it would actually hurt those who are Medicare beneficiaries and would hurt extending the solvency of Medicare by four to five years.

Senator Roberts. Can I respond to that?

The Chairman. All right. Then quickly I am going to rule it out of order. Essentially, all this conversation --

Senator Roberts. I would just like to respond to his comments.

The Chairman. The amendment is not in order.

Senator Roberts. I know you are going to rule it out of order. You will give me a minute?

The Chairman. Sure.

Senator Roberts. All right. My dear friend, you are cutting providers. You are saying that by cutting providers you are going to restore solvency to Medicare. You are also saying that the providers agree with this. When I first learned that the AMA and the American Hospital Association said we are going to take X amount
of cuts, I immediately contacted the Kansas Medical Society, the Kansas Hospital Association, our nurses, and also our home health care providers and the pharmacists. They said, no, we do not agree with that. They are losing membership because of it.

Now, I do not know of anybody else that has had providers rushing in here to say we want to be cut $227 billion. I will tell you what is happening today. This is a marvelous idea in terms of making Medicare solvent by slashing reimbursement to providers, because then the providers do not offer Medicare to their patients. Now, how many doctors today provide Medicare to their patients?

So if you keep slashing the reimbursements to the people who are providing the Medicare, sooner or later the tipping scale hits and that doctor says, no, I am not going to do it any more. The doctors and the hospital set up a specialty hospital, and the pharmacists say, no, I am not going to provide Medicare Part D advice to the person that comes to see me. So it is a wonderful way to make Medicare solvent by basically slashing all the reimbursements to the providers so they do not serve Medicare. This is an Alice in Wonderland kind of situation here, which I do not think is right.

The Chairman. All right.
Senator Kyl. Mr. Chairman, may I ask a question?

The Chairman. I am sorry. I am sorry. I am sorry.

Senator Kyl. Mr. Chairman, I am not --

The Chairman. This is --

Senator Kyl. Mr. Chairman, point of personal --

The Chairman. It has been debated. Pursuant to
Rule 2A of the committee rules, the Chair rules the
amendment is not germane.

Senator Kyl. Is that a debatable motion, Mr.
Chairman?

The Chairman. The amendment is out of order.

Senator Kyl. Is the motion to appeal the ruling of
the Chair debatable?

The Chairman. It is the discretion of the Chair to
rule amendments non-germane and out of order.

Senator Kyl. I understand that. Is the motion to
ask for a vote debatable or not? I just had a question.

The Chairman. It is debatable. That, too, is at
the discretion of the Chair. But go ahead.

Senator Kyl. By the time we finish this, it will
take 30 seconds. I just had a question for the
distinguished Budget chairman, who made an important
point.

The Chairman. All right.
Senator Kyl. My question to the chairman of the Budget Committee is this: the reduction in the reimbursements to providers, or the subject of this amendment. Is it not true that the reason that solvency is extended—and by the way, I think it is two years, not five, but if anybody on the staff wishes to correct me, I will be happy to be corrected—is because the spend-out is slower, not because savings are applied back to Medicare, because in the mark, in fact, the savings are used for a different purpose.

Senator Roberts. That is true.

Senator Conrad. Well, the information that I have that the overall package, as distinguished from the amendment of the gentleman from Kansas, because he is only dealing with part of the Medicare savings, will extend the solvency of Medicare four to five years. The reason is, obviously, if they are getting less reimbursement over time, that is less of a drain on the Medicare trust fund. That simply has to be done in the interest of preserving Medicare.

We are in a circumstance in which those providers have expressed a willingness to take reimbursements from the reductions in the reimbursements they would otherwise receive because they have the prospect of 30 million new people being covered by insurance, therefore providing
them a block of new business to offset these reductions.
And look, we are in a circumstance where there is no
alternative but to deal with the long-term shortfall in
Medicare and the other entitlement accounts.
The gentleman on the side opposite of me made this
point repeatedly. They have offered budgets in the past
that took reductions in Medicare that had imposed
reductions in Medicare for this very reason. Now we have
a circumstances where the providers are willing to take a
reduction in their levels of reimbursement from what
would otherwise be the case because they see a new block
of business coming their way.

Senator Kyl. Would the Senator yield for a
question?

The Chairman. All right. The amendment is not
germane. The Senator has a right to appeal the ruling of
the Chair. The Senator makes that appeal.

The question before the committee is: shall the
committee consider the amendment, notwithstanding the
ruling of the Chair? A "yes" vote would allow the
consideration of the amendment, a "no" vote would sustain
the ruling of the Chair.

The Clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.
The Clerk. Mr. Conrad?
Senator Conrad. No.
The Clerk. Mr. Bingaman?
Senator Bingaman. No.
The Clerk. Mrs. Lincoln?
Senator Lincoln. No.
The Clerk. Mr. Wyden?
Senator Wyden. No.
The Clerk. Ms. Stabenow?
Senator Stabenow. No.
The Clerk. Ms. Cantwell?
Senator Cantwell. No.
The Clerk. Mr. Nelson?
Senator Nelson. No.
The Clerk. Mr. Menendez?
Senator Menendez. No.
The Clerk. Mr. Carper?
Senator Carper. No.
The Clerk. Mr. Grassley?
Senator Grassley. Aye.
The Clerk. Mr. Hatch?
Senator Hatch. Aye.
The Clerk. Ms. Snowe?
Senator Snowe. Aye.
The Clerk. Mr. Kyl?
Senator Kyl.   Aye.

The Clerk.   Mr. Bunning?

Senator Bunning.   Aye.

The Clerk.   Mr. Crapo?

Senator Crapo.   Aye.

The Clerk.   Mr. Roberts?

Senator Roberts.   Aye.

The Clerk.   Mr. Ensign?

Senator Ensign.   Aye.

The Clerk.   Mr. Enzi?

Senator Enzi.   Aye.

The Clerk.   Mr. Cornyn?

Senator Cornyn.   Aye.

The Clerk.   Mr. Chairman?

The Chairman.   No.

The Clerk will announce the vote.

The Clerk.   Mr. Chairman, the tally is 10 ayes and

11 nays.

The Chairman.   Two-thirds of the committee not

having voted in the affirmative, the ruling of the Chair

is sustained.

The next amendment I have is an amendment offered by

Senator Hatch. It says "modified" at the top.

Senator Hatch.   Thank you, Mr. Chairman. Yes, we

have modified the amendment.
The purpose of my amendment is simple. If the Director of the Congressional Budget Office certifies that Medicare Advantage beneficiaries will lose benefits, lose plan benefits when the Medicare Part C reductions are implemented, these provisions would not go into effect.

In light of what we heard last night from counsel, there is a strong possibility that Medicare Advantage beneficiaries will lose benefits as a result of competitive bidding, such as eyeglass care, vision, and dental coverage. It also could affect a beneficiary's premium, deductible, or co-payment.

As we heard last night, these benefits are not offered as part of traditional Medicare and are seen as "extra benefits". Even so, does taking away these benefits not contradict one of President Obama's promises to Americans, more specifically, senior citizens and the disabled: "If you like what you have, you may keep it"? Today, over 10 million Medicare beneficiaries receive their coverage through Medicare Advantage.

I am not sure that they are going to like what they are going to get if the Chairman's mark becomes law. Again, President Obama has said over and over again that no one will lose their health benefits or their current health coverage. He has told the American people over
and over again, most recently this weekend, "If you are happy with your coverage you may keep it." The Finance mark includes $113 billion in reductions for the Medicare Advantage program.

Mr. Chairman, you and I served as members of the House-Senate Conference Committee on the Medicare Modernization Act and worked hard on many of these provisions, including the creation of the Medicare Advantage program, Medicare Part C.

At the time, Medicare beneficiaries in our States had little or no choice in health care coverage, especially in rural areas. Today is different because of that law. Our seniors have several coverage choices in addition to traditional Medicare. As a result, today 23 percent of Medicare beneficiaries have coverage through Medicare Advantage plans. Through this amendment, I am trying to ensure that Medicare beneficiaries continue to have choice and coverage, and in addition keep their current benefits.

So my amendment ensures that President Obama's commitment to allow individuals to keep their current coverage applies to all Medicare beneficiaries, including those participating in Medicare Part C. The Chairman's mark proposes to phase in competitive bidding in the Medicare Advantage program beginning 2012. For many of
the more than 10 million beneficiaries now enrolled in Medicare Advantage plans, this proposal will likely mean significant increases in out-of-pocket costs and reduced access to additional benefits beyond those available in traditional Medicare.

Again, the one and only goal of my amendment is to preserve and protect benefits for seniors enrolled in Medicare Advantage plans across the country, and I hope that my colleagues can support this amendment.

Senator Grassley. Mr. Chairman?

The Chairman. Senator Grassley?

Senator Grassley. I want to tell my colleagues that I strongly support Senator Hatch's amendment. Yesterday we had the Senator from Florida, Mr. Nelson, raise concerns during his opening statement, and I think a lot of us share those concerns. Clearly, the discussion with CBO during the question-and-answer period shows that Medicare Advantage is an area a lot of members are worried about. Seniors have come to rely on the extra benefits and coordinated care that Medicare Advantage plans offer.

President Obama has promised that these seniors will not see reductions in benefits. I would like to quote him: "People currently signed up for Medicare Advantage are going to have Medicare and the same level of
benefits. These folks will be able to get Medicare just as good to provide the same benefits." So I want to make sure, as Senator Hatch does, that the people receive the benefits of the President's promise. This amendment will make sure that seniors continue to have the benefits that they have come to rely upon. I urge support for this amendment.

The Chairman. Senator Rockefeller?

Senator Rockefeller. Mr. Chairman, this amendment would, at core, take a lot of money for much-needed improvements in the Medicare program for seniors, which the other side seems to think is as important as I do. But what, in fact, it does, is it prevents us from doing that because it keeps a whole lot of money in the pockets of private insurers.

The facts show that Medicare Advantage plans are provided, on an average, 12 percent more in reimbursement than what it costs to provide the service. It is a wasteful, inefficient program, and always has been. I recognize there are a lots of people in it, but if we are talking about the future and trying to preserve Medicare and services for seniors, you do not tend to want to preserve what does not help seniors and does not work efficiently.

I am sorry, this is just stuffing money into the
pockets of private insurers and it does not provide any
better benefits to anybody. It annoys me greatly, partly
because I come from West Virginia where we have very few
people who have that, but it annoys me even more because
people protect it with their lives, sort of throwing away
the whole concept of the future of Medicare and the
future of services to seniors, which is what we really
are all about and which we voted on this morning. You
can say, well, let us just talk about now, let us not
talk about the future.

But Senator Conrad has pointed out that we are faced
with a hard decision to make. And that was always part
of the deal on the Finance Committee in doing health care
reform, we would have to make some tough decisions. If
you are going to preserve the Medicare trust fund, then
you have to preserve it in ways which allow it to be
preserved.

And yes, there are some provider cuts, and yes,
there are some cuts where those providers are going to
tell those seniors that their services are going to be
cut. But they are not going to be cut. They are not
going to be cut. The Chairman, and to what I have said,
also has an amendment or some additional thoughts. But
this is a rip-off and hurts people who need Medicare.

Senator Bunning. Mr. Chairman?
Senator Hatch. Mr. Chairman?

The Chairman. Oh, my. All kinds of excitement over here. All right. Senator Hatch?

Senator Hatch. May I answer that, since I am the sponsor of the amendment? Look, our folks in Utah, in rural Utah, and in most other rural States where Medicare Advantage has worked so well, did not have any coverage before Medicare Advantage. We worked on this under the Medicare Modernization Act because we knew they did not have any coverage. We knew they were left out of the program. We knew they had Medicare+Choice, but nobody would utilize it. It did not work.

So we did this, and it has worked amazingly well for these seniors that were not covered, that will not be covered if we go to a different program. Frankly, this corrects it. I think we ought to pay attention to how it has been an amazing help to senior citizens, especially in rural areas. It is certainly not a rip-off, I will put it that way.

Senator Wyden. Mr. Chairman?

Senator Nelson. Will the Senator yield?

Senator Hatch. Sure.

Senator Nelson. If the Senator will yield, Senator Hatch, you are supporting the wrong amendment. You are supporting an amendment that is going to prohibit us from...
getting cost savings out of Medicare Advantage. Medicare Advantage, on the average, costs 14 percent more than Medicare fee-for-service. The amendment that you ought to be supporting is my amendment to say that if you have Medicare Advantage, we are not going to take it away from you. We are going to grandfather you in, and on a going-forward basis, you are going to get these cost efficiencies out of Medicare Advantage.

Senator Hatch. But we have more and more seniors who would qualify for Medicare Advantage; under your amendment, they would not get it. This would keep the program going and would not allow $113 billion to be taken out of the program, which the head of CBO basically characterizes as a loss to the people who were benefitting before. So in other words, how does the President live up to his commitment, if you have your plan you are going to be able to keep it, if we do not do what I am suggesting we do here? It just does not work.

Now, I admit that it is ingenious, what you are trying to do. The only problem is, it is not going to work. We tried it before. The Medicare+Choice did not work. We all thought it would, but it did not. Frankly, I have got to tell you, the seniors in my State—and I think in most every other State where Medicare Advantage has benefitted them—would hate to lose this $113
billion, I guarantee you that.

    Senator Conrad. Mr. Chairman?

    Senator Stabenow. Mr. Chairman?

    The Chairman. Senator Stabenow?

    Senator Stabenow. Thank you, Mr. Chairman.

    First of all, before speaking to the amendment, I think it is very important. I have been listening to all the debate about cutting Medicare for seniors, and I think it is very important that we clearly indicate that, in fact, we are not cutting Medicare services for seniors. I would not support that; I do not know anybody on the committee that would support that. I know there are a lot of political points in trying to scare seniors as we go forward on this bill, but it is not true.

    In fact, in the underlying bill we increase prevention and wellness services for seniors, we increase the quality of their care. At least half of the "donut hole" will be closed. I am hopeful that Senator Nelson's amendment will pass so all of it will be closed for seniors. Nobody is trying to cut seniors.

    But on this amendment, Mr. Chairman, this, to me, is a classic example of how tough it is to do what we are trying to do. I appreciate that Medicare Advantage is out of the box. We are about 20 percent of the seniors that are getting their insurance, their Medicare, through
private for-profit companies who are now taking a piece of this. Eighty percent of the seniors get their Medicare the traditional way, lower cost. They actually see a cost shift onto them.

Eighty percent see their costs go up, so that 20 percent are now out in the marketplace with Medicare Advantage. It is hard to put the genie back in the box.

I support efforts to grandfather in those who are on Medicare Advantage, but going forward, the idea that we would allow plans that not only on average cost 14 percent more, but I remember hearings where CBO said you could tap Medicare Advantage costs at 150 percent of what everybody else pays and still save money, because some of the plans cost so much. Why do they cost so much?

Because we are not talking about coverage in terms of basic coverage.

We have been told that Part A and Part B coverage is the same for everybody. This is a question of what happens when you leverage in the profit on top of everything else. We are trying within this reform to change this so we are more efficient, we are wiser in the way we are spending taxpayer money, and making sure seniors and services are getting the most that they can.

Under the Medicare Advantage, there are a number of limitations. Consumer costs may be greater, actually,
Medicare Advantage than traditional Medicare, which we are strengthening in this bill. There is no guarantee that plans offer any more than traditional Medicare. You may not be able to get emergency care coverage when you need it under these plans. Your doctor may not be in the plan or accept it, which puts a senior at a disadvantage. They can change every year. Plans may withdraw, leaving seniors holding the bag. So, there are a number of concerns that I have overall about coverage.

Mr. Chairman, I would just say that the efforts in the underlying bill, as well as what is being proposed, which is fair, to grandfather in those people who are there now, I think is all that we should be doing. If we are going to look seniors in the face about keeping Medicare strong, we cannot continue to undermine it with efforts that cost more money, but do not add more quality and service over the long run. So, I appreciate the sentiments from my friend, but I would have to oppose this amendment.

The Chairman. I would like to ask the author of the amendment if he would agree to modify the amendment in two respects. First of all, the amendment is unconstitutional. It is unconstitutional because it requires a congressional agency to issue an order that has consequences for the executive branch. Under the
Chada decision and under also the Baucher v. Synart decisions, basically only an executive branch agency official must make these kinds of determinations. So, having CBO do this would be unconstitutional. In fact, it is not CBO's business anyway.

So the suggestion I have is, number one, strike "CBO certify" and insert "CMS" so that the constitutional infirmity is remedied. A second change I would make is on line 3, after the word "plan", between the words "plan and benefits", insert the words Medicare covered, because I think what we want here is to be sure that Medicare-covered benefits will not be reduced and CMS can make that certification.

There are a lot of other non-Medicare benefits provided by some of these MA plans, which traditional fee-for-service Medicare people pay for. They could be gym memberships, eyeglasses, and things like that. I think the real goal here is to make sure that Medicare benefits are not reduced. I would, therefore, ask for the insertion of those two words at that point.

I think it is important to remind ourselves--Senator Stabenow has made this point--that Uncle Sam pays private insurance companies about 14 percent, on average, more for providing coverage to our seniors than it would pay for the same senior in traditional Medicare, and that is
as high as 20 percent in some parts of the country. There is not much evidence that this extra payment leads to better quality for seniors.

I might also add that these extra payments will add $3.60 per month to premiums for all Medicare beneficiaries in the year 2010, which means that a typical older couple in traditional Medicare will pay a Medicare Advantage tax of nearly $90 next year, on average, to subsidize private insurance who are not providing the benefits.

Another point here. The Centers for Medicare and Medicaid Services, CMS, estimates that Medicare Advantage overpayments will bankrupt the Medicare trust fund 18 months earlier than if the overpayments do not exist.

So I would ask my good friend from Utah if he would make those two changes, one so his amendment would be constitutional, and second, so it focuses on the real effort here, to make sure that Medicare benefits are not reduced. I think we all agree with the intent of the amendment, that is, that we do not want beneficiaries in MA plans, as a consequence of this legislation, to have their Medicare-covered benefits reduced. I think we all agree to that. These changes will help make that possible.

Senator Hatch. Mr. Chairman, let me just say this
before I make any modification to my amendment. AHIP has analyzed the Nelson amendment and it has come to the conclusion that only about 30 counties will benefit from his amendment, 30 counties in the whole country. Naturally, some Florida counties--Broward, Miami-Dade, Palm Beach--would benefit; some in Kansas, two in Kansas; in Louisiana, a number of counties; in Massachusetts, Nantucket; in Mississippi, Clayborne; Oklahoma, Kittland; Tallahatchee, Warren; in New York, Bronx, Kings, Nassau, New York, Putnam, Queens, Richmond, Rockland, Suffolk, Westchester; in Oklahoma, Choctau; and then in Texas, M mailand. Those are the only counties, according to AHIP, that will be benefitted by the distinguished Senator from Florida's amendment. I know that he is sincere in this amendment, and I commend him for trying to resolve this problem.

Senator Nelson. Would the Senator yield? You are looking at the wrong amendment.

The Chairman. Yes. I was trying to figure out that, too.

Senator Hatch. All right.

The Chairman. Both of you are talking about the same amendment here.

Senator Hatch. That is what I was told. But let me just say this. Mr. Chairman, let me ask unanimous
consent to modify my amendment to say, instead of requiring CBO to certify Medicare benefits, the Chief Actuary of the Centers for Medicare and Medicaid Services would be responsible for making that certification.

The Chairman. What about the other change?

Senator Hatch. I do not want to put the other change on it. I would ask unanimous consent that we at least do that modification.

The Chairman. That is constructive, it is helpful. We are making progress here.

Senator Hatch. Well, that is what I would like to do.

Senator Wyden. Mr. Chairman?

The Chairman. Senator Wyden?

Senator Wyden. Mr. Chairman, Oregon has the highest percentage of Medicare Advantage in the country, the highest percentage by far. One of the things that we have learned over the years is that not all Medicare Advantage is created equal. Oregon and Washington have good quality, efficient care. In our part of the country, it is a lifeline. It is, essentially, access. We have been hammered under the traditional fee-for-service approach, so without the good-quality, affordable Medicare Advantage, we simply do not have access to care for seniors.
Now, the reality is--and this is why I make the point of, not all Medicare Advantage is created equal--Oregon and Washington have very good Medicare Advantage. It was not very long ago when Senator Lincoln and I sat in the Senate Finance Committee and saw practices involving Medicare Advantage where the people, the executives, ought to really go to jail. We heard, for example, about people selling Medicare Advantage door-to-door, essentially dressed up as providers, essentially in scrubs. Senator Lincoln and I recall it. We had never seen anything quite like it. So what we have got to do is make a distinction between good-quality Medicare Advantage and those kinds of practices.

Now, the Chairman has clearly moved in the right direction. This is what I want to clarify. We have got Shawn Bishop at the table, and she has done very good work on this. The Chairman has moved with competitive bidding to start to advance a new approach, distinguishing between good quality and the outrageous set of practices we have heard about in hearings, and also to offer bonuses. So I think we are moving in the right direction. There is potential here for bipartisan agreement, Senator Hatch knows, and I am interested in working with him on this point.

One of the questions I have, Senator Hatch, is with
respect to the offset. For example, I am concerned about
offsetting with parts of health care reform, such as
making cuts to the exchange plans, because the exchange
is going to be the future. That is where we are going to
get real cost containment. So I would like to know, is
the exchange being cut? Are low-income services being
cut? Otherwise I think we have got a chance to make this
a bipartisan agreement.

The Chairman has moved, certainly with his offering
in the last couple of minutes, in the right direction.
Within the mark, we are already moving in right
direction. Let us see now if we can address this offset
question. What do you envision, in terms of the offsets,
Senator Hatch, for your proposal?

Senator Hatch. We actually have a proportionate
reduction, as needed.

Senator Wyden. In everything? We would reduce --
Senator Hatch. With the exception of the Medicare
program.

Senator Wyden. So we would reduce funding, say,
for the exchanges, the one place, our big hope?

Senator Hatch. It would be a modest reduction.

The Chairman. Is there an estimate? It would help
if we had an estimate on how much this would cost.

Senator Hatch. Well, it would be nice if we had
estimates. That is one of the problems around here. Let me see if this offset would work. I would like to further modify the amendment to include the following offset in place of reducing the subsidies, the new offset that would set the Federal matching rate for all Medicare administrative costs at 50 percent.

The Chairman. I am sorry, Senator, I could not hear you. Would you say it one more time, please?

Senator Hatch. The new offset would set the Federal matching rate for all Medicaid administrative costs at 50 percent.

The Chairman. All matching rates? Medicaid?

Senator Hatch. The Federal match.

The Chairman. The Federal match. You would change the FMAP?

Senator Hatch. Yes.

The Chairman. Oh, just for administrative costs?

Senator Hatch. Just for administrative costs, yes.

The Chairman. And do you have an estimate of what that is?

Senator Hatch. Probably around $30 billion.

The Chairman. Thirty billion over 10 years.

Senator Hatch. That is my understanding.

The Chairman. So you are going to cut the States?

You are going to cut the States. Most States, Federal
pays the greater percentage of Medicaid.

Senator Hatch. Just for administrative costs.

The Chairman. Have you talked to the governors about this?

Senator Hatch. I have talked to our governor, and I can tell you this: he thinks it is a great idea.

The Chairman. You have not talked to the NGA or -- Senator Hatch. No, I have not talked to the Governors Association.

The Chairman. But again, how many billion are we talking about?


The Chairman. Whose estimate is 30?

Senator Hatch. I have no idea. That is from CBO? Apparently it is a CBO estimate.

Senator Ensign. Mr. Chairman?

Senator Hatch. I would prefer to do it on a proportionate reduction as needed on spending.

The Chairman. I do not know who was first.

Senator Ensign?

Senator Ensign. Thank you, Mr. Chairman. I think a couple of points need to be made about Medicare Advantage, first of all. It has been mentioned there is a 14 percent higher payment on Medicare Advantage. If you will remember, one of the reasons is that Medicare
Advantage was basically subsidized. Under Medicare+Choice, rural areas, especially in those under-served areas, were not getting an HMO/PPO type of an offering. Just, the modeling did not work.

So Medicare Advantage was set up with a subsidy so that plans would go out into the rural areas, especially across the country, and to those that were under-served. Well, guess what the companies did? They may get paid 14 percent more, but the average plan in Medicare Advantage makes about a 4 percent profit margin. What they do with the rest of the subsidized payments, is they offer better services, additional services to seniors who are on Medicare Advantage.

So Senator Stabenow, you said you do not want to see any benefits cut for seniors on Medicare. Well, under Medicare Advantage, if you cut seniors, you cut payments to them and programs end up being eliminated. In other words, you are going to cut additional benefits. There is no way around that. If you have, for instance, optometric coverage, if you have dental coverage, if you have gym coverage, if you have whatever, and now you lose your Medicare Advantage, those are benefits you had under Medicare Advantage and now you are in traditional Medicare fee-for-service and you no longer have that benefit, therefore your benefits are being cut.
Now, a couple other points to make. It is interesting that those who are for a public option want the government to compete with the private sector. But by virtually eliminating Medicare Advantage, you are eliminating the private sector competing with the government. I think it is very interesting that we want to have a program that competes with the private sector, but when the private sector is trying to compete with a government program, we want to eliminate that competition. I do not think that that is the direction that we should be going.

The last point to make here is that on Medicare Advantage, if you look at the demographics, from what I understand, most of the seniors who have chosen Medicare Advantage are poor seniors, lower income seniors, and a lot of them are minorities. So by eliminating a lot of the folks on Medicare Advantage, you are going to be hurting those who are actually taking advantage of this because they cannot afford these benefits in other areas.

Thank you, Mr. Chairman.

Senator Stabenow. Mr. Chairman?

Senator Lincoln. Mr. Chairman?

Senator Stabenow. Since my name was invoked, Mr. Chairman, I would like to respond.

The Chairman. Senator Rockefeller is seeking
recognition.

Senator Rockefeller. I am observing this process with interest. Well, a lot more than interest. I am finding that a lot of amendments are being offered from the other side—and I say this respectfully—that are not defined, that are not passed out, that do not have offsets, that do not meet the criteria of what the other side is talking about, how we can actually vote on something that we know about.

I just do not think, Mr. Chairman, that we ought to be doing this. I mean, I have an amendment I would like to do, but I have not gotten it straightened out yet. I just think it is crazy to be speculating about whether CBO has scored this, that, or whoever. It is a bad way of doing business and I think we should stop it. I also think that it is not impossible to speculate, without being called radical, that there is a substantial slow-walk taking place in this committee, which is really harming our amendment disposal process.

The Chairman. I would like now to recognize the author of the amendment, Senator Hatch, who wishes to make, I am told, further modification.

Senator Hatch. Why, thank you, Mr. Chairman. That is awfully nice of you.

The offset would be a proportionate reduction as
needed in spending in the Chairman's mark, with the exception of the Medicare program. For my friend over there, Senator Wyden, I would exempt the exchange, if that would help get your vote. I would be happy to do that and that would be a further modification. If he is that concerned about the exchange, I would be, too.

The Chairman. Well, Senator, I am unclear. What is the cost of the amendment, and what would the offset be?

Senator Hatch. The offset would be a proportionate reduction across the program, with the exception of the --

The Chairman. By "program" you mean the bill, or what?

Senator Hatch. The bill. With the exception of the Medicare program and the health care exchange in the bill. That would be the modification.

The Chairman. Again, how much is this going to cost?

Senator Hatch. Well, we do not have a score on it. Earlier, you told me $20 or $30 billion.

Senator Hatch. That was if you take it -- do we have CBO here? I mean, anybody from CBO? Because --

The Chairman. The next question is, is it not
true, if you exempt Medicare and exchange, the effect
would be to cut Medicaid or add a burden on States to pay
more for Medicaid than they otherwise are?
Senator Hatch. Not that I know of.
Senator Conrad. Yes. Yes.
The Chairman. I think that is, by definition, the
result.
Senator Conrad. That is where the money is.
The Chairman. I might ask some of the experts
here. I do not know. Mr. Hughes, I saw you nodding your
head. Do you have a view on that? Or Ms. Bishop?
Somebody who can tell us what the effect would be of
exempting Medicare and exempting the exchange, who would
pay the cost? A) what is the cost? If one of the staff
wants to answer that question. And B) if Medicare
exchange is exempted from the burden of cost, who would
bear the burden? It is my impression that Medicaid would
then bear the burden. But anyway, Ms. Bishop, what is
the answer?
Ms. Bishop. Well, there are two questions. We are
trying to get a read from CBO about the cost of the
amendment, but as modified --
The Chairman. Well --
Ms. Bishop. CBO is looking at the modified
amendment, as modified. The words "Medicare-covered" are
key here because that indicates whether or not we are talking about the benefits that beneficiaries are entitled to under the statute or the benefits that Medicare Advantage enrollees receive as extra, or in addition to what is mandatory or statutory under the law. So CBO is now looking at the modified amendment. They are going to --

The Chairman. The question again -- again, we are doing this all on the fly here. It makes me a little bit nervous. I do not think this modification includes Medicare-covered benefits. It does not include those words, "Medicare-covered".

Ms. Bishop. Yes. This is the --

The Chairman. No, no, no, no, no. Not his. That is my proposed modification.

Ms. Bishop. Oh. Okay.

The Chairman. That is not his.

Ms. Bishop. So CBO scored --

The Chairman. So we know what we are all talking about, Senator Hatch, why do you not read your amendment so we all know what it is?

Senator Hatch. Well, I ask unanimous consent to modify my amendment to say, instead of requiring CBO to certify Medicare benefits --

The Chairman. Right.
Senator Hatch. You mean the amendment or the --

The Chairman. Well, just tell us what the changes are.

Senator Hatch. All right. The Medicare benefits. "The Chief Actuary of the Centers for Medicare and Medicaid Services" --

The Chairman. Which is good.

Senator Hatch. [Continuing]. "To be responsible for making that certification, and there would be a proportionate reduction, as needed, in spending in the Chairman's mark, with the exception of the Medicare program and the exchange, as mentioned in the --"

The Chairman. All right. Yes. So --

Ms. Bishop. So CBO has said that, as filed with those changes, the cost of that amendment is $113 billion. That is the loss in savings in the package, is $113 billion. If the Medicare program and the exchange is exempted from being used as an offset for that, then the other parts of the bill would have to be reduced. So that would be Medicaid savings, and I will let David Schwartz talk about that.

The Chairman. Mr. Schwartz, could you answer that question?

Mr. Schwartz. Mr. Chairman, you are correct that there are, on the coverage side of all of the tables CBO
has produced through every iteration, there are two big pots of spending, a Medicaid and CHIP line and the tax credits that go with the exchange. So if you held one of those harmless, the other one becomes the primary target. So that covers the cost of the expansion of Medicaid for the Federal Government and the States.

The Chairman. What would a $113 billion cut to Medicaid mean?

Mr. Schwartz. It would be pretty devastating. Our number is somewhere in the 300 --

The Chairman. But does that necessarily mean that there is a substantially higher burden on States with that kind of an extra burden?

Mr. Schwartz. Yes, it does, Mr. Chairman.

Senator Ensign. Mr. Chairman, could I just follow up on that?

The Chairman. Just a minute.

Senator Ensign. Could it be --

The Chairman. Wait. Let him answer the question, then go ahead.

Senator Ensign. This is in addition to your question.

The Chairman. Sure.

Senator Ensign. Could it also, though, be, instead of just dumping the burden on the States and limitation
in coverage? I mean, why are you assuming it is going to
be dumped on the States instead of limiting the coverage?
Why is CBO assuming that?

Mr. Schwartz. I do not know what CBO was assuming. But let me be clear about what I was saying. So the
number on the table, the September 16th table, is 287, so
$287 billion.

The Chairman. I think the answer to the question
is, the exchange is --

Mr. Schwartz. Right. The amendment says "spending".

Senator Ensign. No. I said the exchange is exempted, but remember, Medicaid is expanded in this
bill. In other words, the savings does not have to necessarily be dumped on the States. It could be a
reduction in the expansion --

Senator Conrad. Reduction in the coverage.

Senator Ensign. Reduction in the coverage, right.

Senator Stabenow. Is it not also true that children's health coverage would be cut? So we would be trading to cut children and --

Mr. Schwartz. It sounds that way to me, Senator Stabenow. And Senator Ensign, I believe that the language of the amendment says "spending". So if you just reduced spending, I would interpret that as trying
to hold coverage constant. I certainly would defer to the author of the amendment, but the way it is written, it does say "reduce spending", not "reduce coverage".

Senator Wyden. Mr. Chairman?

The Chairman. Senator Wyden?

Senator Wyden. Just a question for counsel on the dual eligibles, because when I essentially got into this with Senator Hatch, I was talking about low-income folks in the exchange because every member of this committee is concerned about low-income Americans. These are the most vulnerable people in our society and the exchange is the future.

Now, what I need to know with respect to the proposed Hatch modification, would the proposals that he has offered for Medicaid affect the dual eligibles? Would we then affect the seniors who are most vulnerable, where we have a separate program affected by this modification, is that correct?

Mr. Schwartz. I believe you are correct, Senator Wyden.

Senator Wyden. All right. Thank you.

Thank you, Mr. Chairman.

The Chairman. Let me ask this question. If the words "Medicare-covered" were inserted, that is, if CMS or the actuary certification were restricted to
Medicare-covered benefits, what would the score be there?

Ms. Bishop. CBO just e-mailed us. If the words "Medicare-covered" were included in the amendment, that would score zero because Medicare Advantage enrollees, by statute, can never lose their Medicare-covered benefits. So that does not happen under the mark, so certifying that Medicare Advantage beneficiaries will always continue to have their Medicare-covered benefits scores zero relative to the mark because that is what the mark does. The mark does not allow Medicare Advantage enrollees to ever lose their statutory benefits.

The Chairman. Is it also true that fee-for-service beneficiaries are paying for those non-Medicare covered MA benefits?

Ms. Bishop. Right. So the $113 billion that Senator Hatch is referring to are for non-Medicare covered benefits, like vision care, eyeglasses, and things like that.

The Chairman. Gym memberships.

Ms. Bishop. And gym memberships. Those beneficiaries, all Medicare beneficiaries, pay the cost for those extra benefits in the form of higher Part B premiums. The Chief Actuary at CMS has estimated that they pay $3.60 per month for the extra benefits that Medicare Advantage enrollees have. That is $90 per year.
Senator Crapo. Mr. Chairman?

The Chairman. Go ahead, Senator Crapo.

Senator Crapo. Thank you, Mr. Chairman. I think that this discussion that we have is now finally helping us to focus on the distinctions that I think have been missed quite a bit here. As a matter of fact, I think this discussion is very helpful for not only the committee, but the public to understand what we are talking about with regard to the proposal. This is what I mean.

You have some saying that there are going to be cuts in Medicare, others saying, no, there are absolutely no cuts in Medicare. It turns out we need to understand what we are saying when we use the word "Medicare". If you use the statutory required Medicare benefit that is allowed, yes, the cuts to Medicare Advantage do not reduce the statutory Medicare requirements. If you are talking about the actual benefits that a Medicare Advantage beneficiary, under Medicare, receives, very much in reality, yes, you are seeing a reduction in what they would receive.

In fact, yesterday I believe that the testimony of the CBO was that if this proposal in the mark were to be implemented, that the additional benefits above the statutory requirements for Medicare fee-for-service would
be reduced by just a little bit under 50 percent over 10 years. So what we are seeing is that there is a category of recipients of Medicare, those who are under the Medicare Advantage plan, who will, in fact, see what they receive in their health care plan reduced by about 50 percent of the addition over the basic Medicare benefit provided in statute. I do not think there is any way to get around that.

Now, when the President made his comment that in the plan that we adopt we should make it so that, I think his words were, that if anybody wants to keep the health care that they have today, their health care plan today, they will be able to keep it. That is not true. If this proposal were adopted, that is not true for Medicare Advantage recipients. The reason it is not true is because their benefits are going to be reduced by about 50 percent of that increment over the basic statutory Medicare right.

Senator Nelson. Would the Senator yield?

Senator Crapo. Briefly, yes. I am not done yet.

Senator Nelson. I want to thank you, because you have just made the argument for my amendment which will be coming later.

Senator Crapo. I will be waiting for your amendment, Senator.
Senator Nelson. That those with Medicare Advantage, existing, will be grandfathered in and will not lose that benefit, but on a going-forward basis we are going to squeeze the efficiencies out of that extra 14 percent that has gone into Medicare Advantage.

Senator Crapo. I will listen very carefully to your amendment.

The Chairman. And let me just say this. We are approaching 1:00. Might I suggest that we speak just briefly on this and have a vote, and then break for lunch?

Senator Crapo. I will be glad to wrap up quickly. I was not finished before I yielded to the Senator from Florida.

The Chairman. And I also have a -- unless the Senator does not agree to the modifications that I suggest, then I am going to have a side-by-side and it will take me a minute or two to explain that.

But go ahead, Senator.

Senator Crapo. All right. Then let me just wrap up. I mean, what are we talking about when we are talking about those who are currently under Medicare Advantage who will be deprived of their health care plan if this proposal is adopted? Well, in Idaho, that is 60,000 people. That is 27 percent of the Medicare
population in Idaho who will face that circumstance. I think nationally the percentage is about 20 percent of the Medicare population that is under Medicare Advantage.

So this is not an insignificant proportion of the Medicare recipients in our country who will, in fact, see their health care plan reduced by this proposal. The purpose of this amendment is to protect that aspect of it. It has been characterized that the extra payments that are going into Medicare Advantage are being pocketed by the insurance providers.

The reality, as has been indicated, is that they are operating on about a 4 percent margin and that extra is plowed back in to extra benefits for Medicare beneficiaries who choose the Medicare Advantage plan over those who simply stick with fee-for-service. In terms of whether the people who are in Medicare today like this plan, my understanding is that nationally the satisfaction rate with Medicare Advantage is well over 80 percent, maybe approaching 90 percent. In Idaho, it is 80 percent, plus.

The point is, people like this part of Medicare. They like the fact that they can get an enhanced benefit by moving into Medicare Advantage. The whole purpose of Senator Hatch's amendment, and of which I am proud to be a co-sponsor, is to make it clear that we are not going
to allow those people, that significant proportion of our Medicare population, to lose that coverage.

The Chairman. All right. I am going to offer a side-by-side. Essentially, it is very similar to Senator Hatch's. First, it cures the constitutional problem in Senator Hatch's, as his modification does. So it is the same as Hatch, except the certification will be made by the Chief Actuary of CMS, as Senator Hatch has suggested. The only other change is the certification will apply to Medicare-covered plan benefits.

As a consequence, there will be virtually no cost which, as I understand, Senator Hatch's amendment will be passed on somewhere. I am not quite sure where. So again, the Chief Actuary of CMS would make the certification that the Medicare-covered plan benefits will not be reduced before the provisions of the mark go into effect, and again, it is my understanding that that will have virtually no cost because it is restricted to Medicare-covered plan benefits, which I think is more than appropriate. Otherwise, fee-for-service folks are paying for those extras, which are really not core Medicare provisions at all.

Senator Conrad. Mr. Chairman?

The Chairman. Of course those are popular, because they get all those extra goodies. That is because we
made a mistake in MMA in 2003 and gave all these plans so much more money. Now we are trying to correct that mistake in a fair and appropriate way.

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad?

Senator Conrad. Mr. Chairman, perhaps just a bit of history on Medicare Advantage would be useful. When Medicare Advantage was proposed, it was suggested that it would save money in comparison to traditional fee-for-service Medicare. In fact, it was capped at 97 percent of traditional fee-for-service Medicare. What has happened since then is that the promise of Medicare Advantage has not been realized, the cost has mushroomed.

In fact, when I asked CBO for estimates of cost savings by ratcheting in the exploding cost of Medicare Advantage because it is part of what is endangering the entire solvency of the Medicare program -- one of the reasons Medicare is forecast to go broke in eight years is because of the explosive additional cost of Medicare Advantage.

In fact, when I asked CBO for scores, they showed that, at 150 percent of traditional fee-for-service Medicare, there were still savings at putting a cap on Medicare Advantage. So that tells you, the Medicare Advantage plans that cost 150 percent of traditional fee-
for-service Medicare, it is one of the key reasons Medicare is headed for insolvency.

Now, if you want Medicare to go broke, just do not deal with that reality. We have no choice, if we are serious about extending the solvency of Medicare, but to reign in the explosive over-spending in Medicare Advantage.

Senator Hatch. Mr. Chairman?

The Chairman. Senator Hatch? I recognize Senator Hatch. He is the author of the original amendment.

Senator Hatch. Look --

The Chairman. You want to speak in the microphone, Orrin? It is a little hard to hear sometimes.

Senator Hatch. Yes. I am trying to get there. I do not know, I talk pretty softly. If we take Senator Baucus' language, then it is apparent that the Medicare Advantage people cannot keep what they have now. We had Medicare+Choice. It did not work. That is why we came up with Medicare Advantage, which really basically helped a lot of rural counties, mainly. About 25 percent, really, of all Medicare people are in Medicare Advantage. It may be as low as what the distinguished Senator from Idaho said.

Let me just ask Shawn Bishop, Ms. Bishop, this question. You were telling me that you are all right
cutting so-called extra benefits like vision care for
nearly 10 million seniors. Now, was the Nelson amendment
not brought forth to protect these costs? Ms. Bishop?

Ms. Bishop. The Nelson amendment would freeze the
level of extra benefits that beneficiaries receive in
areas of the country where the level of extra benefits
are really high.

Senator Hatch. It would be $10 billion in extra
benefits basically for people in Florida, and maybe a few
other counties?

Ms. Bishop. No.

Senator Hatch. Mainly in the South and the
Northeast.

Ms. Bishop. Now, the freeze would allow those
benefits to erode slowly over time, so the freeze is not
frozen forever. The freeze is, they get the same level
of extra benefits that they would have gotten in 2011,
not indexed. So those benefits will erode slowly over
time and eventually the level of extra benefits that will
be available in grandfathered plans will equal what is
available in competitive bidding.

Senator Hatch. All right. So they are going to
get really high benefits if the Nelson amendment passes
and we are going to protect those, but we are not going
to protect other people in the system? See, it works in
my State. It works in a lot of other States. We are just basically not going to protect those other States, so we can take care of -- and I appreciate the distinguished Senator from Florida and his desire to take care of his own State, but I have an equal desire to take care of my State, and a whole bunch of States beside mine. With all due respect --

Senator Nelson. Would the Senator yield, since he has invoked this Senator's name?

Senator Hatch. Well, in just a second, if I can, if it is all right with you. I would be happy to yield to you.

Senator Nelson. As long as you will yield to me.

Senator Hatch. Oh, I will be happy to do that.

Senator Nelson. Thank you.

Senator Hatch. As you know. And I respect the distinguished Senator from Florida.

The problem with the Baucus amendment is that it limits benefits to those covered in fee-for-service Medicare. My amendment does cover the "extra" benefits covered in Medicare Advantage plans and it does not play favorites. Under the Baucus amendment, you cannot keep what you have if you are in a Medicare Advantage plan, basically.

I think I am coming a lot closer to doing what the
President said he wanted to do than what the Baucus amendment would do, because these people are going to be cut. There is no use kidding about it. They are going to lose these advantages. And a lot of them are rural people who will not be able to replace them on a fee-for-service basis. That was the reason why we did this to begin with, and that is why the price was a little higher. So I am very concerned about it because I do not think it is fair. As much as I love the distinguished Senator from Florida and want him to benefit his people, I do not think it is fair to the rest of the States or the rest of the people in Medicare Advantage.

The Chairman. All right. Are Senators getting hungry yet?

Senator Nelson. Mr. Chairman?

The Chairman. All right.

Senator Stabenow. Thank you, Mr. Chairman. If I might just add --

Senator Nelson. What happened to my yielding?

Senator Stabenow. I would yield.

The Chairman. Yes. Senator Nelson, go ahead.

Senator Hatch. I thought you would just take over when I finished, but I yield to you.

Senator Nelson. I thank the Senator for yielding. First of all, the Nelson amendment has been
characterized many different ways, and I want to make sure that everybody understands what it is, including the lady at the front table on the staff. Any Medicare Advantage firm that would be bidding below Medicare fee-for-service, those Medicare Advantage beneficiaries would be grandfathered as of the date of the bill becoming law and would not have their benefits cut.

Now, I do not know how much clearer that I could make it, but I can make it a little more clear when we talk about fancy terms like "Medicare Advantage". What is Medicare Advantage? It is a Medicare HMO. What is a Medicare HMO? It is an insurance company. The insurance company has an incentive to go in there and rake off part of that high differential of 14 percent for themselves.

Now, the Senator from North Dakota has pointed out that if you do not address that issue, that 14 percent differential, we will never get the cost of Medicare under control over the next 10, 20, 30 years. So are you going to protect Medicare and go after the insurance companies which have a fancy title called Medicare Advantage or protect Medicare by bending that cost curve down over the future?

Senator Stabenow. And if I might add, Mr. Chairman, two issues from my perspective. I appreciate the concerns of my friend from Utah, but unfortunately,
without the Chairman's modification, we are pitting children and low-income seniors against not all seniors, but a small group. We heard from Ms. Bishop that, in fact, 80 percent of the seniors right now in Medicare, traditional Medicare, are paying $90 more a year in their premiums so that some folks can be subsidized through the for-profit insurance companies to get, frankly, services I think we all should be providing for seniors: dental, vision. I would be happy to support and join with my colleagues in offering an amendment to provide dental and vision and other, what I view as critical services for all seniors.

But that is not what this does. Unfortunately, the reality is of Medicare Advantage, if we do not stop it going forward, we are playing favorites, because only a few through this mechanism, where it is run through the private insurance for-profit market, are able to get services that personally I think should be available to every senior under Medicaid. So I would welcome the opportunity to join with colleagues to make sure we truly are not picking favorites.

The Chairman. The hour of lunch having arrived, how many more Senators wish to speak before we vote?

Senator Hatch. Mr. Chairman, let me just say this in conclusion.
Senator Hatch. If we do not do what I am suggesting, then you really should not be making the claim, and never should the President, that you can keep what you have because clearly a lot of seniors are not going to be able to. There are $10 billion that will go to certain States, basically Florida, Louisiana, Oklahoma, Texas, New York, Mississippi, Kansas, and Massachusetts, but the rest of these people are not going to have those benefits. That is what made it work, especially in rural America. We cannot get some of these services in rural America. So let us quit making the claim that people can keep what they have, because this settles it once and for all: they are not going to keep what they have if my amendment is not passed. It is just that simple.

Senator Ensign. Mr. Chairman?

The Chairman. We have debated this for close to an hour.

Senator Ensign. Mr. Chairman, can I have 30 seconds?

The Chairman. I would remind Senators that the effect of the Hatch amendment is to cut about $113 billion, which has to be out of Medicaid.

Senator Ensign. Mr. Chairman, I want to address
that.

The Chairman. Yes, Senator Ensign?

Senator Ensign. The Senator from North Dakota has talked about needing to shore up the Medicare trust fund. Senator Stabenow just mentioned that these cuts, if Senator Hatch, the way he has his offsets, will go to cutting other types of programs. I think that clearly establishes that we are taking Medicare funds for other programs.

Based on your arguments, you are clearly saying-- because if you take Medicare Advantage savings and you do not have those Medicare Advantage savings and you do it across the board, we have heard from the counsel, we have heard from Senators, that basically you are cutting other programs.

So that indicates that the Medicare Advantage savings, savings from Medicare, are going to other programs. Now, I will have an amendment in a little while that will say, any savings in Medicare, including Medicare Advantage savings, should stay in Medicare to shore up the trust fund. That is what we should be doing with Medicare savings. You make some very good points about these extra benefits, but if we are going to do it we should not be using the Medicare savings to expand other programs. We should be doing it to ensure the
solvency of the Medicare programs far into the future. Under the current bill, it does not do that. It uses Medicare savings to pay for other programs.

Senator Cornyn. Mr. Chairman?

The Chairman. All right. We are ready for the amendment.

Senator Cornyn. Mr. Chairman?

The Chairman. Senator Cornyn?

Senator Cornyn. Mr. Chairman, thank you. This will affect 500,000 people in my State who are beneficiaries of Medicare Advantage, so I want to say I strongly support Senator Hatch's amendment and I am a co-sponsor of it. I have to differ with some of my colleagues who believe that Medicare fee-for-service is the ideal. It is, of course, a government-run program. Medicare Advantage is run by the private sector.

Those who basically want to destroy, by cutting Medicare Advantage to the bone, private competition are meanwhile on a pathway to purely a government-run option for seniors who now quality for Medicare, which I would strongly resist. I would just say that, on average, Medicare fee-for-service reimburses at a 20 percent less generous fee structure than employer-provided insurance.

What that means in my State is about 42 percent of the people in my State who quality for Medicare cannot
find a physician who will accept Medicare fee-for-service. Some of them live in rural areas where they are under served, others just find that doctors are unable to pay their bills and accept Medicare rates. In some of the more populous counties, like Travis County, Austin, Texas, only 17 percent of physicians will see a new Medicare patient.

So I do not believe it is correct to say that Medicare fee-for-service is somehow the holy grail and that we ought to eliminate Medicare Advantage, which does, in fact, create a provider network which would allow people not only the coverage, but actually access. We are great at providing coverage for people who cannot find a doctor because Medicaid pays so poorly, and Medicare pays a little better, but still pays under employer-provided coverage.

So we all know what happens in Medicare fee-for-service, that there is enormous cost shifting that causes those of us with private health coverage to pay higher rates as well. And not to mention the fraud, abuse and waste of Medicare that we need to eliminate. It is hardly the standard, I think, by which all Medicare coverage should be judged.

The Chairman. Senator Kyl?

Senator Kyl. Thank you, Mr. Chairman.
Since Arizona has one of the highest percentage of its citizens covered by these policies, this is a very important amendment. I support Senator Hatch's amendment.

In Arizona, 317,000 people, seniors, are covered. That is 39 percent of the Medicare beneficiaries. That is a huge percentage. Not one of them would be advantaged by the Nelson amendment. That is what Senator Hatch was pointing out. What the Nelson amendment would protect are those that provide the highest level of benefits, not those who, I would submit, have the highest cost rather than the plans that have tried to provide important benefits, but not at the highest cost, benefits like lower cost sharing, dental and vision, Senator Stabenow mentioned, some preventative care, including mammograms, flu vaccine, cancer screenings, and, by the way, because it is health maintenance, some chronic care coordination. These are important benefits.

It is the fact that, unless something like the Hatch amendment passes, the President will be wrong and every one of the rest of us who say "if you like your care you get to keep it" will be wrong, because that simply will not be the case. About three million seniors will not have that opportunity.

Let me just conclude by quoting from a couple of our
co-workers—colleagues and one former colleague—about this program. Our colleague from Massachusetts, Senator Kerry: "I urge my colleagues to support the additional funding that is urgently needed to strengthen the Medicare+Choice program for seniors. This should be among our highest priorities in this year's Medicare debate." This was the 2003 Medicare debate.

And Senator Clinton at that time said, "Medicare+Choice plans are feeling the squeeze in the system, caught between rapidly exploding costs and rapidly imploding finances. While we debate the future of Medicare, we need to recognize that there are people right now in our States who depend on these plans today. That is the point. We have 20 million seniors who depend on these plans today, on the kind of coverage for the dental, the visual, the preventative care, and so on that we talked about. They will not get to keep their plans unless something like the Hatch amendment is adopted. We should support it.

The Chairman. All right. We are ready to vote.

Senator Hatch has requested a roll call vote on his amendment. Just one word or two, just to clear up some misconceptions here. One, is in this bill there is no cut in beneficiary payments, none. There has been implication sometimes that the fact of this bill is to
cut beneficiary payments to seniors. The answer is, there is not one red cent cut under this bill. Well, it has been implied many, many times today and in previous days.

Second, I might remind us that the Hatch amendment cuts about $113 billion that will have to be made up someplace. Because of the exemptions, it sounds like it is going to have to be basically an additional burden on States in that amount.

Finally, what we are trying to do with this legislation is work on quality, improve quality of care under both MA plans, and also fee-for-service. There are lots of incentives here to address quality care, fee-for-service, as well as MA. In fact, CBO tells us that because of the additional quality measures for Medicare Advantage plans, that rural areas will probably start to see an increase in payments under this legislation. So I just think it is really not wise to cut $113 billion back from Medicaid or whomever.

Senator Hatch. You are the ones that are cutting $113 billion out of the Medicare Advantage program. How are you accusing us of cutting $113 billion?

The Chairman. We are not --

Senator Hatch. Sure you are. You are taking it right out of Medicare Advantage.
The Chairman. That figure is incorrect. Let us just vote.

Senator Hatch. All right.

The Chairman. The first vote will be on the Hatch amendment and the second vote will be on the Chairman's amendment.

The Clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

Senator Conrad. No.

The Clerk. Mr. Bingaman?

The Chairman. No by proxy.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

The Chairman. No by proxy.

The Clerk. Mr. Wyden?

Senator Wyden. No.

The Clerk. Mr. Schumer?

The Chairman. No by proxy.

The Clerk. Ms. Stabenow?

Senator Stabenow. No.

The Clerk. Ms. Cantwell?

Senator Cantwell. No.
The Clerk. Mr. Nelson?

Senator Nelson. No.

The Clerk. Mr. Menendez?

The Chairman. No by proxy.

The Clerk. Mr. Carper?

The Chairman. No by proxy.

The Clerk. Mr. Grassley?

Senator Hatch. Aye by proxy.

The Clerk. Mr. Hatch?

Senator Hatch. Aye.

The Clerk. Ms. Snowe?

Senator Snowe. No.

The Clerk. Mr. Kyl?

Senator Kyl. Aye.

The Clerk. Mr. Bunning?

Senator Bunning. Aye.

The Clerk. Mr. Crapo?

Senator Crapo. Aye.

The Clerk. Mr. Roberts?

Senator Hatch. Aye by proxy.

The Clerk. Mr. Ensign?

Senator Ensign. Aye.

The Clerk. Mr. Enzi?

Senator Enzi. Aye.

The Clerk. Mr. Cornyn?
Senator Cornyn. Aye.

The Clerk. Mr. Chairman?

The Chairman. No.

The Clerk will tally the vote.

The Clerk. 9 ayes, 14 nays.

The Chairman. The amendment fails.

We will have a roll call vote on the Chairman's alternative.

The Clerk. Mr. Rockefeller?


The Clerk. Mr. Conrad?

Senator Conrad. Aye.

The Clerk. Mr. Bingaman?

The Chairman. Aye by proxy.

The Clerk. Mr. Kerry?

The Chairman. Aye by proxy.

The Clerk. Mrs. Lincoln?

The Chairman. Aye by proxy.

The Clerk. Mr. Wyden?

Senator Wyden. Aye.

The Clerk. Mr. Schumer?

The Chairman. Aye by proxy.

The Clerk. Ms. Stabenow?

Senator Stabenow. Aye.

The Clerk. Ms. Cantwell?
Senator Cantwell. Aye.
The Clerk. Mr. Nelson?
The Clerk. Mr. Menendez?
The Chairman. Aye by proxy.
The Clerk. Mr. Carper?
The Chairman. Aye by proxy.
The Clerk. Mr. Grassley?
Senator Hatch. No by proxy.
The Clerk. Mr. Hatch?
Senator Hatch. No.
The Clerk. Ms. Snowe?
Senator Snowe. Aye.
The Clerk. Mr. Kyl?
Senator Kyl. No.
The Clerk. Mr. Bunning?
Senator Bunning. No.
The Clerk. Mr. Crapo?
Senator Crapo. No.
The Clerk. Mr. Roberts?
Senator Hatch. No by proxy.
The Clerk. Mr. Ensign?
Senator Ensign. No.
The Clerk. Mr. Enzi?
Senator Enzi. No.
The Clerk.  Mr. Cornyn?

Senator Cornyn.  No.

The Clerk.  Mr. Chairman?

The Chairman.  Aye.

The Clerk will tally the vote.

The Clerk.  14 ayes, 9 nays.

The Chairman.  The amendment passes.

Senator Wyden wishes to be recognized, but we are going to break for lunch.

Senator Wyden.  Mr. Chairman, what is your pleasure?  I know you would like to break.  Can I be recognized?  I was ahead of Senator Hatch.

The Chairman.  Sure.

Senator Wyden.  Can I be recognized after lunch?

The Chairman.  I do not see any reason why not.

Senator Wyden.  Good.

The Chairman.  It is about 1:20, so let us break until 2:30.

Senator Wyden.  Thank you.

The Chairman.  The committee is in recess until 2:30, at which point Senator Wyden is recognized.

[Whereupon, at 1:19 p.m. the meeting was recessed.]
AFTER RECESS

[2:34 p.m.]

The Chairman. The committee will come to order.

When we recessed, I said Senator Wyden was going to be next recognized. Senator Wyden, you are our man.

Senator Wyden. Thank you very much, Mr. Chairman.

I would call up the Wyden-Carper amendment D-2.

The Chairman. D-2?


The Chairman. The amendment, as modified.

Senator Wyden. Mr. Chairman, this amendment embodies a piece of legislation that is backed by a large bipartisan group of Senators. Senator Burr of North Carolina, Senator Collins, Isakson, Senator Chambliss on the other side of the aisle, and, also, a significant number of members of our Finance Committee are supporters, as well.

What the bipartisan group of Senators believe is that there is a chance to save a significant sum of money in Medicare offering what amounts to house calls for vulnerable seniors in a program that would be led by primary health care providers.

The challenge, of course, as Senators know, is that something like two-thirds of the Medicare program, two-thirds of the Medicare spending goes toward roughly 10
percent of the Medicare population. These are individuals who are incurring significant multiple, often chronic conditions. They will have diabetes, heart disease, Alzheimer's.

In effect, if they are experiencing a problem which could signal further complications, almost invariably what happens is they go and get an ambulance, ride to the emergency room, often there are 911 calls, things of this nature, so that significantly more money is being spent today caring for these individuals than you would spend if they could be cared for at home.

Suffice it to say many of the technology companies, and there are a host of them, particularly in Oregon and our part of the country, are coming up with exceptional new products, tele-health products and others, to serve this population.

So this is a chance to give better care for seniors at a lower price and also do it in a fashion that would help create jobs. Senator Bingaman and I talk frequently with high technology companies. They have approached us to discuss some of the promising technologies to care for older people at home.

We can have those benefits if we can pass this legislation. We have gone back and forth, Mr. Chairman and colleagues, with the Congressional Budget Office on
this idea. They are looking at some of our further modifications, but we would stipulate that providers would have to achieve minimum savings annually of 5 percent on health care provided to the highest cost Medicare beneficiaries as a condition of participating in the program.

    I think with your lead, Mr. Chairman, I think perhaps we ought to leave it there. I have, in effect, laid down the amendment, as we have talked about with your staff, and if we could continue to work with them, I think that this would help to spur a genuine breakthrough in terms of caring for the highest cost Medicare beneficiaries, the most expensive individuals, and a chance to do it in a fashion that will also assist their getting better care in the days ahead.

    In effect, Mr. Chairman, a lot of these individuals get what the providers call a $1 million workup. They have to go to the hospital when they have conditions that could be treated much less expensively at home. That is the point of the Independence at Home Act.

    Mr. Chairman, you have much to do this afternoon. Let me leave it at that and if we could keep working with you as we get this additional information from CBO.

    The Chairman. Thank you, Senator. I think you have a good idea. That is the kind of coordination that
we need. As you said, that is why the mark authorizes CMS to test a wide range of payment reforms that seek to reduce cost and improve quality.

You are trying to help improve upon this and I very much appreciate your efforts here and would like to keep working with you to see if we can find an additional way to boost up these efforts and maybe find some dollars to help give it a little bit of oomph behind it and make it work.

Senator Wyden. That would be very helpful. Thank you, Mr. Chairman.

The Chairman. Thank you very much, Senator. The next amendment I am aware of in order is Senator Grassley, who has amendments.

Senator Grassley. Are you ready? I am going to let him in my place here.

The Chairman. All right. So next, Senator Kyl, do you have an amendment?

Senator Kyl. Yes, I do.

The Chairman. Is this a new and different amendment that is not on the list?

Senator Kyl. Well, it is new and it is different and it substitutes for something that is on the list.

The Chairman. Was it filed?

Senator Kyl. It has been provided to you all. It
is a modification of amendment number D-6.

The Chairman. You presented this to Senator Grassley and to myself how long ago?

Senator Kyl. About an hour ago.

The Chairman. About an hour ago. All right. We have it in front of us for the first time, are seeing it for the time. So why do you not proceed?

Senator Kyl. Thank you, Mr. Chairman. Mr. Chairman, this amendment responds to something rather remarkable that happened this week. The Centers for Medicare and Medicaid Services, CMS, on September 21, sent a memorandum to all Medicare Advantage organizations, Medicare Advantage prescription drug organizations and cost-based organizations and demonstration plans.

It was from Teresa DeCaro, the acting director of the Medicare Drug and Health Plan Contract Administration Group. The subject of the memo was, quote, "misleading and confusing plan communications to enrollees."

Let me read this memorandum, it is rather short, as an example of one of the most heavy-handed, unconstitutional actions that I can think of that our federal government has ever attempted to take against private citizens, private organizations in this country, because they disagree with the administration with
respect to its ideas on health care reform.

Here is what the memo says. "CMS has recently learned that some Medicare Advantage organizations have contacted enrollees alleging that current health care reform legislation affecting Medicare could hurt seniors and disabled individuals who could lose important benefits and services as a result of the legislation.

The communications make several other claims about the legislation and how it will be detrimental to enrollees, ultimately urging enrollees to contact their congressional representatives to protest the proposals referenced in the letter.

Our priority is ensuring that accurate and clear information about the Medicare Advantage program is available to our beneficiaries. Thus, we are concerned about the recent mailings, as they claim to convey legitimate Medicare program information about an individual's specific benefits or other plan information, but instead offer misleading and/or confusing opinion and conjecture by the plan about the effect of health care reform legislation on the MA program and other information unrelated to a beneficiary's specific benefits.

Further, we believe that such communications are potentially contrary to federal regulation and guidance.
for the MA and Part D programs and other federal law, including HIPAA.

As we continue our research into this issue, we are instructing you to immediately discontinue all such mailings to beneficiaries and to remove any related materials directed to Medicare enrollees from your Websites.

If you have any questions about whether plan communications comply with the MA program requirements and guidance in federal law, we urge you to contact your regional account manager.

Please be advised that we take this matter very seriously and, based upon the findings of our investigation, will pursue compliance and enforcement actions."

Mr. Chairman, when the President spoke to the nation and to the Congress a couple of weeks ago, he said that he would call out those who he thought were misrepresenting what was in the plan.

This appears to be precisely the kind of action that he threatened would occur. I submit to you, first of all, since I have not read what the precise objections of the insurance company was to what the President was proposing, that it may or may not have been accurate information about what the proposed legislation would do.
But, of course, in exercising the First Amendment, it does not matter whether it is accurate or not. You have the right to be wrong in expressing your free speech, and these entities do have the right of free speech.

But secondly, it is probably more a matter of interpretation and opinion. There is a lot of subjective judgment here. Very smart, well meaning legislators on both sides of the aisle here have expressed different interpretations and meanings of different things today and I am sure that we would not accuse each other of trying to deliberately mislead and lie, in effect, about what the legislation does.

In any event, we all have a right of free speech. So what the amendment would do would be to clarify that no provision of the Health Insurance Portability and Accountability Act, HIPAA, or any other authority or agreement would be construed to prevent a health plan from communicating to its enrollees information about legislation or legislative proposals that could affect the terms of the enrollee's plan, maintaining a Website that contains information related to legislation or legislative proposals that could affect the terms of the enrollee's plan, or encouraging its enrollees to contact their elected representatives to express their views.
about legislation or legislative proposals.

   It would prohibit the Department of Health and Human
Services and Centers for Medicare and Medicaid Services
or any other entity within HHS from barring or preventing
a health plan from expressing or penalizing or bringing
an enforcement action against any health plan for
expressing its views about legislation or legislative
proposals, described above.

   Finally, it would establish a safe harbor for health
plans that include in communications described above a
disclaimer that states that neither the Centers for
Medicare and Medicaid Services nor the Medicare program
has reviewed the communication, which, incidentally, was
the language that was used in the transmission that
spawned this communique.

   The presence of the disclaimer would constitute a
defense to any legal proceeding, administrative or
otherwise, that alleges that the communication represents
this as an official communication. Obviously, it would
not in that event.

   Mr. President, the reason that this is so important
is that we will never conclude work on this important
legislation if the debate is chilled.

   If American citizens cannot address their views, if
people with a direct interest in serving constituencies,
like insurance companies that enroll senior citizens in Medicare Advantage plans, if they cannot exercise their First Amendment freedoms and discuss their beliefs as to how these plans might be affected by the pending legislation, then this country is going to be denied the benefit of the kind of free and robust debate that we all believe is important.

So I would hope that my colleagues would support this amendment, which, at the end of the day, does nothing but protect anybody's, in particular, in this case, the insurance companies who are selling Medicare Advantage policies, writes to express their opinions about what the legislation would do.

Now, let me just make one other thing very clear. I am not going to vouch for all of the opinions expressed, though I believe they were essentially accurate. One can argue about whether or not seniors that have Medicare Advantage would be denied coverage for benefits that they currently have or not.

It is our view that they would, 2.7 million of them, according to CBO, would not have the same benefits. People on the other side have said, well, but they do not lose their basic Medicare benefits. Of course, no senior over 65 loses Medicare benefits. But if you have a Medicare Advantage plan, this legislation would
definitely affect the benefits that you receive.

The question here is not whether they were right or wrong in what they said, though I believe they were correct. The question is whether or not the federal government has the right to subjectively decide that issue and, if they think they are wrong, issue a directive to them to cease forthwith the communication with their enrollees or anybody else what their opinion is and urge those people to contact their representatives.

This is the essence of political free speech and I would note that there is Supreme Court precedent for the proposition that you have this right. In Consolidated Edison v. Public Service Commission, a U.S. Supreme Court case in 1980, the Court ruled 7-2 that this kind of — there was a prohibition on a public utility commission from including a mailer in its bills that expressed its opinion on issues of public policy, and the Court said that is perfectly fine. You cannot prohibit that. Government may not prohibit that kind of free speech.

So, Mr. Chairman, I would hope that maybe this is one of those things that everybody could come together and agree on for the sake of having a free, robust debate about this legislation.

Thank you.
The Chairman. Are you finished?

Senator Kyl. Yes.

The Chairman. This is a very important question.

We have laws governing how companies can communicate with seniors, especially companies that have a special relationship with seniors, especially companies that have a lot of personal information about seniors for which they offer plans and benefits.

That is partly because Medicare Advantage plans are really government contractors. They are contracting to provide benefits on behalf of Medicare. In fact, it goes so far that the contracting plans, the MA plans, do not mind seniors thinking that they really they are Medicare; they are really not the government, they are a private company.

So they tailor their cards red, white and blue, do all the things they can to make it look like this is the government, not the plan. Many people think that the Medicare Advantage plan is actually Medicare. They think that, although that is totally inaccurate.

The reason we have laws with respect to a company's communication with seniors, especially on Medicare Advantage plans, communication with seniors, is because seniors are vulnerable. It is a very vulnerable population.
We have a long history of people and companies and individuals taking advantage of seniors. My mother just got a telephone call two weeks ago she told me about, somebody calling her up, unsolicited call. I said, "Mom, do not take those telephone calls."

But somebody fawned himself off to be -- this was not a health insurance company. In this case, it was basically a solicitation to give money to some protective association or something. It was clearly a fraud, because he kept badgering my mother over and over and over again and she said no.

Then he got tougher and tougher and tougher and he got belligerent and started calling her names because she would not give. I said, "Mother, you just do not take calls like that. You do not have to talk to those people."

But we do know that seniors are a very vulnerable population. So there are laws, there are regulations with respect to communications that a company has, especially a Medicare Advantage plan, with seniors, its membership who get health insurance benefits under those plans.

That is why, in 1996, one reason we passed the law, HIPAA, to deal with these kinds of communications and to make sure that the communications between the plans and
the seniors to membership are truthful. We do not want plans putting out untruthful information.

So let us be frank about this. This is basically a political amendment. This is a political amendment that allows companies to take advantage of the relationship they have with their seniors and, in fact, make untruthful statements and statements that misrepresent the truth.

There is no First Amendment right to lie. There is no First Amendment right to mislead. There is no First Amendment right to be fraudulent. But this amendment, in effect, by overruling statutes, essentially says that a company can say anything it wants to its employees and to the seniors that it provides benefits to, and we should not let that happen.

We should not let companies take advantage of the relationship they have with their seniors, and this amendment does that. It says, for example, that no HIPAA provision or any other authority, it can be construed, it says "prevent them from communicating."

Basically, it allows a plan to communicate whatever it wants to communicate. Then it goes on to say HHS, same thing. Then it has got this safe harbor provision. This is a license for a company to say whatever it wants to say to its employees, and I think it should be
rejected on the spot.

Senator Kyl. Mr. Chairman, might I respond to your characterization of the amendment, please?

The Chairman. The gentleman from Arizona.

Senator Kyl. Thank you, sir. First, to clarify, is that a health plan may, pursuant to constitutional rights guaranteed by the First Amendment, nothing new there, express its views about legislation or legislative proposals.

The Chairman. Even if untruthful?

Senator Kyl. Yes. You have the right to be wrong when you express.

The Chairman. Not a right to mislead to seniors.

Senator Kyl. All right. Let us get specific then. It is quite true and very important that both state laws that regulate the sale of marketing of insurance and some of the rules that CMS enforces prevent fraudulent marketing. That is absolutely true and it is important.

Whether you think seniors are more vulnerable than anyone else, no one should be misled. So it is quite true that we have laws against fraudulent marketing.

Now, if CMS wants to try to prosecute somebody for fraudulent marketing, it can do that. That is not what it did here, because this was not fraudulent marketing. There was no effort in the communication that spawned
this from a particular insurance company, no effort to
market a product whatsoever, number one.

Second, it specifically had the disclaimer at the
bottom that neither the Centers for Medicare and Medicaid
Services nor the Medicare program has reviewed these
materials for accuracy or misrepresentation and it did
not need to because this is not an effort to market
anything.

What they are trying to do here is to let people
know their opinion about the effect of the pending
legislation. Members just like you want to know what
these reforms might mean for their Medicare health plan
and how they can get involved to help protect Medicare
Advantage. Nothing wrong with that.

There are two things you can do now to help show
Congress the importance of Medicare Advantage. This is a
program that thinks Medicare Advantage is good. It sells
it to seniors and we have got like 20 million seniors who
agree and they have bought it.

You can complete a little instruction and send it in
and you will receive more information about it. So it is
not trying to mislead anybody there. You receive
information about the issue and learn how to get involved
to protect your coverage; and, second, let your members
of Congress know why Medicare Advantage is important to
you.

So are we going to take the position that we do not want folks directly involved in health care insurance and health care delivery to urge the people that they work with to let Congress know how they feel? That is the second thing.

Congress is considering significant cuts to Medicare Advantage now and your members of Congress will want to know why this program is valuable to you, because these cuts could mean higher costs and benefit reductions to many on Medicare Advantage. That is precisely the argument that many of us have been making here. If you call that a lie, then, frankly, you are calling us a liar. I think that is a true statement.

So they leading health care proposals are being considered in Washington, D.C. this summer, include billions in Medicare Advantage funding cuts, true, $112 billion, I guess, or 13, as well as spending reductions to original Medicare and Medicaid.

While these programs need to be made more efficient, if the proposed funding cut levels become law, millions of seniors and disabled individuals could lose many of the important benefits and services that make Medicare Advantage plans so valuable.

Exactly the facts. It does not take away Medicare
rights. It does potentially reduce from Medicare Advantage plans benefits that these seniors already receive from $132 down to $42 in value.

So that is what the communication was. It was not lies. It is not an attempt to market a product. If they were able to find a law that these folks violated by trying to market a product with fraudulent information, then they ought to be prosecuted, and those laws prohibit that.

But you cannot take this kind of a letter and then tell them to cease and desist, instructing you to immediately discontinue all such mailings, simply because CMS might differ with you about your judgment about whether this legislation is good or not.

So it does not affect the laws that currently need to be enforced to protect people from fraudulent marketing. All it does is say you "have a right to express your views about legislative proposals," that is a direct quotation, "to communicate with enrollees about information about the legislation or legislative proposals that could affect the terms of the enrollee's plan" -- anything wrong with that -- to maintain a Website that contains the information, same thing, or encourage enrollees to contact their elected representatives to express their views about the
legislation or legislative proposals. Nothing wrong with that.

It would also prohibit DHS and Medicaid from barring or preventing a health plan from expressing or penalizing or bringing an enforcement action against a plan for expressing its views about legislation or legislative proposals. Are we going to make that against the law? I do not think so.

Finally, to say that if they have a disclaimer like this, it is at least a defense against the claim that they were trying to suggest that they were communicating in an official capacity. It is clear that they are not in this particular communique.

So, Mr. Chairman, I do not think it is fair to characterize this amendment as protecting lies, protecting untruthful information, and to undercut the laws that we already have to protect enrollees.

Finally, I would ask unanimous consent that the following people be added as cosponsors to the amendment, Senators Ensign, Bunning, Crapo, Roberts, Enzi, Cornyn, and Hatch.

The Chairman. Without objection. Senator Schumer?

Senator Schumer. I would just make a couple of points here. First of all, they got these lists, this company, and probably some of the solicitation with a lot
of federal help and subsidy. So this is not just somebody writing somebody out of their own pocket like you would in other ways.

They are using their lists. They are using something that is actually part of a Medicare plan, because that is how they solicit and that is how they got it and they were subsidized to do this.

Second, this is not an informative piece. This is a piece that takes the insurance company's point of view. They do not say in there that Humana's profits on this program were X and maybe what we could do if we were cut is reduce our profits and not reduce your services.

So this is not a free speech argument. If the president of Humana wanted to, out of his own pocket or -- I do not know how it works out of corporate funds. There are different rules we have always had with corporations, at least until now. We will see what the Supreme Court rules in a few days.

But if he wanted to take money out of his own pocket, somehow purchase a list, like anyone else could, of the subscribers and write them, it is one thing. That is not what happened here.

I am sympathetic to what my friend from Arizona says, that the First Amendment protects false information, but this is a little different here. This
is not a pure First Amendment case, it is not close to being a pure First Amendment case.

Corporations have much more limited political rights than individuals do. There are federal dollars involved here that are, at the very least, commingled and giving an advantage, and the message is clearly one-sided and in the corporate interest there.

It is not necessarily true that they have to cut if they got these. Look, I am sympathetic to Medicare Advantage in many ways and I am trying to work here with Senator Nelson to be helpful, but it is not true that if they receive these cuts, they would have to cut services. They could do lots of other things and this does not lay that all out.

So I think the amendment is off base in this situation and to make it a pure First Amendment argument is not backed up by the facts.

The Chairman. Senator Roberts?

Senator Roberts. Thank you, Mr. Chairman. That cold chill that everybody just should have felt in this room was a message basically that according to this determination or new policy by CMS, we have apparently cast aside the First Amendment rights of everyone that is involved in the entire health care industry.

Think of what your CEO is going to do in sitting
around with the board of directors and he takes a look at this bill or she takes a look at this bill and says "We think that this bill will really harm our patients and our customers, not to mention our company," and they would like to send some information out about it, but, whoops, they see what’s happened to Humana, and they think, “We are not going to go down that road. We do not feel free to contact Senator Roberts or Senator Kyl or, for that matter, Senator Schumer.”

Let me just read this. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedoms of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

Now, when Humana’s classic example of the exercise of First Amendment-protected speech came to the attention of the administration, it demanded that the company and all other companies, again, quit exercising their constitutional rights to petition their government.

Now, the Supreme Court has been very clear on the issue. In 1980, it held, in a 7-2 decision, that a public utility commission could not prohibit a utility from putting policy position papers in its customers' bills.
Now, we just had a huge debate here about Medicare Advantage, in which everybody on your side not only admitted, but were very proud of the fact, in regards to the point, that Medicare Advantage cuts were to reduce benefits, and that is the fact.

And in terms of whether it is wrong or not, the Senator from Arizona is exactly right, you have a right to be wrong. It does not make any difference. You have certainly freedom of speech.

Let me just point out that the Senate Finance mark, private Medicare plans, known as Medicare Advantage, will receive a $124.5 billion cut, 2.7 million seniors will lose their Medicare plan by 2010. Further CBO estimates that the extra benefits Medicare Advantage recipients receive will drop from a projected $135 per month to only $42 per month.

The House Democrat tri-committee proposal also contains cuts to Medicare beneficiaries. Under the House proposal, three million seniors will be forced out of the plans. That is not anything that is misleading, that is factual.

So I think what the Senator is doing, as I understand it, one, the Constitution protects the rights of companies to criticize or support legislation pending in the Congress.
Do you mean that if you get involved in any kind of federal help, that you cannot petition the federal government? Every farmer and rancher in my state should not be complaining about the farm bill or want this or that in a farm bill, and you can pick any subject that you want.

I do not know of any sector of the American economy now that is not involved with the federal government in some way, in some kind of a subsidy or payment or credit. So if you use the example by Senator Schumer, they should not be able to petition the government.

This, to me, if we describe this as a political -- and the thing that is amazing to me is that the Chairman, the distinguished Chairman -- and while I certainly respect his judgment and while I understand his opinion on this, basically, I am a little amazed that you are defending this position.

This is clearly a chilling effect on the entire health care industry to say either go along at the first or you are going to be shut out. Now, somebody made a speech about three weeks ago about calling people out and not setting the record straight, but in this particular case, saying, "I'm sorry, but you can't inform your customers of how you feel about legislation."

This is not right. Quite frankly, it smells exactly
like tough, hardball Chicago politics, abridging the First Amendment. If we are not able to pass this amendment, we have reached a very dark day here on this committee and it strikes at all of the speeches that we say that we are fair and we are bipartisan, to the extent that we can be, and we certainly respect each other's opinion.

To my way of thinking, and I am apparently biased, because I am former newspaper guy, this is an abridgment of the First Amendment. I am very worried about this, Mr. Chairman. I would hope that we would really do some deep thinking about this or we are going to take a step that we will really regret not only in this committee, but with this entire debate, and do some things that we should not be doing.

The Chairman. I appreciate the Senator from Kansas. I especially appreciate his journalism background. I have a deep, deep reverence for the Bill of Rights, especially the First Amendment, frankly, in some very deep way. That is one reason I got into public service, just my reverence for the Bill of Rights, especially the First Amendment.

I might just remind all of us that nothing in this discussion, either side, in any way infringes upon the right of seniors to petition government, and they
certainly do. We have received a lot of letters and telephone calls from a lot of seniors about seniors' issues, whether it is Social Security, Medicare or whatever, and, clearly, we want seniors to tell us what they think, and, believe me, I know they will. There is just no question about that.

So that is not this discussion at all. It has nothing to do with whether seniors should have the right to petition their government. Clearly, they have the right under the First Amendment and, clearly, they should have that right, and they do.

Senator, you made one point, though, I do think needs some clarification, namely, implying that my problem with this amendment in any way has the effect of discouraging communication between, say, a device manufacturer and CMS or whatnot.

We are talking about a special category here. The special category is communications between plans and the seniors. We are not talking about communications between CMS and some other entity that is under CMS regulations. That is a whole different --

Senator Roberts. Well, Mr. Chairman, it does not make any difference. Pardon me for interrupting, sir. But if you are 60 -- what is the number, 65 and older is a senior citizen now or whatever?
What if somebody is 64 and they wanted to let them know that?

The Chairman. No, no, no. That is not the --

Senator Roberts. I know they are vulnerable, sir, but they have to be informed and they at least want to have the right to know.

The Chairman. Let me reclaim my time. We are talking about the fiduciary relationship that these plans have with their membership. That is what we are talking about here, the fiduciary relationship that these plans have with their membership.

Those members could, obviously, call Congress, write to Congress, say anything they want to say and they should. We are not talking about that. That is a whole separate issue.

We are talking about the communications from the plans to their membership, the fiduciary relationship that these plans have with their membership. These plans have personal information that nobody else has. Lots of personal information these plans have on their membership, and that is why we have a fiduciary relationship. That is why we ask the plans to keep the fiduciary relationship.

So all I am saying is -- I am not going to get into that letter, because that is a whole separate issue --
maybe the law was not properly executed. Maybe CMS
overstepped, I do not know. I am only addressing this
amendment, the amendment before us.

The amendment before us has the effect of not only
undermining, but basically repealing current laws which
establish the fiduciary relationship between the plans
and their members and so that there is some protection
for the members, seniors who are a vulnerable population,
and not taken advantage by plans.

I want to make sure that those seniors, that
vulnerable population is still protected. That is all
this is all about, just making sure they are still
protected.

My quarrel with the amendment is it undermines the
law which helps maintain that fiduciary relationship so
this vulnerable population is not protected.

This side of the aisle. Senator Bingaman?

Senator Bingaman. Mr. Chairman, consistent with
the points you just made, I think what we are talking
about here are government contractors that have been
hired by the government to stand in the place of the
government in providing services to seniors who are
entitled to services under Medicare.

I think it is clear that the government should not
in any way impede the ability of that government
contractors to take out TV ads, to run radio ads, do whatever they want to do to try to influence legislation in the Congress.

But to say that they should use their position that they have been contracted to have with these seniors that are on Medicare, to lobby them to influence legislation seems to me a little bit out of the ordinary.

I do think that it is appropriate for the government, if it is going to contract with someone to assist the government in providing health care services, to condition that contract on them doing what they were hired to do as far as that relationship with that senior citizen is concerned.

Senator Ensign. Would the Senator yield?

Senator Bingaman. Certainly.

Senator Ensign. How are these insurers, government contractors, they have a contract between the senior citizen -- they are only basically licensed through the federal government. They are not contracted through the federal government.

They have a contract with the senior citizen, the individual who signs up for the policy, not through the government.

The Chairman. Let us clear up that question. Ms. Bishop, do you want to address that question?
Ms. Bishop. Medicare Advantage plans have agreed to contracts with CMS to provide Medicare benefits. They operate under contract. The contract regulates their payments. It regulates the activities of the plan, the marketing of the plan.

So they sign agreements before they can go out and provide any services to Medicare beneficiaries. They are under contract. Yes, they are.

The Chairman. Senator Bingaman?

Senator Bingaman. That is the only point I was making, Mr. Chairman. This is not a free speech issue. This is a question of contract law and what the federal government has a right to expect of the people that it is hiring or contracting with to provide these services, and I think it is not unreasonable for the federal government to say, "Look, your job is to provide health care services and see to it that these folks get the necessary health care services that they need and not to spend the funds that the federal government is providing to you to lobby the seniors, to lobby the Congress."

So I do not think the amendment makes a lot of sense.

The Chairman. Is there anymore debate? Senator Bunning?

Senator Bunning. Thank you. Why are certain
organizations allowed to run ads in favor of your bill, but Humana cannot even communicate with certain people that they serve?

Now, I want to give you an example. The AARP, I have seen 10 ads a day in Arlington, Virginia by the AARP. Are they government contracted to sell Medicare? They are not. Well, then, they are free to do whatever they dang choose in support of or not in support of the current health care bill.

You are going to tell me that my company in Louisville, Kentucky cannot do the same thing.

Senator Bingaman. Mr. Chairman, let me just say --

Senator Bunning. No, no, I am asking. Let us ask Ms. Bishop.

Ms. Bishop. I think the matter at hand here is whether or not a Medicare Advantage plan that operates under contract with CMS has the ability to communicate with its membership.

Senator Bunning. With the disclaimer, the disclaimer on the communication that it is not an official --

Ms. Bishop. Right. Even though that there would be a disclaimer that said this is not official, as Senator Baucus said, as a fiduciary entity that is acting on behalf of Medicare --
Senator Bunning. How are you interpreting the First Amendment then?

Ms. Bishop. I guess what I am trying to say is that as a contracted entity, not as an individual, as a contracted entity --

Senator Bunning. Please answer my question. How are you interpreting the First Amendment? Is this company permitted to use their First Amendment rights and the AARP not permitted to use their First Amendment rights, or are they?

The Chairman. That is really unfair.

Senator Bunning. No, no, no, it is not unfair.

The Chairman. Senator, she is not a lawyer, she is not a personal lawyer. She is not a lawyer.

Senator Bunning. Then she just consulted with one.

The Chairman. I do not think it is fair to ask those kinds of questions.

Ms. Bishop. Senator Baucus, I do have a response to that. As contractors with Medicare, so in order for them to serve Medicare beneficiaries, they sign a contract with Medicare and they get payment --

Senator Bunning. You have made that perfectly clear.

Ms. Bishop. And part of that contract, they also sign data use agreements with them, as part of their
contract with Medicare, to say "We will only communicate with Medicare beneficiaries under certain conditions."

They agree to do that as contractors. So they are, in a sense, agreeing to limit their communications to those that are approved by Medicare when it comes to their Medicare benefits.

They have a right under their data use agreements to communicate with beneficiaries with respect to educational materials, such as blood pressure and preventive care, but they cannot communicate about benefits unless they get that approved by Medicare. They sign that agreement.

Senator Bunning. I personally believe that the First Amendment precedes or goes in front of the constitutional First Amendment rights of any corporation or any individual, precedes or takes precedent over what you have just said.

If you do not believe that, then we are wasting our time.

The Chairman. You mean it supersedes the contract?

Senator Bunning. Absolutely does.

The Chairman. Where both parties agree to the terms of the contract?

Senator Bunning. Absolutely. Ask the bankruptcy courts in relationship to General Motors and Chrysler.
The Chairman. Senator Stabenow?

Senator Stabenow. Thank you, Mr. Chairman. Since this occurred in Michigan, I just wanted to share with you the reaction that seniors had. Clearly, Humana had violated their contract. They sent out letters to folks that, on the front of it, said "important information about your Medicare Advantage plan, open today." Then on the inside, they gave what I believe is not accurate information. That is debatable.

But then they indicated that they should contact their congressional representatives to protest the actions referenced in the letter. This was lobbying, clearly, by a company who is making money off of a set of policies.

I guess my question to colleagues would be: would you support other entities that do not share your views being able to do the same thing? So anybody on any side, any group that is under contract with the federal government --

Senator Bunning. It is America.

Senator Stabenow. That has not been the case in the past. There have been numerous objections in the past on other entities.

So I would just tell you that this was something that was very unfortunate that happened in the sense that
it scared a lot of seniors unnecessarily and, in my mind, gave inaccurate information to people in an inappropriate and, I would argue, illegal way, because it broke a contract that they made.

To me, this is not about the First Amendment, which, of course, we all support the First Amendment, but this really is about the appropriateness of using government money to lobby for a for-profit insurance company to be able to mail seniors and, in my judgment, give them information that was not accurate.

The Chairman. Senator Kyl?

Senator Kyl. Senator, may I interrupt you to agree with you, in part, on something?

Senator Stabenow. Yes.

Senator Kyl. I really do want to get this debate back to where it needs to be and that is on my amendment. I believe that Ms. Bishop and you are both making a key point and the Chairman alluded to a similar point earlier.

When these plans contract with the federal government to provide Medicare Advantage, they do agree to terms about how they can market these benefits to their enrollees. That is true.

It is also true that the terms of that contract can be enforced by the federal government and I think it is
primarily administrative enforcement, though, if there were a criminal violation, there may be criminal laws applicable here, too, I am not sure, but certainly administrative action would be appropriate.

So that, for example, of one of these companies used the list to say "Our plan will give you a chocolate milkshake at the end of every day" and it does not, administratively, the government has -- that may be the exercise of free speech, but it is in violation of the agreement.

So in that case, it is true that there could be administrative action taken again them. Now, I was very clear at the beginning to say -- and I think, Senator Stabenow, you agree with this point -- that it is not up to us to judge whether this particular letter violates the contract or could bring an administrative proceeding or not; that if there is something in here, I do not see it, but if there were something in here that was a misrepresentation of fact or in some other way violated that the contract with the federal government, then administrative action is permissible against that.

That is not what my amendment has anything to do with. So this is not about -- as Senator Baucus said, my amendment has the effect of repealing existing laws that provide protection to seniors. No. Those are valid.
Senator Stabenow is correct and I would not touch those and I do not touch those.

What I am saying is consistent with the decision of Rust v. Sullivan in League of Women Voters, a U.S. Supreme Court case that said it does not matter whether you receive money from the federal government or not; as a federal contractor, you still have your First Amendment rights.

This is the point Senator Bunning was trying to make. You do not lose your First Amendment rights simply because you make a contract with the federal government. You cannot violate the contract, true, a point Ms. Bishop was making, but you also have a right to exercise your First Amendment, the point I am making.

What does my amendment do? It does not say you now have the right to violate the contract. It does not say now you have the right to misuse the enrollee information which the government has provided or which you have obtained. It does not say you have the right to misrepresent your insurance policy.

It says, first, you can express your views about legislation or legislative proposals. That is pure First Amendment stuff. That is basic. You can communicate to your enrollees information about legislation. You can maintain a Website that does that and you can encourage
enrollees to contact their elected representatives.

Nothing there about repealing existing laws that provide protection, nothing about violating your contract. If you do that, you are still going to get nailed. This is First Amendment protection.

Finally, it says that you have a -- and HHS and Centers for Disease Control would specifically be barred from preventing you from expressing or penalizing your bringing enforcement action if you expressed views about legislation or legislative proposals, not misrepresenting benefits, not violating your contract.

So read my amendment, please, because I really do think that when you read the exact words here, you will see I am ensuring that just because they are federal contractors, they do not give up their right to the First Amendment and the Supreme Court would uphold this anyway.

But we need to verify that today or, unfortunately, I am afraid that you are going to have government agencies, in effect, threatening entities. By the way, they did not just write to this particular insurance company and say "We think you violated your contract."

That is what you would do in an administrative proceeding.

They sent a memo out, I am quoting now, "all Medicare Advantage organizations, Medicare Advantage
prescription drug organizations, cost-based organizations and demonstration plans, instructing you to immediately discontinue these mailings," as they believe here that there is misinformation about the pending legislation.

The Chairman. I think we are getting close to the vote on this. That is a full discussion. Let us vote. A roll call has been requested. The clerk will call the roll on the Kyl amendment. Actually, it is a modified amendment, which could be ruled not germane, because it really is a gross modification of the original. I will not get into that, we have had our regular arguments, but I just urge us to not support this amendment for the reasons I have indicated earlier. The clerk will call the roll.

The Clerk. Mr. Rockefeller?
Senator Rockefeller. No.
The Clerk. Mr. Conrad?
The Chairman. No by proxy.
The Clerk. Mr. Bingaman?
Senator Bingaman. No.
The Clerk. Mr. Kerry?
The Chairman. No by proxy.
The Clerk. Mrs. Lincoln?
The Chairman. No by proxy.
The Clerk. Mr. Wyden?
The Chairman. No by proxy.

The Clerk. Mr. Schumer?

Senator Schumer. No.

The Clerk. Ms. Stabenow?

Senator Stabenow. No.

The Clerk. Ms. Cantwell?

Senator Cantwell. No.

The Clerk. Mr. Nelson?

The Chairman. No by proxy.

The Clerk. Mr. Menendez?

Senator Menendez. No.

The Clerk. Mr. Carper?

The Chairman. No by proxy.

The Clerk. Mr. Grassley?

Senator Grassley. Aye.

The Clerk. Mr. Hatch?

Senator Hatch. Aye.

The Clerk. Ms. Snowe?

Senator Snowe. Aye.

The Clerk. Mr. Kyl?

Senator Kyl. Aye.

The Clerk. Mr. Bunning?

Senator Bunning. Aye.

The Clerk. Mr. Crapo?

Senator Crapo. Aye.
The Clerk. Mr. Roberts?
Senator Roberts. Aye.
The Clerk. Mr. Ensign?
Senator Ensign. Aye.
The Clerk. Mr. Enzi?
Senator Enzi. Aye.
The Clerk. Mr. Cornyn?
Senator Cornyn. Aye.
The Clerk. Mr. Chairman?
The Chairman. No. The clerk will tally the roll.
The Clerk. Mr. Chairman, the final tally is 10 ayes, 13 nays.
The Chairman. The amendment does not pass.
Senator Menendez, are you next? Is that correct?
Senator Menendez. Yes, sir. Yes, Mr. Chairman.
The Chairman. You are recognized.
Senator Menendez. Mr. Chairman, thank you. Mr. Chairman, I have amendment D-2, as modified, to your mark and I believe it has been distributed to all members, as well as that we gave an advance copy of this modification to both sides earlier and it is something I hope the Chairman can accept by voice vote.
This modified amendment basically looks at the plight that some urban hospitals are highly dependent on Medicare payments, because they serve high proportions of
Medicare patients; but unlike many otherwise similar hospitals, they do not receive any special add-on payments, payments for indirect medical education or disproportionate share hospitals.

They primarily face three problems. They suffer greater losses as a result of caring for more Medicare patients; they cannot make up for Medicare shortfalls with payments from commercial payers; and, they do not receive mitigating payments, as I mention above.

So what we are doing here is offering a modified amendment that seeks to study the situation. Under my amendment, the Secretary would be required to conduct a study to determine whether or not a special add-on payment should be afforded to a select group of hospitals designated as urban Medicare dependent hospitals.

These hospitals across the country have simply fallen through the cracks of the Medicare payment system and the proposed study would shed some light on it to determine what is the appropriate way to deal with them, and hope the Chair and the Ranking Member can accept it by a voice vote.

The Chairman. Thank you, Senator. You make a good point. Clearly, this is an area where there are no additional payments or adjustments under PPS in certain areas and I think it is only appropriate to conduct a
study to see the degree to which that is fair and appropriate. On the face of it, it sounds like it is. I accept the amendment.

If there is not any further discussion, the amendment is adopted.

Any further amendments? Any further discussion for the amendments? Senator Grassley, home health; Senator Roberts, home health. We have a list here of amendments.

Mr. Roberts, are you ready?

Senator Roberts. No. I have already voted yes, Mr. Chairman. I am sorry. I am giving you a hard time. I am really not ready with the amendment, so if we could skip over that.

The Chairman. Senators, here is your chance. Here is your opportunity to jump on. Senator Ensign?

Senator Ensign. It is number D-6, Ensign amendment, as modified. We gave it to both sides quite a bit earlier.

The Chairman. Thank you.

Senator Ensign. While the clerk is passing it out, let me just describe the amendment. This is the amendment that I mentioned earlier. It is a very simple amendment.

I believe that most seniors would agree that taking money from the Medicare program to pay for other
programs, especially when the Medicare program itself has serious solvency problems, and this money would be used to fund huge expansions in other health care programs, I believe that most seniors and those who are disabled, who are dependent on the Medicare system, believe that that would be wrong.

My amendment will ensure that if there are any Medicare savings in the bill, then those savings will be kept within the Medicare program itself.

We need to protect and improve the Medicare program for the more than 45 million seniors and disabled people across the country who depend on Medicare for their health care needs.

Unfortunately, the Chairman's mark achieves about $379 billion in Medicare savings and uses it to create additional entitlements. That was already, even through Medicare Advantage, we talked about that this morning. There were people who argued that the savings or the money from Medicare Advantage would go into other programs.

Mr. Chairman, we all want health reform. I believe very strongly that our country needs serious comprehensive health care reform. But taking money from Medicare to fund a new entitlement program is simply not the solution, especially when Medicare's piggybank has
almost run dry.

There is no question, judging by the current state of the Medicare trust fund, that the program's long-term financial stability is in serious jeopardy. A recent Medicare trustees report projects that the Medicare trust fund will be insolvent in the year 2017, two years earlier than was projected last year.

This poses a serious threat to the viability of a program that is expected to cover almost 60 million people by the year 2018. In all, Medicare Parts A, B, C and D have $46 trillion, $46 trillion in unfunded liabilities, and this number grows larger every year.

If we keep Medicare savings within the Medicare program, we could use the savings to improve the current program for seniors. We could also use the savings to begin to reduce the tremendous unfunded liabilities that currently exist.

For example, if we were redirected the $379 billion in Medicare savings into the Medicare Part A trust fund, 27 percent of the 75-year unfunded liability could be eliminated and the Medicare Part A unfunded liability would decrease by almost $4 trillion. In addition, we could push back the date of insolvency for the Medicare trust fund for five years.

Mr. Chairman, I strongly believe that we should fix
our current entitlement programs before funding new programs. We have a responsibility to the working people of American and to future generations to spend carefully and wisely.

Mr. Chairman, the financial difficulties facing Medicare are not insurmountable. My amendment is a step in the right direction and is necessary to maintain the long-term solvency of the Medicare program, and I urge my colleagues to support this amendment.

The Chairman. Senator, I have several documents here. I have your original amendment. I also have your modified. I wonder if you would be willing to go back to your original. Then I would accept your original.

Senator Ensign. Actually, I want the modified in, where it says "no reductions to Medicare outlays may be utilized to offset any non-Medicare outlays."

The Chairman. How about if we modify the modification to say "no reduction to Medicare outlays may be utilized for any non-Medicare outlays?"

Senator Ensign. Say that again.

The Chairman. "No reductions in Medicare outlays may be utilized for any non-Medicare outlays." Then I accept it.

Senator Ensign. The problem is that a lot of the benefits that folks have even talked about earlier today
is Medicare Advantage, when they said they are not
cutting benefits in Medicare, that is because they do not
consider some of the benefits in Medicare Advantage to be
Medicare benefits.

That is why we talked about the devil is in the
details and that is why I think that the language that we
have here is the proper language.

The Chairman. One question comes to mind, whether
your Medicare savings would be counted in the budget at
all, because the amendment seems to question that,
whether they would be counted in the budget.

Senator Ensign. Within this bill, it says that if
Medicare savings stay within the Medicare system, it
preserves the $379 billion. Instead of going to other
programs, it preserves that money for Medicare.

That is the intent of the amendment. That is the
simple language. It is barely even a full sentence. It
is that simple. It says the Medicare savings within this
bill should be preserved for Medicare.

The Chairman. Well, there is a technical question,
because even though the effect of this legislation will
not reduce beneficiaries' payments, and it is clear it
will not, and even though the effect of this legislation
will extend this all to the trust fund, it is clear that
it will, technically, there is a question, if you read
it, which any reductions in Medicare outlays will be
utilized any place else in the budget, even though we are
going to achieve savings and even though the trust fund
is shored up and is more solvent.

I understand your intent. Your intent is to make
sure that Medicare is preserved and that the trust fund
is preserved. This legislation does that. I just do not
want to be too technical about this, but just
technically, there could be some instances where some of
the savings in the short term could go elsewhere, even
though Medicare is --

Senator Ensign. Right. But this is not a small
amount of money. This is not technical. First of all,
it is conceptual language. We have all agreed on that.
This thing would have to obviously be written into the
legal language.

But the point is that Medicare savings should not
offset other entitlement program spending. In other
words, you are saving money here in Medicare. That money
then gets spent over in other programs and to make this
bill deficit-neutral, they call that offset.

That is what we are trying to say is that the
Medicare savings should not offset spending in other
areas. Medicare savings should stay in Medicare and be
used to preserve the solvency of Medicare. It is a very
simple amendment.

The Chairman. So what programs do you propose be cut here because of the effect of your amendment?

Senator Ensign. I am not proposing any. That would be up to the committee as a whole. The $379 billion should not be directed to funding new entitlement programs.

In this bill, there are savings in Medicare of $379 billion. Those savings are going to fund other entitlement programs, and the expansion of other entitlement programs. What I am trying to do with this amendment is to say that is unacceptable.

Medicare savings should go back into Medicare. We should save that money and put it back into preserving Medicare, because we all agree the biggest health care problem in this country is the Medicare trust fund. It is going to bankrupt the country. So we need to save Medicare with this.

The Chairman. Senator, well understandable, but you really do owe the committee a sense of -- just rather than saying that anything that is spent on non-Medicare things should be eliminated, give us some sense.

We do not have to decide what would be eliminated, but we ought to have some sense of what you are talking about.
Senator Ensign. This basically goes to this huge amount of money that is going into Medicare.

The Chairman. You already used that three times.

Senator Ensign. But what I was going to say, with that huge amount of money, we should, as a committee, come up with -- if you want to expand it. That is why I have been saying all along that you really cannot afford to do some of the things that --

The Chairman. Just give us an example. Just give us some example. Make it a real amendment. Give us an example.

Senator Ensign. You cannot afford what this committee is saying. In other words, you are paying right now for all these expansions of entitlements on the backs of seniors, and I am saying let’s not do that, because Medicare, in and of itself -- we are going to make the situation worse, because we cannot use the savings from Medicare to fix Medicare in the future. That is a problem.

Senator Bingaman. Mr. Chairman?

The Chairman. Senator Bingaman?

Senator Bingaman. Mr. Chairman, let me just ask staff, if I could. Ms. Eisinger, I think, might be the right person to ask.

As I understand it, the Medicare funding reductions,
the growth in Medicare would not grow as much in the
future under this bill, if this bill becomes law, and the
savings that we are talking about there accrue to the
Medicare trust fund, as I understand it. Is that right?

Ms. Eisinger. I can speak to the Medicare Part A,
which includes hospitals, some home health, some --

The Chairman. Ms. Eisinger, could you get closer
and speak up, please?

Ms. Eisinger. Certainly. I can speak to the
Medicare Part A, which relates to hospital care, some
nursing home, some home health and so forth. That money,
that is about $200 billion or so in cuts, that all does
stay within the Medicare Part A trust fund.

My colleagues would have to answer on the Part B
side on the general revenue aspect and I think that is
where some of the confusion lies in this amendment.

Senator Bingaman. But the Medicare trust fund does
obtain the savings that are being generated from
reductions in programs funded by the Medicare trust fund.
Is that right?

Ms. Eisinger. Correct.

Senator Bingaman. So the savings are not being in
any way taken out of the Medicare trust fund and being
used elsewhere in the budget.

Ms. Eisinger. No, just spent out more slowly. So
the obligation is reduced.

Senator Bingaman. So that the ability of the Medicare trust fund to remain solvent will be extended for several years by virtue of the action we are proposing to take in this legislation. Is that right?

Ms. Eisinger. That is right, hence the reason that the actuaries at CMS projected this would extend solvency, this package of provisions, by roughly four to five years, from 2017 for an additional four to five years, because the obligations on the trust are reduced.

Senator Bingaman. Thank you.

Senator Ensign. Ms. Eisinger, just common sense-wise, if we are spending the money, we know we have to -- it is called an offset. It is offsetting the spending in the program.

If we are taking money basically out of Medicare and we are spending it in other places, there is going to be whether financial pressures, whether it is hospitals, other kinds of providers to either, one, cut benefits; two, quit providing Medicare services to seniors in the future, and whether or not the folks over at -- that are responsible for analyzing the Medicare trust fund, whether or not they say it pushes it out in the future, is it not true, also, though, if you are taking money out of this system, that the potential for more and more
people to stop participating in Medicare exists?

Ms. Eisinger. This is where it gets a little bit complicated, but I think we need to distinguish between reducing spending and whether spending will continue to increase in terms of growth for these providers.

So as I think Senator Bingaman said, by reducing the Part A obligations, it reduces down the rate of growth, but that does not mean that spending is not going to continue to increase for each of these providers over time.

Senator Ensign. Well, I know, but we were accused for years of cutting Medicare spending by slowing the rate of growth. The other side accused us of cutting Medicare because we reduced the rate of growth.

So we need to talk apples with apples, just the same as the other side used to talk about. The bottom line is this is savings from Medicare and because of medical inflation, things are getting more expensive, we understand, medical inflation is faster than normal inflation, that there will be pressure to decrease benefits.

We are already seeing more and more health care providers take fewer and fewer Medicare patients. That is happening every year. If the money is not there -- what I am saying is if the $379 billion is not there for
Medicare, then there is going to be more and more pressure put on health care providers to provide less services and fewer and fewer people are going to take Medicare patients.

Senator Bingaman. Mr. Chairman?

The Chairman. Senator Bingaman?

Senator Bingaman. I think there is a basic disagreement here and I think it is a misunderstanding on the part of the Senator from Nevada. There is no money coming out of the Medicare trust fund as part of this legislation.

What we are doing is achieving savings in Medicare, which then, for purposes of the congressional unified budget calculation, are used as offsets. But that does not mean money is coming out of the Medicare trust fund and being used for other purposes. It is just not.

So I do not know how to say that more clearly. You just said just the opposite, that it is coming out of the Medicare trust fund and being used for other purposes. It is not.

Senator Ensign. No. I said it is coming out of Medicare. There is Medicare savings. There is Medicare savings in this bill of $379 billion. If the money is not there, it is not there to fix, because it is not just the Medicare trust fund. It is spending on Medicare.
The Chairman. Let me try to make the same point. We have got a trust fund over here, the Medicare trust fund. How is the Medicare trust fund financed? Payroll taxes. Money from payroll taxes goes into the Medicare trust fund.

What dollars come out of the trust fund? Well, dollars that go to pay beneficiary payments. That is the trust fund. That is over here.

Over here, we have the Medicare program; that is, providers, Part A, Part B, we have got C, we have got D, I do not know how many more letters we are going to have, that is Medicare.

Medicare costs are going up. Costs for all of us are going up. Costs for the country are going up. So this legislation reduces the rate of growth of Medicare costs.

Now, that helps the trust fund, in effect, add dollars to the trust fund, in effect. Why? Because Medicare payments are being reduced from what they otherwise would be. It does not cost Medicare as much; same benefits, same procedures, same everything, but it just does not cost Medicare as much.

So it is true that providers are not going to get the same dollars they were getting earlier, savings that they, by and large, all agreed to and they agreed to it
because they know that with universal coverage, they will have more volume.

They may lose some places, they make up on volume and they have agreed to it. But those are savings that, in effect, accrue to the trust fund and extend the solvency of the trust fund.

So when somebody says we are cutting Medicare, it is true that there are savings in providers' payments. It is true that there are savings in payments that Medicare pays to providers. That is true.

But it is also true that the effect of that is to extend the life of the Medicare trust fund, because those costs that hospitals otherwise pay to seniors and so forth are less. So the cost to the Medicare trust fund is next.

So let us just keep those two concepts totally separate. And the slight problem I have here, just to be totally honest, is it is true that some of the savings, for unified budget purposes, will be used for other purposes, maybe for universal coverage, let us say. That is true. That is true. You cannot deny it.

But we are not hurting Medicare beneficiaries. We are helping Medicare beneficiaries. If we want to help Medicare beneficiaries, in a sense -- now, this is two or three steps removed, I grant you -- we would like to have
universal coverage, so Americans have health insurance, because that is going to also help extend the life of the trust fund, because people have health insurance and, over the long run, they will not be needing as much emergency care. It also helps hospitals because of lower uncompensated care, for example.

So to be totally candid and honest about this, I understand, on the surface, it sounds like this amendment is a good idea, because we want to make sure Medicare savings go back into Medicare, but the implication of the amendment is that by the failure of this amendment, it is going to somehow hurt Medicare, it is going to somehow hurt beneficiaries, and the exact opposite is actually true.

I am not impugning your motive, but just saying that is the practical effect. So that is why, frankly, if we are totally candid with ourselves, we are not trying to score political points and we are not trying to play with seniors and cameras and all that kind of thing.

I do think that the practical or better approach is to be candid with ourselves and realize that the savings are not hurting Medicare, they are not hurting beneficiaries.

Senator Ensign. Two points. The way that they could hurt beneficiaries, I made this point earlier, but
it is if you take money out of the Medicare system, the
spending out of the Medicare system, whether it affects
the trust fund, which is just an accounting gimmick
anyway, because we all know there is no money in the
Medicare trust fund. It is just a way of accounting for
funds.

If you take the future spending out of Medicare,
which Medicare already pays less than market rates, you
do two things. One is -- you encourage more and more
providers to stop taking Medicare and two is that you do
more cost shifting to the private sector, because
Medicare is already a 20-30 percent cost shift from
Medicare/Medicaid to the private sector.

If you are decreasing the reimbursement rates for
providers in the future, the low market rates, you are
going to, in effect, do more cost shifting to the private
sector.

The Chairman. Well, let me say this. Despite what
I just said, my assertion that this has potential adverse
budgetary effects, I have just now been informed by CBO
it has no budget effect.

So I suggest we adopt the amendment.

Senator Ensign. As long as we have a roll call,
that would be fine.

The Chairman. Fine with me. The Senator wants a
roll call on the amendment. I suggest we adopt the amendment, accept the amendment. Do you still want a roll call? The clerk will call the roll.

The Clerk. Mr. Rockefeller?
Senator Rockefeller. Yes.
The Clerk. Mr. Conrad?
Senator Conrad. Aye.
The Clerk. Mr. Bingaman?
The Clerk. Mr. Kerry?
The Chairman. I guess he passes, too.
The Clerk. Mrs. Lincoln?
The Chairman. Pass, I guess.
The Clerk. Mr. Wyden?
Senator Wyden. Aye.
The Clerk. Mr. Schumer?
The Chairman. Pass.
The Clerk. Ms. Stabenow?
Senator Stabenow. Aye.
The Clerk. Ms. Cantwell?
Senator Cantwell. Aye.
The Clerk. Mr. Nelson?
The Clerk. Mr. Menendez?
The Chairman. Pass.
The Clerk. Mr. Carper?

The Chairman. Pass.

The Clerk. Mr. Grassley?

Senator Grassley. Aye.

The Clerk. Mr. Hatch?

Senator Hatch. Aye.

The Clerk. Ms. Snowe?

Senator Snowe. Aye.

The Clerk. Mr. Kyl?

Senator Kyl. Aye.

The Clerk. Mr. Bunning?

Senator Bunning. Aye.

The Clerk. Mr. Crapo?

Senator Crapo. Aye.

The Clerk. Mr. Roberts?

Senator Roberts. Aye.

The Clerk. Mr. Ensign?

Senator Ensign. Aye.

The Clerk. Mr. Enzi?

Senator Enzi. Aye.

The Clerk. Mr. Cornyn?

Senator Cornyn. Aye.

The Clerk. Mr. Chairman?

The Chairman. Aye. Senator Bingaman is aye by proxy. Senator Lincoln, aye by proxy. Senator Carper,
aye by proxy. Mr. Menendez, aye by proxy. Mr. Schumer, aye by proxy.

The Clerk. Mr. Chairman, the tally is 22 ayes and one pass.

The Chairman. Thank you. The amendment passes.

Senator Cornyn, do you have an amendment?

Senator Cornyn. Yes, Mr. Chairman. Thank you very much. This is Cornyn amendment D-6, which would strike the Medicare Commission in Title III, Subchapter E of the Chairman's mark.

As you know, the Chairman's mark would establish an independent Medicare Commission to develop and submit proposals to Congress, aimed at reducing Medicare spending. The commission would submit proposals to Congress starting in 2013.

Rather than making tough decisions about how to pay for new spending now, this proposal would delegate to the commission broad spending reduction powers beginning in 2013.

Mr. Chairman, I think the best example of why this will not work is the physician payment formula that we revisit it seems like almost on an annual basis, where Congress has repeatedly acted to prevent the sustainable growth rate and preventing reductions from going into effect.
The same mark also includes a new commission, interestingly enough, to achieve spending reductions. It also includes the SGR spending reduction target. The CBO seems to agree with the concerns addressed by my amendment when it says "These projections assume that proposals are enacted and remain unchanged throughout the next two decades, which is often not the case for major legislation."

For example, the sustainable growth rate mechanism for governing Medicare's payment to physicians has been frequently modified to avoid reductions in those payments. In fact, I believe, if my memory serves me correctly, only on one occasion have we failed to reverse the cuts in the physician payment under the Balanced Budget Act.

While this commission would be modeled, in many ways, after the expertise of the Medicare Payment Advisory Commission, MedPAC does not always get it right either. As the Wall Street Journal reported, the Medicare Payment Advisory Commission created by Congress in 1997 has recommended more than $200 billion in cost cuts in the last year alone, which lawmakers have ignored.

Some may say we should not have ignored those, but indeed they are our responsibility and we should be held
accountable. The Medicare Commission has also raised significant concerns among provider groups, like the American Medical Association, because it would bestow unprecedented power on an unelected board over health care financing for the entire country.

The Medicare Commission essentially allows Congress to spend money now, but avoid responsibility of determining how to pay for that spending. So I would urge my colleagues to support my amendment to strike the Medicare Commission.

The Chairman. Senator, are you finished?

Senator Cornyn. Yes, sir.

The Chairman. All right. I understand this amendment has a $23 billion effect. Is that correct, Senator, do you know? $23 billion, CBO says.

Senator Cornyn. I believe that is correct.

The Chairman. I personally believe that this commission is very important. There are different versions of this commission. Different Senators have different ideas of how it should be constituted, but in the main, I think it is very, very important, this commission.

Why? Basically, it is one of the two or three or four ways in this underlying bill that can begin to get some handle on the rate of growth of health care costs in
this country. It also helps us say and CBO to conclude
that this is budget deficit-neutral over 10 years.

There has been a lot of talk about bending the cost
curve, bending the growth curve, and, clearly, we have an
obligation here in 2009 to pass legislation that begins
to lower the rate of growth of health care spending in
our country. We have no option but to try to do that in
a fair, firm, common sense way.

We know that about every 30 seconds, someone goes
bankrupt in this country due to medical costs. We know
that about 1.5 million homes are lost every year to
foreclosure due to medically-related costs. We know that
health care is becoming an impossible cost of doing
business for most American companies.

We know if the Medicare trust fund is going to be
insolvent, everybody says, by 2017 and the same with
states' Medicaid budgets, they are just going through the
roof, we have got to figure out a way to control costs in
a fair, balanced way.

I do believe that too often Congress has a hard time
saying no to providers. Providers come in and say,
"Well, gee, we do not agree with this update. We need
more." I could name all kinds of providers who have come
here and any Senator on this committee can name that many
more, and I do think it makes some sense to have some
kind of a check here to help members of Congress do the right thing.

By that, I mean, have in law mechanisms that do fairly and in a balanced way start to reduce the rate of growth in health care costs in this country, and the provision in this bill, I think, fairly does that and there is a balance here.

The question is how much do you want another entity to make these decisions and how much do we want members of Congress making these decisions. That is a fair question and one could say only members of Congress and there should be no outside entity that makes these decisions or one could go the other direction and say only an outside entity can make these decisions.

As we know, there have been many references to BRAC, the Base Realignment and Closing Commission, which was established not too many years ago. Why? Because we, Congress, just want to protect our own military installation in our state. We just could not let them go, even though they are inefficient and, in the interest of national security, probably should be closed or relocated or something.

So we set up this BRAC Commission where we could vote yes or no depending upon the BRAC Commission's recommendations. By and large, that has worked. By and
large, that BRAC process has worked. And why has it worked? It has worked because the commission has done a really good. They have been all around the country.

I have gone to two or three BRAC Commission meetings. I am, just like everybody else here, trying to defend the military installations in my state and I go to them, talk to them, give best case, and, as every member of the House and the Senate does to protect his or her military installations in his or her own district or state.

But BRAC has ruled and, frankly, they ruled against my state in one very significant case and I accepted it, because I thought that was a very fair process. That is pretty much what this Medicare Commission is going to be doing, too, in my judgment.

It is going to be very careful. It is going to look at different providers, look at different efficiencies, look at different productivity growth in different provider industries, see kind of what makes sense here and what is right.

To be truthful, I was astounded to learn at one of our roundtable discussions over in Finance Committee when I learned that when we do this updates, we do not take productivity into account. Over the years, we just give the same increase, basically, a kind of cost of living,
but we have not taken productivity in the case.

So really updates could be a little bit less than they otherwise would be, because with productivity, entities become more efficient, hospitals, et cetera, and this is the kind of thing that this MedPAC Commission would do.

Well, we have a mechanism in here that gives us a check, Congress a check. If we think this cost has gone off the deep end, they have made mistakes, hey, they are a rogue outfit, a rogue agency, then there are provisions in here for a congressional vote to check that.

Now, you might say the requirement of extraordinary vote is too tough. That might be. That is debatable. But I do think that it does make some sense to set up an institute like this.

CBO says this is going to help bend the cost curve. CBO says if this is out of here, forget it. CBO says if this is deleted, this provision -- I know I am saying this, I have not talked to CBO about this, but I will bet you dollars to donuts that they would say we are not going to bend the cost curve in 10 years, they will conclude it is negative, not positive for us, but negative.

This is one of these ways, it is kind of something new, but I think something in our American system, given
what we have in America, it is a wonderful system, it is partly public, it is partly private, so forth, about half and half, basically, that keeps pace with that balance by setting up a public outfit, but with a private check, or an Executive Branch outfit with a congressional check. So we would work for our people back home, representing them, we could check them.

So I just really believe very, very strongly that this provision that we have in the market is basically a no-brainer. That is my personal belief, that this is just so important to help set the stage, to help reduce the rate of growth of spending in this country. Because do you know, otherwise, what is going to happen?

Otherwise, I will you this is what is going to happen. Spending is going to keep growing so much that pretty soon, all these calls for entitlement commissions are going to start to sound a lot more attractive. Then they are going to be whacking Social Security benefits, they are going to be whacking Medicare benefits.

We are going to be really crude about this stuff because we have to, because the insolvency is coming so close. I just think nothing is easy in life and this is really one of those difficult areas, but you have got to be smart about it and do what is right, and I think the right thing to do is to have this kind of a commission to
help us get control of our costs.

It will not be perfect. Congress will meet next year. We can make adjustments. We can see how it works and so forth. But if this is in place, it is going to send a signal to the country, a signal to all providers that, hey, we have got to even more get our act together; we have got to be a little more efficient; it is not business as usual. I think that has a very salutary effect on health care reform in this country.

So I just do believe that we should not adopt this amendment.

Let me recognize Senator Rockefeller.

Senator Rockefeller. I feel that strongly and more strongly against this amendment, but not so much against this amendment as I am for the Medicare Advisory Commission.

I think this is probably the most important argument that we will have, which means it will probably go on for three hours instead of one. But we have to learn how to discipline ourselves. I am not going to embarrass anybody over there or anybody over here by asking how much time they spend studying the intricacies of Medicare reimbursement rates to different hospitals, to different doctors in different parts of the country, rural, urban.

I am not going to do that, because I think the
answers would be a very high percentage of their time.

It is not very often that a new idea like this comes
along, which is not new, because it was established by
the Republicans in 1997, but was given no authority to do
anything.

In other words, the Republicans understood that
Medicare was on a path to get out of control and that you
did not just solve that by figuring out reimbursement
rates, but you had to solve that, which is very, very
complicated, which most of us are not competent to do,
but, nevertheless, be more competent to do and do do and
usually do not do very well, which is why we are where we
are today.

But they also look at something which most people do
not want to look at, because it is hard, it is cerebral,
and that is outcomes research. This MedPAC Commission or
whatever you want to call it, and Chairman Baucus and I
disagree a bit on its format, that is not the point. The
point is to defeat your amendment so it remains alive in
some form.

We have to look -- and I would appreciate it if my
colleagues would listen. I would appreciate if my
colleagues would listen, particularly on the Democratic
side over here.

I think there is a turning point for health care. I
think there is the future of health care. This is the
discipline that we are going to have to face up to in
health care in the future, which we do not have today,
and it is not just about reimbursements.

Yes, it is about the lobbyist comes in to see you
and brings in a client from your state, knowing that you
are producing a certain amount of durable medical
equipment or your lower back surgeon, the thoracic
surgeons or ophthalmologists want to get more
reimbursement, or your hospitals or whatever, and it is
very hard to say no.

I am sure the Senator from Texas is very good at
saying no. I am not going to do that. But they get to
see you. So it is a question of who gets to see you and
that really is the way a lot of these decisions are made,
because they are made collectively by people who were all
going about it in the wrong way.

That is not to say that they do it with malice.
That is not to say they do it with greed, although some
do. It is saying that they do it without a disciplined
system, which is both cerebral and far-looking and
accurate in content.

So they have to be given the money to look at
outcomes. Who of us are going to be able to sit here and
explain how to really do a good outcomes, research-based
reimbursement policy so that a hospital on the lower western side of West Virginia, which is about the same as a hospital on the higher western side of West Virginia which is doing a much better job on outcomes because they have a tougher administrator and he is making really good decisions, that that administrator gets rewarded with a higher reimbursement rate because he is not maybe making as much money, because he is being very efficient.

You have to recognize these things and it is the future of health care. Analysis, hardcore professional, non-political, non-monetary-based, I say carefully, decision-making is the future of a health care system which works.

It is called saving our health care system. It is not called messing it up. It is called saving it. We are the ones who are, in large part, as Congressmen and women, responsible for giving it all of its difficulties, because we are making ad hoc decisions -- I so firmly believe this -- we are making ad hoc decisions based on friendships, based upon counties.

I want to say that West Virginia is one of the four poorest states in the country. Therefore, I have got this special passion which comes when it comes to reimbursement of our pediatricians or our geriatricians. I do, also, incidentally, looking out to the future, use
geriatricians as a example and I have in the last couple of days in this setting.

People train geriatricians, medical schools train geriatricians and they get trained, they do their residencies, they go into practice, they make almost no money, they make almost no money for two years, and then go off and get into a specialty and leave geriatrics, when that is the part of the population which we have got to pay attention to.

So we do not discipline ourselves. We do not discipline the system. We do not discipline how we do reimbursements. We are not tough enough on hospitals or we are not gracious enough toward hospitals that are really doing it.

I had 15 hospital directors, I mean big-time, I felt like I almost had to stand during the meeting, they were so big-time. Johns Hopkins was one of them. They were in to see me, to lobby me on getting rid of this MedPAC advisory concept so they could go about the good work they were doing.

I had just come back from a very long meeting of something and I was in the mood to really let them have it and I let them have it and I was on the side of virtue of rectitude. You know what? When they left, I had switched a lot of their minds, and they told me that,
because they know what they are about. They know how to come to Congress with it. They know how to put pressure on us.

I will tell you, when some of these hospitals and some of these physicians' group come into your office with their lobbyists or your former colleagues who hold fundraisers for us and all the rest of that kind of stuff and you say, "I am sorry, I have got other things I have got, I cannot help you," we do not do that. We accommodate them, for the most part.

Now, you join with me, please, in the discipline of thinking about what is the worst way to making a decision about how you shape the future of health care. What we need to do is to have this commission, whatever you want to call it, and give them the resources and the authority, which they do not have now.

Of course, they advise what we ought to do, but they have no authority, so we do not listen them. We do not listen to them. This was a Republican idea in 1997. It was good then, it is good now. But they have no authority. They have no power. They have no resources. They have no staff.

I mentioned to one of these hospital people, "Well, would Gail Wolensky be a real big threat to you," because they say, "Oh, you are going to fill it up with
ideologues," either to the right or to the left or whatever, going to fill it up with ideologues.

And I say, "Well, what about Gail Wolensky?" Gail Wolensky is a Republican who has been on MedPAC before, and I respect her greatly. She is good, she is tough. She could care less about what lobbyists think. They will not dare go into her office, because she will pitch them right out of the second floor. But they probably will not have a second floor, they will probably just be on the first floor, because they will not be that big.

But the point is she is smart, she is tough, she is experienced, she is un-ideological, she is a professional. That is all she thinks about. We might have to expand them from five to 15. I do not care about that. That is small money compared to if we can actually take a whole system and discipline it and really get into this business of outcomes.

That really is, Senator Cornyn, that is the future, who is performing and who is not, no matter what part of the reimbursable field you are talking about, hospitals, doctors, whatever.

They have these groups out there now, and Senator Snowe's colleague, Susan Collins, has a brother-in-law who has one of the best in the country in Charleston, West Virginia, lives two blocks from me, and it is sort
of a quality assurance. It is a how you get to quality.

These thing are all over the place, but they are not
national, they are local. They are specialized. They
are Brookings. People read their papers or do not read
their papers. This is a built-in system which is part of
us, we are part of them.

I would not have a congressional vote at all. The
Chairman would have a congressional vote, and I probably
will not fight to the death with him on that issue. I do
not think I will anyway.

But I know the idea is right and I know the idea is
the instrument to improve health care delivery in this
country in a fair way by professionals who do it all the
time and who have the knowledge and who are not guessing
and who send people out all over the country to find out
the geographic variations and what about a little bit
more for geriatricians, a little bit more for primary
care physicians.

They have that power to do that. So does the CMS
director have the power to do that. But I think if you
are talking about preserving the trust fund in 2017 from
beginning to decline, this is your instrument. This is
your friend, Senator Cornyn.

This is what is going to take a huge state like
Texas, which is going to get a tremendous amount of money
no matter how you look at it, and divide that money to
reward those who are doing the best, discipline those who
are not, encourage those who are not, but who are on the
cusp of, because they will know. They will know.

So I strongly oppose this amendment and I hope that
some of my colleagues will speak.

The Chairman. Senator Grassley?

Senator Grassley. In the group of six, we were
talking about the commission work and I think we were
looking favorably at it, but it was kind of a question of
just how far you go and what Congress has to do with it.

Beyond that, what we were thinking in terms of using
it for a short period of time. Now, I see the Chairman
has modified that or at least -- I guess we did not have
anything to modify, but at least modification from what
we were talking about, that this will not sunset at 2019.

I was looking favorably at it from the standpoint of
how would it work and bringing it down to a point of a
future Congress making a judgment whether or not it ought
to be extended when it sunsets.

But now I see in the Chairman's mark it does not
sunset at 2010 and then after 2019, we have this very
solid goal of GDP plus 1 percent. Now, I think we were
all hoping to end up at GDP plus 1 percent, but I am not
sure that I want to turn it over to an arbitrary
commission to make sure that that is where we come out.

Worse yet, if Congress decided, at the year 2019 or sometime in the future, that it ought to be discontinued, I assume that CBO is going to have some budget score that would go with it and if we were going to do away with it, we would have to have an offset.

Maybe staff can correct me on that, but that is the way I read the way things are going. So I think that this is one thing to try it in this 10-year budget window and see how it works and see what it can accomplish and then have Congress at a future time make a designation and move it on.

So I am reluctant to think in terms of going along with the Chairman's mark at this point where it does not sunset in the year 2019. So I am going to support the amendment by the Senator from Texas.

Senator Conrad. Mr. Chairman, in a letter to me and Senator Gregg, the ranking Republican on the Budget Committee, on June 16, about ways to bend the curve in health care spending, the CBO director, who has been much quoted here today, had this to say: "Another way to ensure significant savings in Medicare would be to give the Secretary of Health and Human Services, the administrator of the Centers for Medicare and Medicaid Services or some other governmental entity broad
discretion to make changes in Medicare to produce
savings, but also to impose an across-the-board reduction
in payments to providers if sufficient savings were not
achieved in other ways.

Many experts think that broader discretion for the
administrators of Medicare would help to encourage
innovation and enhance efficiency in any event. However,
the fallback reductions in payments to providers would be
crucial in encouraging providers to accept other changes
in the program instead.

Moreover, as noted above, this mechanism and others
in this section would only be effective in the end if the
Congress let the legislated reduction in payments take
effect."

Mr. Chairman and colleagues, I think everybody on
this committee know we are headed for a cliff. Medicare
is going broke in eight years. The trust fund has
already gone cash negative.

Let me repeat that. The trust fund, the HI, the
trust fund has already gone cash negative. And we are in
the circumstance in which the trustees have told us they
are going to go broke in eight years.

The unfunded liability in Medicare alone is $37.8
trillion. The head of CBO has told us unequivocally that
this mechanism is important to his assessment on whether
or not we bend the cost curve in the right way in the second 10 years.

That is the reason the Chairman accepted my amendment that says we are extended beyond 2019 unless Congress votes affirmatively to stop it, because that is critical to the CBO director giving us the scoring in the second 10 years that we are bending the cost curve in the right way.

For everybody who says they are concerned about our seniors, and I believe every member of this committee is, for everybody that says we are on a course that is unsustainable, and I believe everybody on this committee knows we are, this is one of the three key elements that the budget director has told us has got to be part of a package for him to be able to say to us we are bending the cost curve in the right way.

So I would urge my colleagues to support the Chairman on this amendment.

The Chairman. Senator Cornyn?

Senator Cornyn. Mr. Chairman, I appreciate the passion with which the Senator from West Virginia speaks about this and others and I think I understand his point. But my hope is that our future would embrace the courage to make tough decisions ourselves rather outsource them to an unelected, unaccountable body.
I might add that the record of our having embraced these kinds of automatic cuts is not good. Six out of seven times that the Balanced Budget Act imposes a cut in the sustainable growth rate, we have overridden it and there is nothing in this legislation that would prevent Congress from coming back and overriding it again.

I agree that we need to find a way to bend the cost curve and, indeed, this bill does include very salutary provisions with regard to delivery system reforms, seeking value rather than volume and realigning incentives and the like.

But we have an experience to demonstrate that this kind of outsourcing of our responsibilities ultimately is an undependable way to bend the cost curve, because, of course, as the CBO said, Congress -- the assumption is these projections remain unchanged.

In other words, the proponents of this legislation want to spend $756 billion in new entitlements, create a new entitlement, and cash that savings now that comes from this MedPAC on steroids provision, when experience tells us that this Congress will, in responding to concerns like our physician providers and draconian provider cuts, will come back and revisit those, indeed, and reverse those.

I would just suggest that BRAC is not an analogous
situation, because it does not have to do with spending
by health care providers. It is not analogous. And I
would just say to my colleague and friend from West
Virginia, when you talk about joining the spending
decisions with decisions about outcomes, it reminds me of
some of the concerns that we have heard about comparative
effectiveness research and how this would be used as a
tool for rationing and how government rather than
physicians, making decisions in the best interest of
their patients, would determine who gets what care,
because it would determine who gets compensated for that
care and who does not.

This is really at the heart of some of our concerns
about rationing and the abuse of comparative
effectiveness research, which could be used for a good
purpose, but which, in the hands of unelected,
unaccountable bureaucrats, could also be abused.

So I agree with the Chairman that our entitlement
spending is out of control. I agree with the
distinguished Chairman of the Budget Committee. This
bill does nothing to fix that. Indeed, it makes it
worse, and this provision, which provides a fig leaf,
with all due respect, which is also subject to being
abolished at a later time, so the budgetary assumptions
upon which we are acting may prove, as the CBO has
indicated, not sustainable, because Congress can always come back and change it later on.

The Chairman. I see a vote has begun, two votes.

Senator Enzi. Mr. Chairman, could I ask just one quick question to staff based on what Senator Grassley said that I want to clear up?

The Chairman. Sure.

Senator Enzi. He talked about the requirement in there, the GDP plus 1 percent. What would have happened if this would have been in effect, say, 18 months ago and then we had the downturn in the economy? Would there have to be even more drastic cuts in order to meet that requirement?

Mr. Dawe. I think the intent of the provision is to have GDP be modeled out over a number of years to smooth out ups and downs in the economy, so perhaps a five-year rolling average of GDP.

Senator Enzi. So you are saying it would have no effect.

The Chairman. It deletes the provision of the bill.

Senator Kyl. I had the same question. Sorry, Mr. Chairman. I had the same question. It was unclear when Senator Grassley mentioned that. I am not sure how that formula works and it is not clear from the language.
The Chairman. Mr. Dawe, could you please explain that 1 percent provision in the mark?

Mr. Dawe. The Conrad amendment that modified the mark called for the growth rate to be GDP plus one over the long term. It was written broadly. So the thought would be that it would be defined by half GDP plus one over a number of years to stabilize ups and downs.

Senator Kyl. If I could, excuse me. It just says eliminates the sunset on the Medicare Commission and sets the growth target beyond 2010 at GDP per capita plus 1 percent, period, nothing else said in there.

This may be an illustration of why legislative language is important.

The Chairman. That is what the legislative language would say.

Senator Kyl. So there is no long term, there is no five-year averaging. It just says at GDP per capita plus 1 percent.

The Chairman. That is something that can be addressed either later on today, tomorrow or the next day or so forth. The vote is on. There is a vote on the floor. I suggest we have a vote here.

Senator Carper. Mr. Chairman, could I just have one minute?

The Chairman. Senator Carper, very briefly,
because we have got to vote.

Senator Carper. Just one minute. A thought for my colleagues. If we had not just come through eight years in which we actually doubled our nation's debt, if we had not just rolled up as much new debt in eight years as we had in the previous 208 years of our nation's history, I might be inclined to vote for Senator Cornyn's amendment.

If we are on track this year to run up the biggest deficit we have ever run up in one year of our nation's history, I might be inclined to vote for Senator Cornyn's amendment.

If Medicare were not scheduled to go broke in 2017, I might be inclined to vote for Senator Cornyn's amendment. If there were no provision in the Chairman's revised mark to allow a congressional override, an override which I think might even be described as too easy, if that opportunity for an override were not there, I would be more inclined to vote for Senator Cornyn's amendment.

As it turns out, I am not going to vote for Senator Cornyn's amendment, because we have run up a huge deficit in the last eight years, matching the first 208 years of our nation's history, because we are on track to run up the biggest deficit in any one year this year, and because Medicare is going to go broke unless we do
something.

I have said before I am not going to vote for a bill that does not bend the cost curve. This is one of the biggest ways to bend the cost curve and we need to defeat this amendment.

The Chairman. The clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

Senator Conrad. No.

The Clerk. Mr. Bingaman?

The Chairman. No by proxy.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

The Chairman. No by proxy.

The Clerk. Mr. Wyden?

The Chairman. Pass.

The Clerk. Mr. Schumer?

Senator Schumer. No.

The Clerk. Ms. Stabenow?

Senator Stabenow. No.

The Clerk. Ms. Cantwell?

Senator Cantwell. No.

The Clerk. Mr. Nelson?
The Chairman. No by proxy.

The Clerk. Mr. Menendez?

Senator Menendez. No by proxy.

The Clerk. Mr. Carper?

Senator Carper. No.

The Clerk. Mr. Grassley?

Senator Grassley. Aye.

The Clerk. Mr. Hatch?

Senator Grassley. Aye by proxy.

The Clerk. Ms. Snowe?

Senator Snowe. No.

The Clerk. Mr. Kyl?

Senator Kyl. Aye.

The Clerk. Mr. Bunning?

Senator Bunning. Aye.

The Clerk. Mr. Crapo?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Roberts?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Ensign?

Senator Grassley. I do not have a vote for Senator Ensign.

The Clerk. Mr. Enzi?

Senator Enzi. Aye.

The Clerk. Mr. Cornyn?
Senator Cornyn.   Aye.

The Clerk.   Mr. Chairman?

The Chairman.   No.  Senator Wyden?

Senator Wyden.   No.

The Chairman.   Senator Crapo?

Senator Crapo.   Aye.

The Chairman.   The clerk will tally the vote.

The Clerk.   Mr. Chairman, the final tally is eight

ayes, 14 nays.

The Chairman.   The amendment fails.  Just an

announcement here.  We will stand in recess until 5:00.

We are now surveying Senators to figure out evening

plans.  I tentatively would like to schedule dinner, our

side.  We have got a conflict tonight on the floor.  So I

will try to get word out as quickly as possible.

We will reconvene at 5:00.

[Whereupon, at 4:35 p.m., the hearing was recessed.]
AFTER RECESS

[5:14 P.M.]

The Chairman. The Committee will come back to order.

The next amendment I think will be offered by Senator Kyl. I think it is D-7. Is that the one?

Senator Kyl. That is correct, Mr. Chairman. It is not "as modified." It is exactly as written.

The Chairman. Well, that is good news.

Senator Conrad. Mr. Chairman, Senator Kyl? Could I interrupt for just one minute?

The Chairman. Yes.

Senator Conrad. Can I ask consent, Mr. Chairman, I was out of the room when the Ensign amendment D-6 was offered. Could I be recorded in the affirmative? It would not change the outcome of the vote. In fact, it was a unanimous vote.

The Chairman. Yes.

Senator Conrad. Could I be recorded in the affirmative on that?

The Chairman. Well, we will have to think about that a while.

[Laughter.]

The Chairman. Absolutely.

Senator Conrad. I thank the Chairman. I thank my
colleagues.

The Chairman. Okay. Senator Kyl.

Senator Kyl. Thank you, Mr. Chairman.

This amendment is similar to the Cornyn amendment which was just defeated, but much narrower in scope. It preserves the Medicare Commission in subtitle (e) of Title III, but it eliminates the three paragraphs that specifically provide automatic authority to the Commission in the event that Congress does not act. I will just read the three paragraphs. It is very short, and it gives you a good idea of what would be eliminated from the bill.

"By April 1st of 2014, the Senate Finance Committee, along with the relevant House committees, would be required to report out either the Commission or the Secretary's proposal or an amended proposal that achieves the same level of reductions in excess cost growth."

So there is the first requirement that we would have to meet a level established by this Commission, which I think may raise constitutional questions, but we can talk about that later.

"Second, if the Committee fails to report a legislative package achieving the targeted level of Medicare savings by April 1st, the Commission's or Secretary's package would be automatically discharged
from the Committee." In other words, our failure to act results in an automatic discharge to the floor of these proposals.

And, finally, "If a package that meets the level of savings described above is not enacted into law by August 15, 2014, the Chairman's mark would require the Commission or Secretary's original proposal to go into effect automatically."

That obviously seems very strange. The idea, of course, is that we are just not able to do this on our own, frequently, and, therefore, we will let this Commission do it for us. And our procedures will reflect that fact. That is the language that would be stricken from the bill—or from the mark, rather.

The Chairman. Any discussion on the amendment?

Senator Kyl. Well--

The Chairman. Sorry.

Senator Kyl. Could I make the strong and compelling case for it, Mr. Chairman?

The Chairman. Certainly.

Senator Kyl. It does not take too long. It is actually that compelling.

The first point I would make is this: This Commission will clearly--by virtue of the fact that it is given the obligation to target sources of excess cost
growth--be looking at ways, probably primarily reducing payments to providers, to reduce costs. This could easily have and I believe will have an effect on the care that seniors are expecting to receive under Medicare, primarily from hospitals, doctors, nursing homes, just to name a few.

Now, recognizing that this potential rationing is a problem, the mark contains the language that the Commission would be prohibited from recognizing proposals that ration care. That is a very important acknowledgment. It could have that result. I think about Great Britain's entity--I forgot what we call ours, the Medicare Commission. They call theirs NIHCE, the National Institute for Health and Clinical Excellence. NIHCE has gotten to be not so nice in Great Britain. It does ration care. It bothers people that it does that. And so learning that lesson, we have said that the Commission is prohibited from presenting proposals that ration care.

I like that. The problem is I do not think that that goes far enough, because here is what we are doing. Like some other provisions of the mark, the recommendations end up making the providers do the dirty work. In other words, the Federal bureaucrats would, in effect, reduce the payment to providers, forcing them to
reduce the care, forcing them to delay the treatment or
the scheduling of the American people or whatever it
might be. So it is not the Government directly that is
actually rationing care. No, we would not want to do
that. We cut the providers to the point that they have
to do it instead, and that result is still rationing.
And as far as the patients are concerned, it is still the
same result, but they just blame the providers, I guess,
rather than Congress.

And then the final insult here to our authority, I
think, is that if we do not do—if we do not cut to the
level that this Commission says we have to cut to, not
even a level that we say we have to cut to, then the
Secretary or the Commission recommendations bypass the
Congress. We have to act by a certain date and to a
certain amount. Our authority is to do it in a different
way.

We know that the issues are very complex, and what I
do not want to get into is handing off to this group of
people who are not elected the same authority that NIHCE
has in Great Britain where they have created something
called the QALI, or the determination that that if you do
not have that much longer to live, then certain
treatments that cost a lot of money are going to be
denied to you. That is the kind of thing we want to
avoid. And what I submit here is that we have a responsibility to our constituents not to pass the buck to people over whom we have no control.

Now, I understand—and I will cut my statement. There are a lot of examples that I was going to point to where we do not do that, and there are certain reasons why we do not do it.

Here is what can happen if we do it. You go to a meeting and constituents come up to you and they say, you know, I am denied this thing that is going to save my life. How did you let that happen? Well, I did not have anything to do with it. Well, who did? Well, it is this Commission. Well, how did you give them the authority? Well, we gave them the authority and they are doing it, so don't blame me.

I mean, that cannot work in our society. We represent these folks. They are our bosses, and we have to be accountable to them.

Now, I am very cognizant of the argument that many have made—and there is a lot of truth to it—that we do not always cover ourselves in glory when it comes to responding to recommendations on how we can cut money. There are some that—I will not name names here, but some of my best friends argue against it. I am for it. We have differences of opinion.
We are all responding to constituents, and the argument is that makes our job tougher, we will not do it, and, therefore, we need to turn it over to somebody else. And even worse than that, we might be responding to certain special interests. And it is true--Senator Rockefeller made the point--that special interests come in and see us all the time, and they are arguing that this medical device not be cut or that drug not be cut and so on. And sometimes we respond to that.

I think the answer to this is that is our democratic republic at work. And if intelligent and courageous people are elected to office, they will make decisions that reflect their constituents' desires, which, after all, is what we are supposed to be doing.

Now, we are also, in the Edmund Burke tradition, supposed to give our constituents our best judgment, which may not always agree totally with what they all think. And then we have to go home and explain it. But that is the challenge that we have.

To turn it over to unelected people is contrary to our way of doing things. Folks say, well, but look at the BRAC commission. There is a big difference, colleague. The BRAC commission gives us cover on a political decision relative to closing a base or reducing the number of employees at a base in our State or, in the
case of a Congressman, a congressional district. And we can avoid direct responsibility and pass the buck onto somebody else for that unpopular political decision.

When it comes to the rationing or potential rationing of health care, you have got something totally different. We are talking about people's lives, our families' lives, our constituents' lives. And in that, we have an obligation to take charge and to make the best judgments. And I do not think it is an answer to say, well, we have not done a very good job in the past of making sure that costs do not get out of control, so let's just turn this over to somebody else. That is, at the end of the day, not a responsible course of action.

And so I urge my colleagues to just think about this one point. We are going to retain the Commission. We are going to give them this mandate to make recommendations that help us identify ways to cut costs, and there is going to be a lot of pressure for us to do that. But the one thing that my amendment says we will not do is let the Commission tell us how much we have to cut and to say that if we do not do it by a certain date the way they want us to do it, we either have to do it a different way, or else their recommendations go into effect.

That is turning it over to unelected bureaucrats,
the last thing that our constituents want us to do, and
the first step toward the British kind of system of
turning it over to a group like NIHCE, which will then
ration care.

The Chairman. Senator Kyl, first question. Is it
true that this amendment loses about $23 billion in
savings?
Senator Kyl. Yes.

The Chairman. It does. Is it also true that the
amendment has no offset?
Senator Kyl. That is correct, Mr. Chairman.
Again, I would argue that since we are preserving the
status quo, we are preserving Congress' authority,
preserving the Commission in terms of the requests that
we have made of it to make recommendations to us, there
is no offset because--

The Chairman. Since there is no offset--
Senator Kyl. It preserves the status quo.
The Chairman. --at the appropriate point, I will
rule it out of order. In fact, I do rule it out of
order. But before we--does the Senator wish to have a
vote to override the ruling of the Chair?
Senator Kyl. Yes, I would move at the appropriate
time to--
The Chairman. Okay. Before we have that vote, I
will let the Senator say a word or two.

    First of all, this is essentially the same amendment
as the Cornyn amendment. The only difference is the
Cornyn amendment did have an offset. This one does not.
    I think it was Cornyn. It might have been Ensign. I
have forgotten who it was.

    Senator Kyl. Cornyn struck the full--

    The Chairman. It is essentially the same as the
Cornyn amendment, which we struck down.

    Point two, I hope people are not confused by what
this commission is. This is not anything resembling
NIHCE in Britain. We are not talking about what
procedures are allowed or disallowed. That is totally
irrelevant to this provision. This provision basically
just addresses the rate of growth of provider payments
and setting--giving the Commission the authority to look
at the appropriate provider payments. It has nothing to
do with procedures for patients, as is the case with the
NIHCE in Great Britain. These are totally different, and
I do not think it is really fair to try to lump the two
together.

    And for a lot of reasons, I think this amendment
should be defeated, but I ruled it not germane and out of
order. So after a little bit of discussion, then we will
have a vote to appeal the ruling of the Chair.
Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad.

Senator Conrad. Mr. Chairman, I think it is very important to try to put this in context.

First of all, this is not at all anything close to the British system. I would strongly oppose anything approaching the British system. The provision explicitly protects beneficiaries from benefit cuts and increased cost sharing.

Furthermore, the provision explicitly forbids the Commission from making recommendations that would ration care. It also protects beneficiaries' access to care, and it protects providers with negative margins.

If, as I believe will happen, the delivery system reforms elsewhere in this bill are successful in slowing the growth of medical expenses--and that is the object of this exercise. If the delivery system reforms and the insurance reforms are successful, this Commission will never have to act.

But if the reforms are not fully successful, then the Commission functions in effect as a fail-safe mechanism. And Congress has every opportunity--if they do not like what the Commission comes up with, the Congress has every opportunity to meet the equivalent savings so that health care expenses in these accounts
are not growing faster than the gross domestic product
plus 1 percent. That is the goal.

If we do not do it, if the other provisions of the bill do not do it, the Commission makes a proposal. If we do not like it, as Congress we have every opportunity to offer an alternative that achieves the same result.

So, to me, this is very responsible, and I will not repeat the letter from the Congressional Budget Office and Mr. Elmendorf, who tells us that he thinks this kind of provision is important to making progress at dealing with what is a crisis. Medicare is going to go broke in 8 years. The trust fund has already gone cash negative.

So we have got to step up here, and--

Senator Kyl. Could I interrupt you for a question?

Senator Conrad. Yes.

Senator Kyl. You have accurately characterized the essence of the amendment in terms of what it would provide. But I am very unclear as to what the permissible funding level or mandated or targeted funding level here is. When you say gross domestic product plus 1 percent--I have read the language. It is actually per capita gross domestic product plus 1 percent. What does that mean? Does that mean that you take a trillion dollar GDP, divide it by 300 million people, that gives you a certain number. You add 1 percent of something to
that. I am not sure what it is. And then that is the
amount of money per Medicare beneficiary that we are
going to spend a year or what? I do not understand how
this target is supposed to work.

Senator Conrad. Maybe we could ask one of the
technical staff for an explanation on how GDP plus 1
percent works. But my understanding is you look at GDP
plus 1 percent, you compare that to health care costs.
If health care costs are rising faster than GDP plus 1
percent, then the Commission has an obligation to come up
with a plan to get back down to the level. And if we do
not like what they come up with, we come up with an
alternative plan.

Senator Kyl. Do you mean Medicare—you said health
care costs. The Medicare health care costs.

Senator Conrad. Yes.

Senator Kyl. Could staff clarify that?

The Chairman. Mr. Dawe, do you want to add to
that?

Mr. Dawe. Yes, GDP refers to the rate of growth of
gross domestic product plus one percentage point. It is
not the level of GDP but the rate of growth.

Senator Kyl. But doesn't the language say per
capita so, therefore, it is not a rate of growth? It is
a dollar figure.
Mr. Dawe. I will have to get the language.

The Chairman. I believe it is per capita rate of growth. I think that is what the standard is.

Mr. Dawe. I believe that is correct.

Senator Kyl. So you take the per--well, what is a per capita rate of growth for GDP? There is no such thing.

The Chairman. Yes, there is. That is used all the time.

Senator Kyl. But that is not what this says, Mr. Chairman, with all respect. It says the growth target at GDP per capita plus 1 percent. GDP per capita is a dollar amount of money. But it does not even say plus 1 percent of what.

The Chairman. Of that.

Senator Kyl. So it is a dollar amount.

The Chairman. One percent--

Senator Conrad. It is the rate of growth of GDP per capita plus 1 percent. That is a percentage. It is the rate of GDP growth--

Senator Kyl. Well, first of all--

Senator Conrad. --per capita, which is a percentage, plus 1 percent.

Senator Kyl. The mark does not say rate of growth.

Senator Conrad. Well, maybe we should just clarify
that.

Senator Kyl. So we would have to clarify that. So let us assume that it is different than what the mark says. It is the rate of growth of per capita GDP. So maybe the staff could give us an example, like what is the per capita GDP today rate of growth? I gather that is compared with the previous year?

The Chairman. It is.

Senator Kyl. It does not say that either. Is that what we intend?

Ms. Bishop. Senator, I think that the intent there is to signal that the rate of growth is not going to account for growth in population because that would be—we do not want to limit spending that is attributable to growth in Medicare population or population at large. So just the intent is to signal that it is growth in spending on a per person basis not including—you know, so we want to remove the effects of the population growth on the estimate of the rate of growth in spending. Does that make sense?

Senator Kyl. No, it--

The Chairman. Let us proceed. This amendment is out of order in the first place.

Senator Kyl. Well, but Mr.--

The Chairman. And I do not want a budget seminar
on GDP.

Senator Kyl. Mr. Chairman--

The Chairman. Let us vote on the motion to--

Senator Kyl. Mr. Chairman--

The Chairman. --uphold the ruling of the Chair.

Senator Kyl. Maybe let me just make this point.

The Chairman. Very briefly, because this is out of order, so--

Senator Kyl. That is true but--

The Chairman. --the discussion is moot. It is out of order.

Senator Kyl. I understand that, but it is debatable. The motion to override--

The Chairman. No, it is not.

Senator Kyl. Yes, it is. Mr. Chairman, I beg to differ.

The Chairman. No, it is not. No, it is not. It is not--

Senator Kyl. The rules of the Senate provide that a motion to table or to suspend the ruling of the Chair on an issue of germaneness are debatable. This Committee has no rule--traditionally we refer to the rules of the Senate in that event. The point here that I am trying to make is that the Commission is going to set a target. We do not set that--
The Chairman. Let me just cite the rule, Senator, so you know what the rule is--

Senator Kyl. I have read the rule, Mr. Chairman.

The Chairman. Well, wait. Let me read it to you just so you are more familiar with it. The rule says that if the Chairman determines that a motion has been adequately debated, he may call for a vote on such motion, and the vote shall be taken unless the Committee votes to continue debate on such motion. The vote on a motion to continue debate on any motion shall be taken without debate.

Senator Kyl. That is continuing.

The Chairman. That is correct.

Senator Kyl. But that is not what we are talking about here.

The Chairman. Well--

Senator Kyl. What you first--

The Chairman. I am starting to reach the judgment that this has been adequately debated because it is not germane.

Senator Kyl. Mr. Chairman, we can argue about--you can check with the parliamentarian. Under the rules of the Senate--

The Chairman. This is a Senate rule--

Senator Kyl. An appeal of the ruling--
The Chairman. The matter is a Committee rule.

Senator Kyl. And the Committee rule is--

The Chairman. That is what the Committee rule--

Senator Kyl. Mr. Chairman, the Committee rule is silent on the question of whether an appeal by a ruling by the Chair is debatable.

The Chairman. Let us not waste time here.

Senator Kyl. Good. My point is simply this--

The Chairman. I will give you a few minutes. Then we are going to--

Senator Kyl. Good. It will just take a second here.

The Chairman. Okay.

Senator Kyl. The mark is, first of all, not only not clear, it is not susceptible of an interpretation right now as to what target we are talking about. This Commission is required to come up with a recommendation to meet a target, but we do not know what that target is. And the Congress is compelled under the language of this mark to abide by that level of spending. We do not set the level. The Commission sets that level. And we either adopt their way of achieving that degree of saving, or we come up with an alternative way. If we do not come up with an alternative way, their way automatically becomes the law.
So it is highly relevant what target we are setting here, and what I am saying is you cannot give that to an unelected body. We cannot even agree here today what that target is based upon what has been written here.

Let me just make one final point. There is a recent survey I read that shows if you are a 65-year-old male and you have a heart attack in 1980, you get to the hospital, you have got a 60-percent chance of living. Today you have got over a 90-percent chance of living because there are a lot of new medical procedures. It costs more money. And the question we have got to answer is: Would you rather have 1980's health care at 1980's prices or today's health care at whatever price that may be?

I, therefore, do not think you can just set an arbitrary limit today and say we are never going to spend more than that on our Nation's seniors. It depends on what new devices and treatments and medications and so on cost. And, sure, we try to the care the most efficient way we can. But you cannot set an arbitrary limit, especially not one that is so ill-defined as is the case with respect to the mark today.

The Chairman. The question is on the motion to overrule the ruling of the Chair. All those in favor of overruling the Chair, vote aye--
Senator Kyl.   Roll call, please.

The Chairman. --those opposed, vote no.

The Clerk. Mr. Rockefeller?

Senator Rockefeller.   No.

The Clerk. Mr. Conrad?

Senator Conrad.   No.

The Clerk. Mr. Bingaman?

Senator Bingaman.   No.

The Clerk. Mr. Wyden?

Senator Wyden.   No.

The Clerk. Mr. Schumer?

Senator Schumer.   No.

The Clerk. Ms. Cantwell?

Senator Cantwell.   No.

The Clerk. Mr. Carper?

Senator Carper.   No.

The Clerk. Mr. Grassley?

Senator Grassley.   Aye.

The Clerk. Mr. Hatch?

Senator Hatch.   Aye.

The Clerk. Ms. Snowe?

Senator Snowe.   Aye.

The Clerk. Mr. Kyl?

Senator Kyl.   Aye.

The Clerk. Mr. Bunning?
Senator Bunning. Aye.

The Clerk. Mr. Crapo?

Senator Crapo. Aye.

The Clerk. Mr. Chairman?

The Chairman. No.

The Chairman. The clerk will tally the result.

The Clerk. Mr. Chairman, the final tally is six ayes and 8 nays.

The Chairman. Two-third of the Committee not having voted in the affirmative, the motion fails.

The next amendment.

Senator Grassley. Is it going to be mine?

The Chairman. If you want to. Are you ready? Any Senator who wants to offer an amendment.

Senator Grassley. And it is not modified.

The Chairman. Okay. Do you want to call up the amendment?


Senator Grassley. I think, Mr. Chairman, because of my oversight work over the years that I have been in the Senate, and particularly in the last 6 years, some of my oversight work not just of nonprofits but--well, mostly nonprofits, I think I bring some expertise to this subject and offer to my colleagues some experience I have
had with governance of some organizations.

The Chairman's mark creates a new patient-centered outcome research institute to conduct comparative effectiveness research, and, no, I am not going to raise Cain about comparative effectiveness research. There are some aspects of it that are very good.

You know, we have heard a lot of concern about this type of research maybe resulting in rationing or Government bureaucrats getting between you and your doctor. Even though I share those concerns, that is not my interest in this amendment.

But I also think that comparative effectiveness research, if done properly, can be a very valuable tool in helping promote higher-quality care. I think the concerns about comparative effectiveness exist because the Government is too involved in the research. So this has benefits beyond just what I am trying to do here with the governance of the project.

What this kind of research should be about is about patients, doctors, academics, and researchers, not people in Government. So I want to create a clear line between the Federal Government and this research. So my amendment would prohibit any Cabinet Secretaries or other Government officials from serving on the board of the patient-center outcome research institute.
As many of my colleagues know I have done extensive oversight of charitable organizations over the last 8 years, and that has included reviewing governance of these organizations. I will just cite a couple of examples where Government officials were very much involved.

My oversight of the American Red Cross and the Smithsonian Institution in particular has shown that Cabinet Secretaries and other high-ranking Government officials frequently are not able to properly fulfill their roles and responsibilities as board members.

I know that there are still a lot of other changes that need to be made to deal with concerns about rationing and Government taking over medical care. But adopting this amendment would not have anything to do with that issue--except maybe quiet some of the concerns that people have.

I would just suggest to you in one particular instance, without naming Government officials, but when I got involved with one of these organizations, one of our friends in Congress said to me, "Well, I am glad you brought that up. I didn't know things were so bad in that organization." So I think that it is necessary that we have people in place.

Now, just to show that I am not in any way crippling
this organization at all, the Secretary of HHS would be on it, the director of the quality organization, AHRO, and the director of the National Institute of Health. Now, we would have--effectively these would be the ones--I better ask my staff. Those would be the ones that we would be eliminating, right?

Yes, those--otherwise, Mr. Chairman, the way you have set this up, it seemed to me that you got good people from outside of Government that are very much involved in this process. And that is where it ought to be, in my judgment, and I think it would relieve some of the concerns that people have about--you know, some people consider this whole project a scary project. I just told you I do not, because I think it can serve a very, very good purpose in bringing evidence-based--or bringing about evidence-based medicine, the practice of medicine.

The Chairman. Okay, Senator, I think you make a very good point, frankly. When I looked at this earlier, that question came to mind. Why are we requiring all these elected officials to be part of this? I had some of the same, frankly, private concerns that you are now addressing. I think it is a good idea. The amendment is a good idea. It will make it more clear that this is not some government-run outfit; rather, these decisions are
made by—they are clinical decisions made by clinicians and by experts in the field, and I suggest that we accept your amendment.

Senator Grassley. We will accept it without a vote if it is okay with everybody else.

The Chairman. That is fine with me. Are there any objections to accepting this without a vote?

Senator Grassley. And I thank you very much.

Senator Rockefeller. Can I raise just a question?

Senator Grassley. Yes, please do.

Senator Rockefeller. To the good Senator from Iowa, my friend.

Senator Grassley. Please do.

Senator Rockefeller. If you have Cabinet Secretaries, people who are designated into heavy work situations by the nature of their full-time work, my hope was that this would be their full-time work and, therefore, I raise the question: Would they have the time to devote to what is an incredibly complex--

Senator Grassley. I think you are raising—I hope I expressed that. If I am wrong in interpreting your question to me, I think you are raising the same question I raised, whether or not they would have time to devote to it to get the job done right.

As I said, people, you and I know, on one of my
investigations said, "Well, I am glad you brought that up. I didn't know that it existed." And the person had been involved with the organization for a long period of time. I think we—you know, I can tell you in two instances where I have been appointed by leaders—maybe I ought to not name them, but I just did not find the time to serve.

The Chairman. Okay. Without objection, the amendment is agreed to.

Further amendments? How are we doing? Who is next? I would like, just for the information of Senators, to say that we will continue meeting tonight. I will break at 7 o'clock for one hour, reconvene at 8 o'clock, and we will plow ahead after 8 o'clock. There will be no votes after 6:30. But I do intend to vote beginning at 8 o'clock. We can debate 6:30 to whenever we recess at 7 o'clock, but no votes after 6:30, but votes will occur after 8 o'clock.

Senator Grassley. Does this break that we have take into consideration the Senate program that they have?

The Chairman. I understand that starts at 6:30.

Senator Grassley. Okay.

The Chairman. That Senate program. But I am going to recess at 7:00, 7:00 to 8:00.
Senator Stabenow. Mr. Chairman?

The Chairman. Senator Stabenow.

Senator Stabenow. Thank you, Mr. Chairman. I have an amendment that I would hope that would be able to be accepted. It is something that has passed the Senate--

The Chairman. Sure. Which one is it?

Senator Stabenow. --Finance Committee before. It is D-19.

The Chairman. D-19?

Senator Stabenow. Yes, to the Chairman's mark. The amendment is the same at the Patient Safety Abuse Prevention Act that was passed by the Senate last Congress. It requires the Secretary of HHS to--

The Chairman. Can you help me, Senator? Is it on this list by chance, do you know? Or is it on another list?

Senator Stabenow. It should be.

The Chairman. We have a different list. Okay. It is on the second list, and it is D-19. It is nursing home abuse.

Senator Stabenow. Yes.

The Chairman. Thank you.

Senator Stabenow. This actually is patterned after an act that Senator Kohl is the prime sponsor of, and he had asked me to bring it forward, which I am happy to do.
as a strong supporter of this. But it requires the Secretary of HHS to establish a program to identify procedures to conduct background checks for folks that are in nursing--prospective employees that work in nursing homes and other providers that provide direct care to patients.

We have had a pilot project in Michigan that has been extremely successful in doing background checks, and, in fact, in the time that it has been set up under one of these pilots for then 9,987 prospective direct care workers that have actually been excluded from being hired based on findings of abuse and neglect or criminal convictions for fraud, theft, and controlled substances. And so this would simply allow the Secretary to take what has been a pilot project and be able to expand that to be able to make sure we are supporting every effort to make sure people who are working with seniors, working with people in long-term care facilities are the right folks, that they do not have--that they are not people who have committed crimes or have been convicted of abuse and neglect.

The Chairman. Senator, I am inclined to want to accept this. Is this the same amendment that Senator Kohl has been pursuing?

Senator Stabenow. Yes.
The Chairman. Is there a cost to this?

Senator Stabenow. I understand it is fully offset by requiring national correct coding.

The Chairman. Okay. I am inclined to accept it.

Senator Stabenow. Thank you very much. Thank you, Mr. Chairman.

The Chairman. Any further debate on this amendment?

[No response.]

Senator Stabenow. Thank you.

The Chairman. If none, without objection, the amendment is agreed to.

Senator Bingaman. Mr. Chairman, if you have another new updated list of amendments that we are going to be considering, that would be great if we could get copies of that.

The Chairman. I think that would be a good idea. Can we get copies of that? I think we have some here.

Senator Rockefeller. Mr. Chairman, can I agree with that? We got this evidently 2 minutes before--

Senator Bunning. Mr. Chairman?

Senator Rockefeller. You accepted it, and I have no idea--

The Chairman. Only one person can talk at a time.

Right now Senator Rockefeller is speaking.
Senator Rockefeller. No. I finished. I mean, I got this 2 minutes before--

The Chairman. Well, you got it about 2 minutes after I got it, so we are about in the same boat here.

Okay. We are distributing the second list. This is Second Round Amendments, Delivery Reform. That is the title of the list that is being distributed. Down at the bottom it says 4:45 p.m. Okay.

Senator Bunning. I just have a question for the Chairman.

The Chairman. Sure. Go ahead.

Senator Bunning. In regards to the Henry Clay portrait, some of us have a problem being here until 6:30 because of commitments over--

The Chairman. Okay, sure.

Senator Bunning. I just want you to understand that. Thank you.

The Chairman. Okay. Well, as I said, there will be no votes after 6:30, not votes until 8 o'clock. I appreciate that. We will try to work around maybe a debate or something as it gets close to 6:30 if that is a problem. We will work out a solution.

Okay. Other amendments? I will go down the list here. We have done number 1. That has been agreed to.
Senator Hatch is not here. Senator Lincoln is not present. Senator Kyl, do you want to—he is not here now. Senator Roberts, not here.

Senator Bingaman, do you want to do yours? This is the low-income Medicare benefits.

Senator Bingaman. Mr. Chairman, I am advised that we are still working with the Committee staff to get agreement on an offset that is acceptable.

The Chairman. Okay.

Senator Bingaman. And as soon as we do, I will be glad to offer that amendment.

The Chairman. Okay. Senator Ensign, your D-3, D-4, are you ready to offer that? Okay. We will now go to Senator Ensign's D-3, D-4, which is medical malpractice—which is not within the jurisdiction of this Committee. So why don't you describe it briefly so we can rule it out of order?

[Laughter.]

Senator Ensign. Well, Mr. Chairman, let me talk a little bit about medical liability reform that is desperately needed. We know we have junk lawsuits across the country in so many aspects of our legal system, none worse than in our medical health care system.

Really great doctors are sued all of the time now. Patients who actually have true medical malpractice
performed on them have years and years and years of delay of actually getting the kind of compensation that they deserve simply because our courts are clogged up with frivolous lawsuits.

We all understand and we hear about it all the time. The President mentioned it in his speech. The practice of defensive medicine, all kinds of tests, unnecessary tests, are run just to cover the potential for a lawsuit, because what happens today is we have a whole team of "experts" that go around testifying in medical malpractice cases. And most of these are not even experts. Most of these—a lot of them—are not even board-certified in the field in which they are testifying.

So we know in State after State after State there is a problem in the United States, and the reason that I believe that it is critical as a national priority is because the Federal Government pays, depending on the statistics that you look at, 40 to 60 percent of all medical bills day, between Medicare, Medicaid, the VA, and SCHIP and the like that we pay; and the taxpayer, obviously, is the one who holds the bill for this, pays a tremendous amount in excess cost due to all of these junk frivolous lawsuits that occur in the United States.

There have been many States over the years that have
passed really good medical liability reforms. Back in
the early 1970s, California was the first State to really
embark on this. I doubt if California could pass the
same law today, but it passed back in the early 1970s.
It is known as MICRA. It has done a good job in holding
down a lot of the costs in California, especially the
cost of medical liability insurance. Colorado has passed
reform, done similar things.

The most recent example, I think, that has had
dramatic effects is Texas. As a matter of fact, the
amendment that I have before us reflects the Texas model.
Since Texas passed their medical liability reform,
and not only passed their medical liability reform, but
had it tested in the courts to make sure that it was
upheld in the courts, they have had dramatic results, to
say the least.

Under Texas law, there is a cap of $250,000 for a
judgment against a physician or a health care provider.
But, in addition, a patient can be awarded up to $250,000
for a judgment against a health care institution. Now,
these caps are on non-economic damages. The total of
non-economic damages cannot exceed $750,000, but economic
awards can be whatever the economic damage that has been
done to the person turns out to be.

What we have seen in Texas is the arrival of
thousands of new physicians—physicians who fled other States and said, "I can't practice here anymore. My medical liability insurance is too expensive, and I do not want to get sued every time I turn around."

We hear about the shortage of doctors—specialists, primary care doctors—in many of our States. Texas now has more primary care doctors and specialists because of medical liability reform. For example, since 2003, Texas has added 655 emergency room doctors alone; 358 heart doctors, 212 OB/GYNs, and the statistics go on and on.

Not only that, we hear about the shortage of doctors in rural areas. The Chairman obviously has a very rural State. Well, the ranks of rural obstetricians have grown in Texas by 27 percent. So when we talk about incentives, you know, for doctors, first of all, a lot of doctors are leaving practice today, the really good ones, they are tired of it. They are tired of being sued. They cannot afford the medical liability insurance anymore, and they are just tired of it. That is why you are seeing so much call for medical liability reform across the United States.

The interesting thing also is charity care has been expanded in Texas. Today Texas hospitals are rendering almost $600 million more in charity care than they did just 6 years ago. That is $600 million per year than
they did just 6 years ago. That is almost a 24-percent increase in charity care, which is largely funded by liability savings.

Liability savings have also allowed hospitals to upgrade medical equipment, expand emergency room services and outpatient services, staff ER rooms 24/7 with high-risk specialists, improve salaries for nurses, and launch patient safety programs. Without the reforms and the attendant savings, these healthy developments would not have been possible.

So we desperately need medical liability reform. Most Texas doctors today are paying lower liability premiums than they were in 2001, and all major physician liability carriers in Texas have cut the rates since the passage of the reforms, most by double digits.

The Chairman. Senator, may I ask you a question?

Senator Ensign. Yes.

The Chairman. There are Senators who are getting a little antsy, a little nervous. They would like to--

Senator Ensign. I am just about finished.

The Chairman. I just wondered if perhaps we could have the vote soon, then you could talk later if you--but in the interest of other Senators--

Senator Ensign. Sure, and I will wrap up. I am just about to wrap up.
The President talked about the need for medical liability reform. I believe that this bill addresses those concerns, and the reason that I brought it forward in this Committee is because the Judiciary Committee, which would have jurisdiction, is not marking this up. There are no plans, from what I understand, to have serious medical liability reform included in the final package. And so if this Committee is not going to do it, if this Committee does not take the jurisdiction, what Committee would? And that is why we are asking for this amendment to be considered today. If we want to get serious about medical liability—and we are going to take this, by the way, to the floor. We are going to take this amendment to the floor and offer it there. But I realize that you are going to rule this as not germane, so I have a follow-up amendment that hopefully will be ruled as germane.

The Chairman. Okay. Senator, I appreciate your remarks very much. In fact, the Group of Six discussed tort reform and medical malpractice quite seriously for 3 or 4 days, what to do. There is a recognition and realization that this is a subject that must be addressed, and it is true this Committee does not have jurisdiction. I suspect that other committees of jurisdiction are probably not going to report so-called
tort reform legislation to the floor. And as you have indicated, this is most likely going to be a floor amendment, and that is, I believe, the proper venue to take up essentially medical malpractice amendments.

There is a provision in the mark, as you all know, that encourages States to develop and test alternatives to the current civil litigation system as a way of improving patient safety and reducing medical errors, et cetera, and that is a recognition of the need to address the subject, even though the Committee does not have jurisdiction over the subject.

So I appreciate the Senator for raising the subject, and because this is clearly not the Committee's jurisdiction, I will have to rule that his amendment is not germane and is out of order. If the Senate wishes to have a vote overriding the ruling of the Chair, that is his prerogative.

Senator Ensign. There are not enough people here. [Laughter.] The Chairman. Okay. Yes, Senator Carper?

Senator Carper. Just a quick comment, if I could. We have heard a lot in the past several months about fee-for-service driving costs, and one of the reasons why we see incidents of more tests, more procedures, more visits, more imaging, more MRIs, more this, more that, is
in some cases to try to help people get better, provide better health care. In some cases, we are finding that it is a way to generate income. And in some cases, folks do it in order to reduce their exposure to litigation costs, and it is a form of defense medicine to do that.

I am very much interested—and I know a number of Republicans and Director colleagues are interested—in reducing three things: reducing the incidence of litigation in this regard, reducing the incidence of defense medicine, and also to improve health care outcomes.

We are going to have an opportunity—I hope to offer a bipartisan approach on the floor—not in Committee but on the floor—that says less robustly test, a variety approaches that are being used in the States, including my State and other States. One, we have a number of States that use certificate of merit. Let's test that. Let's just test it and evaluate it does it really do those three things: reduce the incidence of litigation, reduce the incidence of defensive medicine, and improve outcomes.

Secondly, I want us to test the safe harbor to see how it is working in at least one State with respect to those three goals; test the approach of health courts, which we discussed here previously; test the approach
that works fairly well at the University of Michigan, "Sorry Works," to see how is that really working. And, finally, we have a number of States with different approaches in caps on medical malpractice. When I was at the Cleveland Clinic, they talked to me about the approach in Ohio which is a cap of $250,000, but it is a sliding-scale cap that goes up to $1 million.

What I would like to see us do is test a number of those approaches, use the States as laboratories for democracy, see if they are working, any of those approaches are working well in those States to help better inform the other States as to what maybe they should be doing.

The States, as you know, basically control tort law, not us, and so I think we have an opportunity to do something real, not illusory, and get started literally on the adoption of this legislation.

So I would welcome the partnership with our friend from Nevada.

Senator Ensign. Thank you. Mr. Chairman, if I could just make 15 seconds more comment.

The Chairman. Sure.

Senator Ensign. The one thing I also wanted to mention that I am going to be trying on the floor that I think just makes a heck of a lot of sense as far as
medical liability reform, we want to encourage more
doctors to do pro bono work and donate their services.
We ought to at least, kind of like a Good Samaritan law,
we ought to protect--unless there is gross negligence, if
somebody--any health care provider, whether he or she is
a nurse, physical therapist, doctor, whatever, donates
their services, unless there is gross negligence, they
should be able to be protected from medical liability
lawsuits. And so I will be offering that amendment as
well on the floor of the Senate when this bill gets to
the floor.

Thank you, Mr. Chairman.

The Chairman. Senator Menendez.

Senator Menendez. Mr. Chairman, I know you have
ruled this out of order, and I just want to make an
overarching point because I know that there are other
amendments that may be pending in this regard. And I
appreciate the Chair's position, and I understand those
who want to offer this on the floor.

Let me just say that certainly most of these
amendments that I have seen filed, at least unless they
are amended again, are hooked onto Medicaid. The problem
is that Medicaid should not be conditioned on whether a
State has passed a specific tort reform provision, such
as caps on non-economic damages. And there really is not
a rational relationship or link between States receiving Federal Medicaid dollars and so-called tort reform.

Secondly, all of these amendments require—or many of these amendments require non-economic damage caps in all—medical malpractice cases, not just those involving Medicaid patients. So this supersedes far beyond the question of Medicaid and linking it, which I think is a tenuous link in any event. This is about telling States what, in fact, they should and should not do as it relates to the tort law.

And while I do not want to get into the specifics, all of the arguments that might be had in this regard, I do want to just point out one thing. You know, there is a study by the University of Alabama by Professor Morrissey in which they examined 27 States--27 States that have already decided on their own, on their own, to cap damages, including Texas. And that study concluded that tort reforms have not led to health care cost savings for consumers, that it really had a small effect, or else it does not seem to change what some call "defensive medicine" and that it is not a panacea for health care costs.

So I know particularly hope that we are not going to use Medicaid and denying Medicaid dollars to States that are critical, particularly in this economy as we are
moving forward, based upon imposing upon that State what
some would want them to be their tort law. And so I hope
that that will be the generic view of the Chair as we
move forward in terms of those that are trying to link
this issue outside of the jurisdiction of the Committee
on the back of Medicaid.

The Chairman. Thank you, Senator.

Okay. Are there other Senators who wish to offer
amendments?

Senator Bingaman. Senator Ensign had a second
amendment on this.

The Chairman. Let me ask. Senator Ensign, did you
have a second amendment?

Senator Ensign. I do. We are just trying to do
some research on it, and I think it may be better, if
that is okay, if we do after we come back at 8 o'clock,
if that is okay.

The Chairman. I am just trying to get amendments
offered now if we can.

Senator Bingaman, I do not mean to rush you. Are
you ready?

Senator Bingaman. Mr. Chairman, I am still advised
that we--my staff is trying to get an offset agreed to
with the Committee staff that is acceptable.

The Chairman. Okay. I am going down the list
here. Senator Grassley is not here, Senator Kyl--Senator Stabenow, we did yours? Okay. Senator Roberts is not here. Senator Cornyn, not here.

Senator Schumer. Mr. Chairman?

The Chairman. Yes, Senator Schumer.

Senator Schumer. Yes, on my amendment on the biologics and the exchangeability, we are very close to an agreement

The Chairman. Okay.

Senator Schumer. So I would like to come to that at 8:30, because it looks like we will have an agreement by then. Is that okay?

The Chairman. How about 8:25?

[Laughter.]

Senator Schumer. Anytime. I thought we were--sure, 8:25 is great. How about 8:24?

The Chairman. Whatever. I am easy.

Senator Schumer. I thought we were coming back at 8:30.

The Chairman. 8:00.

Senator Schumer. When we come back.

The Chairman. Okay. Are there any other Senators--

Senator Bingaman. Mr. Chairman, I am advised that I will not be offering this amendment D-4.
The Chairman. You will not be offering.

Senator Bingaman. I will not be. We believe a significant part of it will be included in another amendment that Senator Lincoln--

The Chairman. Okay. We will strike that one from the list.

Senator Bingaman. That I am working on with Senator Lincoln. It will be a Lincoln-Bingaman amendment, which will be offered a little later.

The Chairman. Okay. Are there any other amendments? We have got some time here.

Senator Schumer. Let's break until next Tuesday.

The Chairman. If not now, then 8 o'clock. If not now, we will move to as many amendments as we possibly can at 8 o'clock and just clear plowing through. Just keep moving, keep going.

Senator Schumer. Mr. Chairman?

Senator Lincoln. Mr. Chairman?

The Chairman. Yes, ma'am.

Senator Lincoln. I would like to call up the Lincoln amendment, it is D-7 in this grouping.

The Chairman. Okay. Good for you.

[Laughter.]

Senator Schumer. You automatically get--

Senator Lincoln. Just for being brave enough to
bring it up.

Well, Mr. Chairman, this addresses the need of home infusion therapy for Medicare beneficiaries. I think this amendment is a really great example of a solution to the current problems we face in our health care delivery system.

Infusion therapy involves the administration of medication directly into the bloodstream using a needle or a catheter, and right now Medicare pays for the cost of infusion drugs. However, the equipment, supplies, and the professional services to ensure safe and effective home infusion are not covered.

My home State of Arkansas is extremely rural and has one of the highest rates of seniors living in poverty, and, therefore, many of my constituents who really need home infusion therapy, they just simply cannot afford it. They then have to enter a hospital or a nursing home for infusion treatment to be fully covered by Medicare, and not only is this a hardship for patients and families, it adds substantially to Medicare costs. It does not make sense. Certainly given that right now private insurance companies, including many Medicare Advantage plans--TRICARE, the Veterans Administration, many Medicaid programs--pay for home infusion.

Basically, Mr. Chairman, everybody reimburses for
home infusion except Medicare.
So I am pleased to be joined in this bipartisan
effort by Senator Snowe. She and I have worked on many
things together, and this is yet one more of them. But
when it comes down to it, offering people a choice in
infusion treatment at home for a lower cost will be a
win-win for patients, families, and the Medicare program.

We have been working diligently, Mr. Chairman, with
CBO and CMS on this issue, and I would certainly like to
continue working with you and your staff so that we can
make home infusion therapy a cost-effective reality for
Medicare beneficiaries. But we have not gotten the full
scoring of that, and I am hoping that as we move forward
we can.

But I just want to point out to my colleagues that
this is a really cost-effective thing that absolutely
everybody else is doing except for Medicare. And it
certainly makes sense. I know having visited our
Veterans Administration twice during the August break and
actually having one of my former staffers who needed home
infusion, being able to get their antibiotics at home as
opposed to going back into the hospital where they are
subjected to the possibilities of becoming more ill or
catching something else, it certainly makes sense.

So I hope that the Committee would consider it, and
I am glad to work with the Chairman.

The Chairman. Senator, you make a very good point. There is certainly a gap in benefits here for not covering home infusion. It is really true, and we have got to figure out a way to solve it.

This amendment, I am advised, costs about $20 billion as it is currently drafted, but I would very much like to try to figure out some way to get at this problem, because it is not fair the way the law today does not allow home infusion benefits. I clearly want to work with you to try to find a solution.

Senator Lincoln. Well, I appreciate it. I certainly will withdraw the amendment with the idea that we could work together. But I just really will remind my colleagues, almost all private insurance companies, including Medicare Advantage plans, TRICARE, the Veterans Administration, and many Medicaid programs, do pay for and reimburse for home infusion. So I hope that we will take a look at this really cost-effective way that has been proven. Again, many of these entities have been covering home infusion for more than 20 years, so it is not a new thing either.

So it is a great cost-effective way for us to not only create savings, but provide the kind of quality of care that people want in the setting that they want it
in. So I appreciate that, Mr. Chairman, and I will withdraw my amendment with the idea that we can work as we move forward on this one.

I would also like to mention, Mr. Chairman, briefly that I filed several other amendments that are long-time priorities of mine that I do not plan to offer today since we are still working on refining Budget Office scores and some of the offsets, including the amendments to increase access to Medicare Part B providers, physical therapists, respiratory therapists, and others, as well as one that would help our critical hospitals serving rural and underserved parts of the country, to continue to serve low-income and uninsured individuals until we are able to get them covered. We all know that we are not going to be able to take a pill when we pass this health care reform bill and wake up the next day and everything is going to be great. And it is going to be very difficult in rural areas for the transition that is going to need to happen. So being able to take care of particularly the low-income and the uninsured in those areas is going to be an important part.

So I look forward to working with you, Mr. Chairman. I have got several other of those amendments, and I would like to continue to work with you and your staff on those issues.
The Chairman. You bet.

Senator Lincoln. Thank you.

The Chairman. Absolutely. Those are good ideas, and we will do our best to address them.

I see Senator Cornyn has just arrived, so if the amendment is withdrawn—that is, the amendment by the Senator from Arkansas—Senator Cornyn, did you want to offer an amendment? I am told that you had—you have two on the list here. Either one of these you want to offer?

Senator Cornyn. Mr. Chairman, excuse me. Would you give me a minute to get my--

The Chairman. Okay. You got it.

Senator Cornyn. Thank you.

The Chairman. You bet. Okay, Cornyn, Roberts, Kyl, Grassley. Otherwise, we will have to offer these amendments at 8 o'clock and afterwards.

If there are no amendments, we can start the coverage amendments right now.

Senator Bingaman. Do we have a list?

The Chairman. Do we have a list of coverage amendments? Well, let's begin to work it out. Let's start—why doesn't staff start working out a list of coverage amendments right now so we have that ready and available?

Senator Cornyn. Mr. Chairman, I am ready whenever
you are.

    The Chairman. Thank you, Senator. Senator Cornyn is recognized.

    Senator Cornyn. Thank you very much, Mr. Chairman.

    Mr. Chairman, I would like to call up Cornyn amendment D-13.

    The Chairman. D-13, okay.

    Senator Cornyn. I ask that its modified version be distributed, which I understand it has at this time.

    The Chairman. I am sorry. You say it is modified?

    Senator Cornyn. Yes.

    The Chairman. Okay. I understand it is a very simple modification, is that correct, to D-13? I do not have the modification--oh, here it is. Now I have it. Thank you.

    Senator Cornyn. Mr. Chairman, the modification just makes it clear that this does not preempt State tort law.

    The Chairman. Okay.

    Senator Cornyn. Mr. Chairman, as many of us have discussed, including the President of the United States, when you talk about reforming our health care system, it has to include a component of medical liability reform. We know that the practice of defensive adds, by some estimates, up to 9 percent to our health care bills as a
country. And at the same time we recognize the
importance of maintaining an open door at the courthouse
so that people who are legitimately victimized by the
negligence of a health care provider can be compensated.

But we also know that frivolous litigation, abusive
litigation, can cause physicians to practice defense
medicine. These excesses increase insurance premiums for
physicians and, as I said, encourage the practice of
defensive medicine.

To ward against these excesses, 27 States have
followed the lead of my State, Texas, in capping
allowable total non-economic malpractice damages. And,
of course, among these States there is no red or blue
divide. Texas, Florida, Mississippi—all sensibly cap
non-economic malpractice damages at $750,000.
California, Michigan, and Massachusetts each cap such
damages at $500,000 or less.

Recognizing the need to reform our medical
malpractice laws nationwide and to follow the lead of a
majority of the States, I propose to amendment the
Chairman's mark to encourage all States to adopt a total
non-economic damage cap in medical malpractice of $1
million or less. You will note that is higher than the
States I just mentioned. Because the $1 million cap is
higher than almost any States' current cap, it allows
States to craft their own damage limits while restraining the most excessive damage awards.

Nothing, as I indicated earlier, in this amendment would preempt any State law that already provides for a total cap of less than $1 million. I believe that total caps of less than $1 million, such as the $750,000 cap in Texas, are effective and fair. But at minimum, States should limit total non-economic malpractice damages at $1 million.

When wrongs are committed, compensation should be paid to those who are harmed. But we need to rein in the runaway jury awards and opportunistic litigants who currently are abusing our judicial system at the cost of all of us.

Mr. Chairman, as we all know, the Federal Government in one form or another pays, the American taxpayer pays about half of our health care in this country directly, and so many Senators may wonder why are we making a Federal case out of what has heretofore been dealt with at the statewide level. I believe this kind of amendment, which, again, does not preempt State law but certainly provides incentives to States to adopt sensible caps, will have the impact of bringing down medical liability premiums. In my State, it has been somewhere on the order of 30 percent.
It has also had the beneficial outcome of actually encouraging more physicians to move to our State since they feel like they have more predictability, more certainty, and certainly the cost of their medical liability insurance is lower. So that has had the beneficial impact of increasing access to health care because, as we know, having coverage is one thing, but having access to a physician who will actually see you and treat you is something altogether different.

So for all those reasons, I would ask my colleagues to support the amendment, which I believe will have a number of beneficial effects. Thank you.

The Chairman. You bet.

Senator Bingaman, do you wish to be recognized?

Senator Bingaman. Yes, Mr. Chairman. I just had a question. I guess the Senator has described his amendment as privilege incentives to States to enact these laws. The way I read what has been passed out, it says that if you get Medicaid, you shall enact this limitation. So I assume that the inverse of that is that if you do not enact this limitation, you no longer get Medicaid. Is that what the Senator intends?

Senator Cornyn. Maybe I should rephrase it. It does place a $1 million cap on non-economic damages, and it provides an incentive for the States to adopt those
kinds of caps. It is similar to other ways the Federal
Government provides an inducement. For example, I am
thinking of adopting a driving age at 21 or the like in--

Senator Bingaman. Well, the way we did that is
withhold highway funds.

Senator Cornyn. Right.

Senator Bingaman. But here you are saying that the
States' ability to obtain Federal Medicaid funds would be
terminated if the State did not enact this law?

Senator Cornyn. Well, my expectation is that they
would, the Federal Government would enact the $1 million
cap. The States are free to adopt a cap lower than that
if they wish.

Senator Bingaman. Well, I did not read it that
way. It says, "Any State that receives funding under
Medicaid shall enact a limit against doctors"--a limit
against on total economic--non-economic damages against
all doctors and health care facilities of $1 million or
less. We are telling the States each State has to enact
a law of this type, and if they do not, then they no
longer receive Medicaid. Is that the gist of the
amendment?

Senator Cornyn. My expectation, Senator Bingaman,
is that all of them will once they see this--

Senator Bingaman. When they see that kind of
hammer. That is a pretty good hammer, I would say.

Senator Cornyn. We want it to be effective.

Senator Bingaman. Well, Mr. Chairman, I could not
support cutting of Medicaid to my State. Federal funding
for Medicaid is pretty important to a lot of people in
New Mexico, and I would not want to say to our State
legislature, "You do what Senator Cornyn says or you get
no Medicaid money." That would be a difficult vote for
me to explain back in New Mexico.

Senator Cornyn. Well, Mr. Chairman, if I could
respond, I certainly would not presume that Senator
Bingaman's constituents would do anything because of what
I said. I am asking for the support of the majority of
the Committee and the majority of the Senate to do what I
think will help increase access to quality health care,
will help health care providers manage what are
frequently medical malpractice liability costs, and I
think bring a little bit of sense to what is the practice
of defensive medicine, one that has increased health care
costs, by some estimates, as much as 9 percent. So to
me, that is why I think it makes good sense and why I
would encourage all of our colleagues to support it.

The Chairman. Let me say I am somewhat sympathetic
to legislate in this area, but I do believe, as Senator
Bingaman has pointed out, that the hammer here is a
little bit too heavy. It is too much of a bludgeon. And I do wonder what the enforcement mechanism would be here if States were to fail to enact these measures that the Senator is suggesting in his amendment.

I think having these actions contingent on Medicaid is too heavy a price to pay for not enacting them; that is, it is not appropriate that the penalty is disproportionate to what is intended here. But that is on the substance. Frankly--

Senator Cornyn. Mr. Chairman, I--

The Chairman. Frankly, even though in this amendment you tried to base this provision on Medicaid, the basic gravamen, that is, essentially this is a tort reform amendment. It is essentially a medical malpractice amendment, just looking at it in its totality and its whole, and this Committee clearly does not have jurisdiction over tort reform, and I would have to rule this amendment out of order, consequently. And if the Senator wants a vote on overriding, that certainly is his prerogative, but this essentially is a tort reform that the Committee does not have jurisdiction over tort reform; therefore, it is not germane; therefore, it is out of order.

Senator Cornyn. Mr. Chairman, I would ask to appeal the ruling of the Chair and have a roll call vote
on that. But may I say that we have tried to figure through the Medicaid angle or hook some way to address this in a perhaps less direct way than just the Federal Government passing a law preempting State tort laws. We could do that and remove the Medicaid hook and just say impose as a matter of Federal law, which, of course, preempts State law, that the cap shall be thus-and-so. But I would also be willing to modify it if it helps to see if there is some other incentives we can get to deal with this practice of defensive medicine and frivolous litigation which has a health care cost, I would be glad to do that.

The Chairman. Sure. Let's revisit this issue during the next hour, hour and a half. A quorum is not present, so we cannot do business anyway, and I cannot rule it out of order because that would be doing business. Right now we could not have an override vote because that would be doing business.

If Senators wish to make more statements and persuade us when we come back to take a certain action, that is certainly permissible. But we cannot do business, that is, take action at this time.

Senator Cornyn. I will try to think of persuasive arguments, Mr. Chairman.

The Chairman. All right. You are free to continue
if you wish.

Senator Cornyn. I would be glad to try when we have a quorum, and so hopefully I can convince some members of the Committee. Thank you.

The Chairman. Do other Senators wish to speak to the amendments that they will be offering later? All right. A quorum—the presence is dwindling.

Senator Bingaman. Since we cannot do business, I suggest we eat supper.

The Chairman. All right. Is there a motion to eat supper?

[Laughter.]

Senator Bingaman. I so move.

The Chairman. Okay. The Committee stands in recess until 8 o'clock.

[Whereupon, at 6:30 p.m. the meeting was recessed.]
AFTER RECESS

The Chairman. Committee will come to order. When we recessed, Senator Cornyn’s amendment was pending. Senator Ensign has a similar amendment which he would like to offer. I just discussed the issue with Senator Cornyn and Ensign. They both agreed that Senator Ensign should go first and that is what we will do. Senator Ensign?

Senator Ensign. Thank you and I want to thank my good friend from Texas for the consideration as well. We have similar amendments in that they do address medical liability reform, actually paying honor to your state because the State of Texas has done such a great job with medical liability reform.

Just for colleagues who were not around earlier, I will just summarize very briefly because there are similar issues as my previous amendment that was ruled non germane. I fully believe that this one should be ruled germane, and I will make a defense of germaneness in just a moment.

I am sorry. Do you have your amendments in front of us, Senator? It was passed out previously, D4 as modified.

The Chairman. D4 as modified.
Senator Ensign. D4 as modified. This is the one with the medical liability with the FMAP tie in.

Senator Bingaman. Mr. Chairman, I do not have it here.

The Chairman. I do not either.

Senator Bingaman. If someone has got a copy that I could get, that would be great.

The Chairman. Can we get copies. Senator? Do you have more copies of the amendment?

Senator Ensign. While they are passing that out, I will just describe the amendment very briefly. It models medical liability reform after the Texas law. Earlier this evening, I talked about how Texas has had a very successful medical liability reform law.

It has gotten rid of a lot of the junk lawsuits in Texas. It has freed up the court systems and it has also held state constitutional muster in Texas. They have attracted a lot of doctors to Texas. Medical liability insurance rates have gone down dramatically in Texas. A lot of doctors want to go in practice there and leave states that have a lot of frivolous lawsuits.

The impact has been fairly dramatic. Texas is just one of the examples. I think it is one of the better examples out there and the reason that we modeled our legislation after Texas.
Now, our tie in and why we believe this is germane is we said in order to encourage the states to enact comprehensive medical liability reform, that we provide the states with generous financial incentives. Under my amendment, any state that enacts the medical liability reform provisions I previously described will be eligible for a federal medical assistance percentage for two years for children.

The FMAP increase would be paid for by reducing the federal poverty level thresholds for tax credits in the bill by the amount necessary if needed.

Now, I believe that first of all that medical liability reform will save money for the federal government and it shouldn’t be needed in the first place, but in case it is needed, that is our offset.

Why do I say that this should be germane after my last amendment was ruled not germane? I have several points to make. One is in the Deficit Reduction Act of 2005, Section 6031 provides states with a Medicaid FMAP incentive to pay the False Claims Act legislation. This provision gave states an extra 10 percent in FMAP funds for any claims recovered through qualified state false claims acts.

Let me be clear. The state False Claims Act is not limited to health care issues and the False Claims Act is
not in the jurisdiction of the Finance Committee. It is
in the jurisdiction of the Judiciary Committee just like
normally the medical liability would be in the
jurisdiction of the Judiciary Committee as well.

The state False Claims Act could be applied to any
matter of fraud that occurred in a state. So in that
sense, the Deficit Reduction Act used the state Medicaid
program as an incentive to create far broader change than
is in the amendments on the medical liability being
considered tonight.

I would also direct the committee’s attention to
Section 6035 of the same Act. The provision is related
to enhancing third party identification and payment in
Medicaid. This provision requires states to pass laws to
require insurers and other third party payers to turn
data over to the state so that the state can check to see
if other parties should pay claims before the state
Medicaid program.

This is a very important provision that enhanced
states’ ability to protect Medicaid programs from
wasteful spending. That provision is also consistent
with the amendment being offered tonight.

I would also point out that the provision in DRA
Section 1902A25I is based on Section 1902A258 of the
statute. That provision of the law also requires the
state Medicaid program to pass certain laws related to subrogation.

That provision of law was enacted in 1993 Public Law 103-66. As I recall in 1993, the Democrats held the White House, the Senate and the House. So this mechanism has been used when Republicans and Democrats were in charge. While I appreciate the Chairman’s concern, I think he needs to be careful with the precedent that he may be setting tonight.

I came up with these examples in the statute in about an hour’s research and I am fairly certain that in the hundreds of pages in the Medicaid statute there are many more examples of states being required or incentivized to take certain actions through Medicaid. I imagine others were also done under Democrat control of the Congress and were considered good policy at the time.

So I think the Chairman should move cautiously as this ruling may come back to haunt the committee.

Given the two percents I was able to dig up quickly for you, Mr. Chairman, using Medicaid as an incentive or as a condition of medical liability reform, a subject which undeniably has an impact on health care costs in the state, our amendments are in the jurisdiction of this committee and consistent with recent precedent of the committee.
Defeat them if you feel you must, but do not weaken the precedent of the committee by ruling them non-germane. Then I also think that we should adopt the amendment.

The Chairman. Good try. I might say -- go ahead.

Senator Bingaman. If you want to go ahead, Mr. Chairman, I had some points I wanted to clarify.

The Chairman. Okay. I will let you do so, but first I appreciate your efforts, Senator. I commend you for your efforts to find other matters tied to Medicaid that is not precisely the jurisdiction of this committee, but as I look at your amendment, still taken as a whole.

The gravamen of your amendment is still med mal. It is not in this committee’s jurisdiction and I feel constrained. Therefore --

Senator Ensign. Mr. Chairman, as far as the rule --

The Chairman. Therefore, it is out of order.

Senator Ensign. As far as the ruling is concerned, the two issues that I pointed out, the basis, the majority of those two provisions were not in the jurisdiction of this committee.

The Chairman. I have not seen those. I am only basing my decision upon what I see, the amendment that I see. Just looking at this amendment, the amendment
clearly is med mal. It is tort reform. We do not have jurisdiction, so I have reached my conclusion.

Senator Bingaman sought recognition.

Senator Bingaman. Mr. Chairman, let me just ask something here. Maybe I could ask Mr. Barthold with joint tax if he could clarify this. The offset that you identified, Senator Ensign, you say the F map increase would be paid for by reducing the federal poverty level threshold for tax credits in the bill by the amount necessary.

I must be confused. I thought if you reduced the federal poverty level threshold for tax credits, you lost money instead of raising money.

Mr. Barthold. Senator Ensign may want to clarify, but I think his intent was to have the --

Senator Bingaman. I think you are correct.

Mr. Barthold. -- a lower level.

Senator Ensign. I think you are correct and it needed to be stated the other way around.

Senator Bingaman. So you would raise the federal poverty level?

Senator Ensign. It does not matter. He already ruled it out of order.

Mr. Barthold. Instead of phasing out at 300 percent of poverty level or 400 percent of poverty level,
he would carve it back so that it was fully phased out by 250 or 275 or whatever the necessary amount was.

So by phasing it out sooner, there would be fewer people who would qualify for at least a partial subsidy and that would provide an offset. I believe that was Senator Ensign’s intention.

The Chairman. Okay. Does the Senator seek a vote to overrule? I assume that everyone wants a roll call vote. Okay. The clerk will call the roll. To appeal the ruling of the Chair, those that vote no will stand. Those that vote aye will be overruled -- Chair. The clerk will call the roll.

The Clerk. Mr. Rockefeller?
Senator Rockefeller. No.
The Clerk. Mr. Conrad?
Senator Conrad. No.
The Clerk. Mr. Bingaman?
Senator Bingaman. No.
The Clerk. Mrs. Lincoln?
Senator Lincoln. No.
The Clerk. Mr. Wyden?
Senator Wyden. No.
The Clerk. Mr. Schumer?
Senator Schumer. No.
The Clerk. Ms. Stabenow?
Senator Stabenow.  No.
The Clerk.  Mr. Nelson?
Senator Nelson.  No.
The Clerk.  Mr. Menendez?
Senator Menendez.  No.
The Clerk.  Mr. Grassley?
Senator Grassley.  Aye.
The Clerk.  Ms. Snowe?
Senator Snowe.  Aye.
The Clerk.  Mr. Kyl?
Senator Kyl.  Aye.
The Clerk.  Mr. Bunning?
Senator Bunning.  Aye.
The Clerk.  Mr. Ensign?
Senator Ensign.  Aye.
The Clerk.  Mr. Cornyn?
Senator Cornyn.  Aye.
The Clerk.  Mr. Chairman?
The Chairman.  No.
The Clerk.  Mr. Chairman, the final tally is six ayes, ten nays.
The Chairman.  Two-thirds of members present not having voted affirmative, the motion to overrule the Chair fails.  Any further amendments?  Oh, that’s right.
Senator Cornyn.  I’m sorry.
Senator Cornyn. Thank you, Mr. Chairman. Let me just briefly reintroduce the Cornyn Amendment D13. This amendment would mandate that any state receiving funds under Medicaid must limit total economic damages in a medical malpractice case to $1 million or less.

Mandating such a nationwide cap on non-economic damages would reduce health care costs and improve patient access to medicine by discouraging the practice or de-incentivizing the practice of defensive medicine.

A majority of state including my state already have adopted such caps and their success has proved that a federally mandated cap is necessary.

Excesses of $750,000 cap on economic damages has resulted in dramatic benefits. As the New York Times reported, new doctors swelled the ranks of specialists of Texas hospitals and brought professional health care to some long under served rural areas.

Overall, Texas has experienced a 31 percent physician growth rate in under served areas like El Paso. The growth rate has been as high as 76 percent. The cap has also helped lower malpractice insurance premiums by an average of 27 percent.

This amendment would extend to all states the benefits gained in Texas an 27 other states from non-economic damage caps.
For those states like Texas with caps lower than a million, it would have no effect. Those existing caps would remain. For states without caps, it would mandate the adoption of a non-economic malpractice damage cap of a million dollars or less.

As I said, in my state we have seen the benefits of this. Physician malpractice premiums before that had doubled the number of physician liability. Insurers had dropped from 17 to 4. Many doctors had left the state or limited the procedures they were willing to perform.

These increases in costs and reductions in service left many Texans, especially those in rural areas in need of specialist care without affordable access to health providers.

So responding to the problem, the Texas legislature has stepped up with the kind of non-economic caps that I am talking about. In addition, it required that juries unanimously approve punitive damage claims, imposed a stricter statute of limitations and set higher standards for expert witnesses. So it has had a dramatic impact.

Earlier I would like to clarify one of my exchanges with Senator Bingaman earlier. Senator Bingaman asked about an incentive payment in my amendment and argued that the amendment would affect his states or a state non-compliant state’s Medicaid funding. I want to make
clear that my language in the amendment does not actually speak to an incentive payment and would never result in cutting Medicaid.

The enforcement mechanism is simple. It makes a federal law that states receiving Medicaid funds shall enact a liability cap. If the state receives Medicaid funds but refuses to enact such a cap, the cap would thereby be imposed by the federal government by this Congress at a million dollars.

So to clarify, and I apologize for any lack of clarity in my earlier response, this would not in any circumstance result in a Medicaid cut or an incentive payment to the states. It would, as I say, if the state declined to act, it would, the cap would be imposed by Congress.

I would just incorporate by reference Senator Ensign’s comments about how this committee in the past, there is well established precedent both under Democrats and Republicans to use Medicaid as a jurisdictional hook for the Finance Committee to act in this area.

The Chairman. Thank you, Senator. This is a worthy discussion, medical malpractice. Seriously, I think I probably speak for many members of this committee. I heard a lot of people over the break raise this with me, a lot. More than I would have expected.
frankly. Frankly from my perspective, the more one looks at it, analyzes it, the more one realizes we need to act in this area.

I do not know exactly what to do, but we need to act. I have seen all kinds of studies to which doctors practice defensive medicine. It is hard to know exactly how much defensive medicine is practiced because all of the surveys are based, they are self-reporting docs and what might be defensive medicine for one doctor might be just more caution by another.

I have seen studies as high as 20 percent of health care costs because of defensive medicine in this country because we do not have tort reform. On the other hand, and I may be wrong in this, the last CBO report I saw on this, as I recall, was about 2/10 of a percent of health care costs according to CBO is due to defensive medicine.

Now, that is a very good debate and we need to have some place to discuss it to try to find the correct answer to it. But unfortunately this committee does not have jurisdiction to address that. We discussed this many times tonight. I think the proper place is on the floor of the Senate. I am sure there will be many amendments on the floor and they will deal with this issue. It will be a good debate.

Senator Ensign. Mr. Chairman, can I ask you a
question?

The Chairman. Sure.

Senator Ensign. If the argument that you are making that basically we do not have the jurisdiction over the committee because we are trying to change laws, you know, state laws basically that would be more the jurisdiction of the Judiciary Committee and we are using Medicaid.

Is this bill, the underlying premise in this bill that for Medicaid laws, we are making states change their laws, their coverage laws? Aren’t we doing that? And so why would not most of the coverage rules in this bill, underlying bill, be out of the jurisdiction and only in the jurisdiction of the Help Committee and not in the jurisdiction of this committee?

The Chairman. Well, Medicaid is exclusively the jurisdiction of the Finance Committee. The HELP Committee does not have jurisdiction over Medicaid, for example, even though they legislate in the area to some degree. And frankly --

Senator Ensign. No, but I am talking about changing the rules requiring state laws on coverage.

The Chairman. We are. But that is under Medicaid.

Senator Ensign. No, not just Medicaid. Requiring state laws change laws on a lot of things on coverage.
On certain minimum plans, exchanges. All those coverage things are state laws.

The Chairman. That is true, but the main point is, the main point is that the thrust of your amendment is med mal. This committee does not have jurisdiction on medical malpractice. That is the trust. That is the totality. If you look at the --

Senator Ensign. How do we have jurisdiction over changing state laws on coverage? Outside of Medicare or Medicaid. Outside of Medicaid, how do we have --

The Chairman. There are conditions to participate in the exchange.

Senator Ensign. That is right.

The Chairman. For setting up an exchange.

Senator Ensign. These would be conditions to participate.

The Chairman. And exchange is essentially tax credits. Taxes aren’t the jurisdiction of this committee.

Senator Ensign. Medicaid is the jurisdiction of this committee. We gave the hook.

The Chairman. Anyway, I have ruled. I looked at this totally honestly as a whole and we do not have jurisdiction.

Senator Cornyn. Mr. Chairman, may I ask a
question?

The Chairman. Certainly.

Senator Cornyn. I understand the ruling of the Chair, but I am feeling a little bit like Lucy and the football here when it comes to the President teeing this issue up before the American Medical Association in its joint sessions speech to Congress, if this is comprehensive health care reform and if this committee does not have jurisdiction of it, why cannot this bill or at least that portion of the bill be referred to the Judiciary Committee to report out that provision of it so that we can consider it on the floor?

The Chairman. Senator, with all due respect, I think you will find a much more receptive audience on the floor than you will in the Judiciary Committee. I suggest that your best shot is on the floor.

Senator Cornyn. Well, Mr. Chairman, serving on the Judiciary Committee, I think the Chairman is right.

The Chairman. All right. Does the Senator wish to -- we have done this a couple of times already.

Senator Cornyn. I would ask for a vote on overruling.

The Chairman. The clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.
The Clerk. Mr. Conrad?
Senator Conrad. No.
The Clerk. Mr. Bingaman?
Senator Bingaman. No.
The Clerk. Mrs. Lincoln?
Senator Lincoln. No.
The Clerk. Mr. Wyden?
Senator Wyden. No.
The Clerk. Mr. Schumer?
Senator Schumer. No.
The Clerk. Ms. Stabenow?
Senator Stabenow. No.
The Clerk. Mr. Nelson?
Senator Nelson. No.
The Clerk. Mr. Menendez?
Senator Menendez. No.
The Clerk. Mr. Carper?
Senator Carper. No.
The Clerk. Mr. Grassley?
Senator Grassley. Aye.
The Clerk. Ms. Snowe?
Senator Snowe. Aye.
The Clerk. Mr. Kyl?
Senator Kyl. Aye.
The Clerk. Mr. Bunning?
Senator Bunning.  Aye.

The Clerk.  Mr. Ensign?

Senator Ensign.  Aye.

The Clerk.  Mr. Cornyn?

Senator Cornyn.  Aye.

The Clerk.  Mr. Chairman?

The Chairman.  No.

The Clerk.  Mr. Chairman, the final tally is six ayes, 11 nays.

The Chairman.  Two-thirds of the members present not having voted in the affirmative, the ruling of the Chair is sustained.

I now recognize the Senator from New York for purposes of offering an amendment.  Oh, he is not ready.

Senator Kyl.  In order to keep the process moving along and anticipating that you would rule an amendment Number C25 that I have not germane and since it deals with the same subject matter, would it be a capricious time for me to go ahead and bring this up now?  I think we could save time.

The Chairman.  Why cannot we just incorporate the last discussion by reference and just rule out of order and proceed?

Senator Kyl.  That is a good question and let me provide an answer to it.
The Chairman. Okay.

Senator Kyl. I think you, I understand the ruling of the Chair. I think the American people might view it as formal resubstance, but the Senate has rules. One can disagree, but we all on this side I think appreciate the basis for your rule.

I think the point you made about action on the Senate floor is a worthy point. The Senator from Texas noted that the President had talked about this. My purpose for bringing the amendment that I have up right now for brief discussion here before the Chair rules is to make a couple of points about what we all ought to be considering about med mal reform in preparation for floor action.

It is in that spirit in trying to recognize what you have said and to move on that I would like to very briefly discuss this amendment.

The Chairman. Senator, I appreciate it but I will rule out of order. In the interest of time, other Senators have amendments. I just urge you to be quite brief and quite short.

Senator Kyl. I appreciate that. Thank you very much. And I just ask my colleagues to consider this because when we start talking about medical malpractice reform on the floor of the Senate, if in fact we do, I
think this is one of the best ideas. It is an idea that combines the reforms that Texas has done and the reforms that the state of Arizona has done.

I will not repeat what Senator Cornyn has said though I have some statistics. For example, the Texas Medical Board says that more than 10,000 doctors have either returned to the state or decided to move to Texas as a direct result of tort reform, and there are a lot of other --

Senator Rockefeller. But you are not going to repeat them.

Senator Kyl. Information, factual information that I am not going to repeat. Senator Cornyn did not make that particular point.

The point is that the Texas experiment has worked. They have had over five years now and the data are in. In the state of Arizona, we do not have as much data because the changes were made I believe in the year 2006.

But the essence of what Arizona did in 2006 is to make two changes that do not affect damages at all, but rather just the procedure that you follow when you file a malpractice claim and pursue it.

To summarize it very briefly, when you file your claim, you have got to have an expert witness whose credentials meet the statutory requirements. For
example, practicing in the very area of the alleged malpractice.

An expert that files an affidavit with the court confirming that in his expert opinion, malpractice was committed under the facts of this case in laying out some other details that then apprized the defense of what the suit is all about. It enables the court to better make an initial determination of the validity of the case, and frankly it has resulted in better settlements because plaintiffs in many cases have found that it isn’t worthwhile to pursue the case.

Senator Conrad. Will the Senator yield just on that point?

Senator Cornyn. Yes. Sure.

Senator Conrad. I would just say in the group of six that I raise and that others did, I think the Senator from Maine did. I respect the state’s experience. In my state we have a certificate of merit. It sounds like very much along the lines of what you described.

People back home tell me they think it has been quite effective in weeding out frivolous suits that do not have merit. The Senator from Maine said in our group that a similar program in her state has been extremely effective at weeding out frivolous suits, ones that have less merit.
So there is an area I think where there could be support on the floor.

Senator Kyl. I appreciate that comment and perhaps this is one area where a group of us might even sit down before the bill comes to the floor and see if we could work something out.

The other half of the Arizona provision says that when you have expert testimony to establish the standard of care in the case that was allegedly briefed, again, the expert witness has to be licensed in some state, it has to have specific specialty experience in the area of the alleged malpractice. You cannot have a pediatrician testifying about an oncologist’s malpractice, for example, and a couple of other items that demonstrate to the court that this isn’t just a person that has been hired by the plaintiff’s lawyer in case after case after case, but a real expert in the area of the alleged malpractice.

According to James Carlin, who is the President and CEO of MIAC which is the Medical Associations Insurance Company, it is a self-insurance company in Arizona, that the enactment of these Arizona statutes have reduced meritless medical malpractice suits in Arizona. He notes that just in the first year they had a drop of about 30 percent just in filings.
The premiums that were returned to MIAC participants were $90 million in the first year in the form of dividends which mean that they got money back because there were not as many claims to file.

So Mr. Chairman, considering your admonition to try to be brief, the point here is that there are good ideas in the states and I believe it is important for the American people who view this who as you said believe medical malpractice must be a part of what we do to understand that we are going to tackle this problem even though we cannot do it here.

My last point is this. From a Price Waterhouse Cooper study a couple of years ago, $.10 of every health care dollar spent is on malpractice premiums. From Mark McClellen who is a former Director of CMS, he had a partner whose name I do not recall. $100 billion at least every year of defensive medicine practiced could be saved with good medical malpractice reform.

So when we talk about A, wanting to reduce the cost of health care and B, therefore making it more accessible to people, you can do this without costing a dime of the federal government or the state. In fact, you could buy insurance for the 12 million people who do not have it just with the money that may be able to be saved from this.
So Mr. Chairman, I would ask simply so that my
colleagues will have this before them that I do offer the
amendment and I would appeal to the Chair to get a vote
on this. I will not ask that for three other variations
of this that I was going to present.

The Chairman. Okay. Right. This amendment is
primarily medical malpractice, not the jurisdiction of
this committee. It is not germane. Therefore it is out
of order. I believe the Senator said he wanted a vote.

Senator Kyl. Yes. And Mr. Chairman, can I just
ask one other thing?

This is not a commitment that I know you can make
tonight. But I would ask that the members of this
committee appreciate the spirit in which this is done and
agree to do their very best to ensure that votes on
medical malpractice amendments will be permitted if and
when a bill gets to the floor of the Senate and that
members of either side of the aisle will support having
votes on some of the proposals that we have discussed
here this evening.

The Chairman. This is going to come up on the
floor I am quite certain. Okay. The clerk will call the
roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.
The Clerk. Mr. Conrad?

Senator Conrad. No.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

The Clerk. Mr. Wyden?

Senator Wyden. No.

The Clerk. Mr. Schumer?

Senator Schumer. No.

The Clerk. Ms. Stabenow?

Senator Stabenow. No.

The Clerk. Mr. Nelson?

Senator Nelson. No.

The Clerk. Mr. Menendez?

Senator Menendez. No.

The Clerk. Mr. Carper?

Senator Carper. No.

The Clerk. Mr. Grassley?

Senator Grassley. Aye.

The Clerk. Mr. Hatch?

Senator Hatch. Aye.

The Clerk. Ms. Snowe?

Senator Snowe. Aye.

The Clerk. Mr. Kyl?

Senator Kyl. Aye.

The Clerk. Mr. Bunning?
Senator Bunning. Aye.

The Clerk. Mr. Ensign?

Senator Ensign. Aye.

The Clerk. Mr. Cornyn?

Senator Cornyn. Aye.

The Clerk. Mr. Chairman?

The Chairman. No.

The clerk will tally the vote.

The Clerk. Mr. Chairman, the final tally is seven ayes, ten nays.

The Chairman. Two-thirds members present not having voted in the affirmative, the ruling of the Chair is sustained. Now other amendments.

The only ones I am aware of at this point unless somebody -- offer an amendment is I have been advised -- Senator Carper, do you have an amendment? Okay. Senator Carper, you are recognized.

Senator Carper. Medicaid D3s and on the first round of amendments near the bottom.

The Chairman. Okay. Just for the information of the Senators, Senator Carper’s amendment is D3. It is near the bottom of the first round of amendment list.

D3, Medicaid overpayments. First list.

Senator Carper. Mr. Chairman, colleagues, I chair a subcommittee on homeland security and government
affairs. It is a subcommittee that Tom Coburn and I have taken turns at chairing over the last several years.

One of the issues that he and I have focused on is improper payments. As you may know, under federal law, federal agencies are required to report to OMB each year their improper payments. This has been a requirement since the earlier part of this decade.

As it turns out, some of the agencies report the improper payments and some do not. Over the course of the last half dozen or so years, more federal agencies are beginning to report improper payments.

For the most part, over payments, some under payments, but for the most part, over payments. As of last year, improper payments reported collectively by agencies totaled $72 billion. $72 billion. That does not include Department of Defense, that does not include homeland security, that does not include the Medicare part D program. I do not believe it includes Medicaid. It does not include as I understand it, Medicare Part C.

Still it is $72 billion. What we have found in the course of our hearings and investigation is that over the course of this decade, one, federal agencies are beginning to comply with the law, they are reporting their improper payments. Two, they are identifying their improper payments. Two, they are starting to report
their improper payments and three, a couple of them are actually starting to go out and recover over payments.

Those of you who serve on this committee that have been here for awhile may recall that a couple of years ago an effort was begun to begin recovering overpayment or improper payments in the Medicare program. I think Part A and Part B.

The first year or two they recovered almost nothing. Last year they recovered about $700 million from three states. Three states, $700 million. Last year. We want to go forward and recover over payments, improper payments in some cases from five, other cases -- we want to do that in all 50 states, not just three, but all 50 states. That is recognized in the Chairman's -- Medicaid part A and B, but also in C and D.

If we can recover $700 million last year in just one portion of Medicare, we can do a whole lot better than that if you add in Part D and Part C. I believe we need to turn our attention to Medicaid and the improper payments that occur in Medicaid. Frankly, we just haven’t addressed that yet.

The amendment they are offering here grows out of a hearing that we held earlier this year. One of our witnesses and the issue before us at the hearing was improper payments. The question is now that we have
identified improper payments, what are we doing to recover them?

We had the Medicaid director from the state of New York before us and the Medicaid director from the state of New York shared with us that they hadn’t done a very good job of recovering improper payments there until fairly recently and he felt they were doing a much better job.

But he shared with us what I thought was an invaluable point, very valuable point. He said under current law if we, once we identify fraud in an over payment, if we identified fraud, we have to turn over whatever portion of federal dollars is involved within 60 days. He says as it turns out in these fraud cases, a lot of them are fairly complex and we do not have the money to turn over within 60 days. We will not have the money within 160 days or 260 days. Some of these fraud cases take a fair time to flesh out, to identify and to be able to go out and get the money.

As a result, states turn a blind eye when they identify fraud in a lot of cases when they are going to have to fork out the money to the feds that they don’t even have, they just turn a blind eye. They do not recover the money and frankly we do not recover the federal share either.
What this amendment does is a couple of fairly simple things. I think they are common sense. One is to say in response to that testimony, why do not we say that the states, and that is where fraud is involved. When fraud is involved, you have to turn the federal money over to us, the federal share over within 360 days. They basically have a year to do it.

We want the money but we want them to stop turning a blind eye to these investigations. We want them to get their money for themselves and we want to get our money, too.

The idea is does it make much sense to get 50 percent of nothing or does it make sense to get 50 percent of a whole lot more than nothing if they have the 360 days or 365 days? I think it makes a whole lot more sense to wait the extra 300 days and get our share and for them to get their share.

It is a great incentive, Senator Rockefeller as a former Governor knows and we all know what states are going through with the Medicaid programs. If there is fraud, they need money to help support their programs. If they can recover more of the improper payments, that is a break for them, and frankly it is good for us, too.

It is good for us, too.

The Chairman.  Senator Conrad?
Senator Conrad. Mr. Chairman, I think this is really an excellent amendment. I believe it because Secretary Levitt when he was the head of Health and Human Services came to see me about fraud and Medicare and told me about a number of undercover operations they had underway at the time and it really is shocking what they were finding.

I would support this amendment if it was nothing more than the second half. The offset, the expansion of recovery audit contracting because I believe there is a gold mine to be found there in going after fraudulent, incorrect and other forms of payments which the taxpayer of the United States is getting cheated. I believe it constitutes billions of dollars.

The Secretary came to me and asked for me to put in several hundreds of millions of dollars in the budget to go after these wrongdoers. We did. It paid enormous dividends, but there is much more to be found. Frankly, we are limited in what we can do in the budget and these recovery audit contracts have proved to be very, very productive.

So if the Senator’s amendment was nothing more than the second half, I would support it. But he has put on the front end an inducement to the states to be interested in going after fraud as well because he is
exactly right. The states, I have had states tell me they were afraid to go after fraud because they would have to produce money before they received it. What a backward system that is. So I think the Senator has got a great amendment.

The Chairman. I would like to ask Mr. Schwartz to give us a summary of provisions in the market, help our fraud and abuse recovery systems. There is a lot in here that we are trying to do to help stop -- get some money out of these bad actors who are ripping off American taxpayers. What is in the bill?

Mr. Schwartz. The Chairman’s mark contains a whole series of provisions related to improving program integrity.

To sort of just summarize, the first thing that the Chairman’s mark does is recognize that programs, the Medicare and Medicaid programs today do not do a very good job of screening people when they come into the program. By people, I mean doctors, hospitals, ambulance providers, DME suppliers, anyone who can incur billing for either program. So the first step is to try to do a better job of checking out who is coming in.

The Chairman. Do we have some kind of estimate how much we could pick up? A savings with greater program integrity.
Mr. Schwarz. Well, I can tell you this. It was a lower number than we were hoping for, but it is broken out into a couple of categories by CBO. The first is increased revenue that is derived from a new provider application fee which would be charged to people, providers looking to join Medicare or Medicaid and I believe that is about $2 billion of new revenue.

Then the savings that CBO scores us as achieving for the prevention and elimination of fraud compared to what they assume is in the baseline is about $1.1 billion. So now we are at $3.1. Then there is an additional what they call memorandum on the CBO table of what they call non-scorable savings.

Years ago there was something called the health care abuse control account or HCFAC as we call it. HCFAC funding goes to CMS, the HHSOIG, the Department of Justice and the FBI under sort of a convoluted formula, but it is dedicated money to prevent health care fraud.

It is non-scorable savings of $400 million. We give HCFAC in the mark $100 million and just parenthetically I would reference that the OMB website actually credits HCFAC as having a 17:1 return on investment which is a number I think the members are very familiar with. So we are hoping that that .4 of non-scorable savings is actually significantly higher in real life.
The Chairman. Okay. Thank you very much. I think frankly, Senator, you have a good amendment. I am sure it must be very difficult for states. They know they have overpaid, to try to cover from providers so they can make the overpayment back to the states. I think your extension is appropriate. It is not too long, 180 days makes sense to me.

Second, as the Senator from North Dakota has pointed out, we found some additional savings here to beef it up through the so-called recovery audit. That is very good. I suggest that we take a voice vote in this amendment. I support the amendment and I encourage all my colleagues to vote for it. All those in favor, say aye. Those opposed, no. The ayes have it, the amendment is agreed to. Thank you, Senator, very much. Senator Grassley?

Senator Grassley. This is amendment C9. It says so right here. I do not think it had to be modified.

The Chairman. Good for you.

Senator Grassley. The Chairman’s mark requires states to expand coverage to cover all populations up to one hundred thirty three percent of federal poverty by the year 2014. A very laudable goal. But providing coverage in Medicaid as we all know doesn’t automatically mean that people are going to get the care that the coverage would allow them.
Medicaid reimbursement rates and provider participation rates are very, very low compared to either private insurance or Medicaid. No, that is Medicare. Access to serious challenge. Access is a very serious challenge to Medicaid programs.

In 2014, states will be mandated to expand to cover adults that have never been covered under Medicaid before. States will get additional assistance for covering these adults. State will get on average a 90 percent match from the federal government. Of course we know states are going to be thankful for that.

States are already at a breaking point, and so they should be thankful that this bill is only going to cost them an additional $30 billion.

We are deluding ourselves though if we think that we are going to do anything in this bill to make Medicaid a better program for the people it serves. We are throwing just enough resources at state Medicaid programs to achieve certain coverage targets. But I ask you, are we guaranteeing Medicaid recipients access to providers? I think even during our talks on group of six, that was recognized as a very serious shortcoming.

The bill will likely make it worse on kids then. This bill provides a clear, undeniable financial incentive for states to cover adults. What does the bill
do to cover access for kids? What does the bill do to
guarantee that providers will participate and treat kids?
Nothing.

So, Mr. Chairman, my amendment requires states to
raise reimbursement rates for Medicaid providers. This
would include pediatricians, children’s hospitals and
dentists, providing care for an eligible child to 100
percent of Medicare levels starting in 2014.

Let us be clear. Doctors are not going to get rich
on Medicare rates. But at least they are more likely to
participate because this low participation rate in the
Medicaid program is a very serious social problem we
have. It goes beyond a health problem to be a social
problem.

We need to pay pediatricians to participate in
Medicaid. We need to pay children’s hospitals to
participate in Medicaid. We need to pay dentists to
participate in Medicaid. We are fortunate that so many
providers feel a duty to provide services in Medicaid,
but the dollars do matter.

So my amendment states well get a 100 percent match
for the additional cost of reimbursing providers for two
years, phasing back the regular matching rate by 2019.
The additional cost of this provision is paid for by
eliminating subsidy provided in the bill for people over
300 percent of poverty and lowering the overall subsidy amount to a sufficient amount to make up the difference. So the money then goes for the subsidy instead.

The choice of this amendment is really very simple. You can use this as an opportunity to guarantee access to the poorest kids in the country and all of you have to be willing to do so to reduce subsidies to people who make more money than the national median income.

Bottom line. Coverage without access is not an improvement on what we have today. I yield the floor.

The Chairman. Is there discussion on this amendment? Senator Stabenow?

Senator Stabenow. Mr. Chairman, I have a question I guess for the sponsor. Do I understand that you are lowering the subsidies for families, for individuals in the exchange?

Senator Grassley. Yes, from 400, whatever it is, down to 300.

Senator Stabenow. I would, Mr. Chairman, have a concern with that, but at the same time I am very sympathetic. In Michigan we have extremely low Medicaid rates for providers. It is very, very hard to find providers in the midst of an extremely challenging economy.

The state has had to cut Medicaid. So I certainly
am very supportive of raising the rates for providers. We have a difficult time of finding doctors that will serve people, but at the same time doing that in the context of lowering the tax credits for people that we are now saying would need to participate in the exchange and get insurance I think is the wrong tradeoff.

I am extremely sympathetic to what my friend is saying. I would be concerned about the way this is paid for.

Senator Grassley. Well, thank you for being sympathetic and it is a trade off. It would be 1/10th or $40 billion of the subsidy for the exchange, and what you would be basically saying is people at higher income that have more ability to provide for their insurance anyway would be helping provide health care for kids that we have promised over a long period of time and we haven’t delivered on that promise.

The Chairman. Senator Menendez?

Senator Menendez. Mr. Chairman, I appreciate what Senator Grassley is going to do, wants to do in ensuring that children have good access to health care is a worthy policy. It should not, however, come at the cost of eliminating premium credits to help moderate income people afford health insurance.

Now, the premium credits are important, especially
when we are creating a mandate here. The premium credits are important to ensuring that a requirement for people to have coverage does not place a harsh burden on moderate income people who otherwise could not afford to pay for health insurance.

If the amendment would be accepted, many people with incomes just above 300 percent of the poverty line would face difficulty paying the full price for coverage. The average job based insurance policy today would cost a family of three just above 300 percent of the poverty level, nearly one quarter of its pre-tax income. One quarter of its pre-tax income.

So many people who fall in that category, they also need help in achieving, affording health care. Otherwise, they could be faced with a difficult choice of having no health care and paying some of the basic necessities like housing and food.

So when we continue to go below, there is universe in this country, a very significant universe that find it equally as difficult because of the areas of the country in which they live to be able to afford that health insurance, and this is one of those.

Senator Rockefeller. Mr. Chairman?
The Chairman. Senator Rockefeller?
Senator Rockefeller. I share sort of a foreboding
about this amendment. I think what Senator Grassley has
done is to pick out a particular section and we
understand what he is saying, but for this reason that we
created a Medicaid and CHIP payment and access commission
last year which, or maybe this year which looks at the
whole problem.

I am sort of like Senator Menendez, you know, it is
very vague. When amendments are very vague, I get very
nervous. I am not sure that we have to rob Peter here in
order to pay Paul and I have a very uncomfortable feeling
about it which I cannot substantiate enough except that I
have enough worry that I am going to vote against it and
hope that my colleagues will, too, even without the
specificity of information other than what Senator
Stabenow has told us as well as Senator Menendez.

We are dealing with a very big subject here.
Senator Grassley is dealing with a small part of that
subject and I think it is premature and it is the kind of
thing I do not think we should be voting on now. That
sounds defensive, but I look at this amendment and I feel
extremely defensive.

The Chairman. I might say, Senator, we are being
rushed here to make a judgment that can have I think some
significant consequences. This is the first I have seen
this amendment now. I think I can speak for my
colleagues saying it is pretty much the same for them, too.

I am advised that first of all there is a $41 billion cost to this amendment. I am advised that actually children that, CHIP children do better in Medicaid than to other populations in Medicaid.

Their benefits are good, they are good visits. I just do not know what data you have to back up the reasons for your amendment, but I am advised that actually kids in CHIP do pretty well -- better in Medicaid populations than in private health insurance, for example.

I might also say that I am a little concerned with the point that Senator Rockefeller made. We are robbing Peter to pay Paul here. Mainly we are taking away tax subsidies significantly from families -- as for the bulk of the money is above 3 percent.

So those kids in those families will be getting fewer tax credits while the shift here to, I guess to Medicaid kids I guess primarily. I think discretion is a better part of valor here and that we should direct a commission we set up called MACPAC which is the Medicaid and CHIP Payment and Access Commission to study -- that is agree to which low income kids are not getting the benefits that they should relative to children say in
private health plans.

My sense is CHIP kids do pretty well relative to children in private health plans. CHIP and Medicaid kids both. CHIP and Medicaid kids both do pretty well relative to children in private health plans. I would just urge us because we are moving so quickly on something we do not know a lot about that it is better to have that commission study this issue and report back to us within a year.

Senator Rockefeller. You know, someone comes up to me and I walk out of my house and they say be careful, the wind is blowing. That does not mean very much to me because it could be blowing a little bit or it could be blowing loaded with rain or sleet or it could just be bellowing like a howling tornado.

But just saying that the wind is blowing, that is sort of what I feel this amendment is like and I cannot support something I do not understand. So I would like one thing to get Mr. Schwartz to explain what this commission is set up to do. Go ahead.

Mr. Schwartz. Thank you, Senator Rockefeller. So the Medicaid Payment and CHIP Payment and Access Commission, or MACPAC as it is called, was created, as you pointed out, as part of the CHIP Reauthorization Act that was signed into law in February. As you well know,
one of the things it is charged with doing is reviewing all sorts of Medicaid and CHIP policies that --

The Chairman. Could I call to order here? There is a lot of side conversations going on here and I just think we would do better if we focus on one issue at a time. Right now we are discussing the question asked by the Senator from West Virginia which Mr. Schwartz is now answering. I just urge all of us to cease our private conversations so they can get their work done. Thank you.

Mr. Schwartz. Thank you, Mr. Chairman. It was set up to review all of the policies that exist at the state level and in the federal law for CHIP and for Medicaid that effect access to services, access to the programs and payments under both programs. It is modeled very loosely off of MedPAC, and I say loosely because the federal government doesn’t set payment levels, so MedPAC is a payment advisory commission, so the title is different, the mission is a little different.

But it was set up to get at this very issue. I think Senator Grassley very correctly points out that payment levels are a big concern in Medicaid. It is something that has sort of come up periodically throughout the discussions about an increase in Medicaid eligibility levels.
I think it is important to note that we do not know how much they are off and which providers are worse off than others. The general consensus is that hospitals are paid pretty well in Medicaid and individual providers and specialty, pediatric specialists are paid less well, and so access to them is a little bit tougher. But then again it varies by state.

Some states actually exceed 100 percent of Medicaid rates across the board in their Medicare programs and some are woefully below. So to pick a target of 100 percent of Medicaid rates sounds good and then it puts it on par with the other big federal program, but we actually will not know, until MACPAC gets up and running and is able to survey all 50 states, really what the right levels are.

I would also just add that under the Chairman’s mark, the Medicaid expansion takes effect January 1st of 2014. MACPAC’s first report I believe under the Chairman’s mark gets delayed to come out in 2010. So there is a fair amount of time between the creation and initial reporting period for MACPAC where they could weigh in with much more evidence than any of us have available today about payment levels in Medicaid.

Senator Rockefeller. Mr. Chairman, let me just close by saying that I get extremely sensitive when it
comes to how children are handled. This is what I call a very vague amendment. It may not be to the Senator from Iowa, but it is to me.

We have a problem here where amendments are coming in, sometimes you have less than 30 seconds to look at them, much less to try to understand them. I do not want to vote on something which I do not understand and I have a feeling a lot of people share that feeling. We have no business doing that.

Yes, we understand this is a rush process, but there are not so many amendments that we could, that something comes at us and we have to vote yes or no. On this one, I want to vote no because I do not know, I think I probably would vote no if I understood it better, but I certainly want to find out what the commission has to say and we have the time to do that. So I cannot possibly vote for this.

The Chairman. I might say too, on the surface I find it a bit bizarre. Medicaid payments for kids to Medicare. I do not know very many kids in Medicare. It just seems a bit bizarre. Maybe there is a good explanation, but I do not know why we would want to tie Medicaid rates for kids to Medicare which doesn’t have a lot of kids. Unless they are pretty old kids. I just do not know. Senator Hatch?
Senator Hatch. Yes. Let me just ask a question.

Couldn’t MACPAC set payment levels for adults?

The Chairman. I’m sorry, Senator. Use the microphone, please.

Senator Hatch. I am using it.

The Chairman. Okay. Thank you.

Senator Hatch. Couldn’t MACPAC set payment levels for adults instead of doing it in this bill? The kids need it.

Mr. Schwartz. I’m sorry, Senator Hatch. Is there a question, could MACPAC set payment levels for adults in Medicaid?

Senator Hatch. Right.

Mr. Schwartz. I do not think that MACPAC, it is an advisory commission, sort of like MedPAC. It does not actually have rate setting authority.

Senator Hatch. Well, isn’t the idea the same? I mean, they could advise.

Mr. Schwartz. I think that part of the concern is that because states vary so tremendously and the old saying, if you have seen one Medicaid program, you have seen one Medicaid program, that includes their provider payment rates. States obviously get lobbied by different provider groups and are subject to different pressures to pay one provider group X and another Y.
So I think that taking averages can sometimes be deceiving whether they are high or low. But to get back to your original question, MACPAC’s authority does apply consistent with the Chairman’s mark for all Medicaid eligible beneficiaries, adults and children.

Senator Rockefeller. There are a lot of Governors around this country, and some of them would love to have this so that they could use the money for something else. I have seen that. I have seen states that do that. I know Governors who do that. That is part of my suspicion. You cannot fool with payment to kids and that is what I think we are doing here. Let us get the recommendations and do it right.

The Chairman. Senator Snowe?

Senator Snowe. Yes. Mr. Chairman, I would like to ask a question. Does the commission make recommendations to Congress regarding any policy changes?

Mr. Schwartz. MACPAC is authorized to make recommendations to both Congress and the state governments since both MACPAC Medicaid and CHIP are joint programs. So some things are within the federal government’s province, some in the state’s, so its authority goes to both.

Ms. Snowe. It reviews all of the provider payments?

Mr. Schwartz. Yes, and other policies. But yes,
provider payment.

Senator Grassley. Mr. Chairman? First of all, I do not want to think Senator Menendez that I give short shrift to what he said because I know he does have a high cost state.

But I think in terms of nationally, you know, 50 percent of the families and workers are above 300 percent of poverty and that is where I have to shoot for something. When it comes to the comments that you made and Senator Rockefeller made, I would only say this.

I do not know how many times in the group of six we heard Senator Enzi always bring up, you know, you can do these things with Medicaid if you want to, but are you going to be able to deliver health care if you do not have access to it.

I never heard anybody take on Senator Enzi on that point. He has not said anything tonight, but I hope I am recollection from the many times that I think I heard you say that that we had to provide access to health care or what does all these promises under Medicaid do any good if we do not have it? That is what I am responding to here with this amendment, Mr. Chairman.

Senator Stabenow. Mr. Chairman?

The Chairman. Senator Stabenow?

Senator Stabenow. Mr. Chairman, again, I want to
just emphasize that certainly for us in Michigan, Medicaid rates are very serious. Medicaid is at 40 percent of Medicare right now and it is extremely difficult to find providers. So I hope, Mr. Chairman, that we can work together with the distinguished ranking member on this question.

The unfortunate part of this amendment is that it pits providers for children against middle class families and that is just not a choice that I believe we should be making because I think we need to support middle class families who need health insurance and we also need to be addressing what is a very serious issue in terms of Medicaid.

So I would hope that we might just work together and see what we might be able to do.

The Chairman. Senator Enzi?

Senator Enzi. Mr. Chairman, I have been trying to get recognition here because I was going to make my statement before Senator Grassley did because the bill that we are looking at is going to force 11 million more people onto Medicaid. Right now 40 percent of the doctors will not see Medicaid patients.

If you cannot see a doctor, you do not have insurance. So we have got to do something and we have got to do it on the front end to make sure that people
can see a doctor. So I appreciate the Senator’s 
amendment.

Senator Conrad. Mr. Chairman?
The Chairman. Senator Conrad?

Senator Conrad. Mr. Chairman, I remember those 
conversations very well as does Senator Grassley and 
Senator Enzi made this point repeatedly in our group and 
he is right to do it because it is a real issue and 
Senator Grassley is attempting in a good faith way to 
address it.

I do not think we have quite got the right pay for. 
I increasingly wonder if something that Senator Cantwell 
has been talking about does not need to be more fully 
reviewed in light of two things. One, the affordability 
issue that Senator Stabenow and others have repeatedly 
brought to our attention and this issue that Senator Enzi 
and now Senator Grassley have brought to our attention to 
find a less expensive way to give people coverage who are 
on the edge of Medicaid somewhere in that 100 to 200 
percent of poverty range there would be for those from 
133 to 200 percent of poverty who are going to the 
exchange which is a more expensive way to get them 
coverage than we might find in some alternative.

I know Senator Cantwell is working very hard on that 
and I think that might be a funding source to deal with a
couple of things. The affordability issue as well as this issue. Senator Enzi is right. Forty percent of doctors are not taking Medicaid patients and if we increase the number of people, we are going to run into issues of a lack of capacity, a lack of capacity.

We see it in Massachusetts already where they have expanded their coverage and because they have not had enough of an increase in primary care doctors, and I applaud the Chairman because in this mark there is a 10 percent bonus every year for the next five years for those that go into primary care.

So I do think we have got some more work to do to have a rounded package.

The Chairman. I think that is probably true. One point that has not been brought out here is that states under the law set provider rates. We give the states broad authority to set provider rates, reimbursement rates. It is up to states primarily so long as it is fair basically and so forth.

So if states want to raise provider rates, they are certainly free to do so and they are able to do so and get the match, too, the federal match when they do so. So this 40 percent figure, Senator, I am not sure it is only 40 percent. My guess is that it is more than 40 percent of doctors take Medicaid kids and CHIP kids. I
bet it is 100 percent.

But even if it is low, the states could increase the provider rates if they want to. That is up to states and they have the federal match when they do so.

So I just, this is a big area that needs work, I grant you. I think it is not right to adopt this at this time. Senator from Oregon?

Senator Wyden. I think Senator Enzi is making a very good point and I just want him to know that I intend to follow up with him specifically because we were able to significantly expand state’s waiver authorities earlier today.

I think that the Senator from Wyoming over the years has made a number of good points with respect to making sure states had more flexibility. It is one of the reasons that I and others were involved in the state waiver provision. I think this is one way to very directly expand coverage as the Senator from Wyoming wants to do.

So we are going to stay at this and I want them to know that I think there is an opportunity to get done what he is interested in pursuing.

The Chairman. I just want to ask you, Senator Grassley, is there another way to get at this? It sounds like there is cohesion here. I just do not know if this
is the precise way to do it and I am afraid that --

Senator Grassley. Do you want to opt it off until
tomorrow afternoon or something?

The Chairman. Let us try that. Let us see if
there is another way to do it because I think you are
raising a good issue.

Senator Grassley. Okay. But I think one thing I
want to say in addition to what you said previously to
recognizing Senator Wyden, you have got to remember
everything you said is accurate, but we are loading the
states down with $33 billion additional mandate as a
result of this legislation with what we are doing with
adults.

So that is a consideration you have to take into.
But if you think this can be worked out, we will put our
staff on it and see what we can work out. I do no want
to, I want to make sure we have plenty of time between
now and the time you pass this bill out to get fair
consideration of it.

The Chairman. And your goal is to make sure the
kids get treatment under Medicaid. That is more than --
is that the basic goal?

Senator Grassley. And I do not understand why
Senator Rockefeller does not understand what I am trying
to do here. It is pretty darn clear.
Senator Rockefeller. I am pretty nervous about it. When the wind blows, I do not know which direction it blows and how strong it blows.

Senator Grassley. And I would hope Senator Conrad would think in terms of how many people, kids in his state would benefit from an amendment like this and how many people between 300 and 400 percent of poverty are going to benefit from the bill the way it is written.

The Chairman. The amendment is withdrawn. We are going to work on it.

Senator Enzi. One quick comment. Incidentally that 40 percent figure comes from MedPAC 2002. So I suspect it is a lot worse now.

The Chairman. Could be. Senator Schumer seeks recognition to offer an amendment.

Senator Schumer. Mr. Chairman, I call up my amendment D1, the affordable reimbursement equity act. Let me just explain it briefly.

We have broad agreement on this amendment and I want to thank all my colleagues and staff who helped to work out an acceptable compromise on the issue. Supporting this are Senators Enzi, Stabenow, Hatch, Menendez, Carper and Kerry.

Bottom line is biologics are life saving drugs. They represent the best of American innovation. But
there is currently no FDA approval pathway for the
generic version of the biologics, but it is coming very
soon.

Senator Bunning. Excuse me, Senator. Could we get
a copy of the amendment?

Senator Schumer. It is filed. It is in the
notebook because it is modified, yes.

Senator Bunning. One of the big fat notebooks.
Thank you.

Senator Schumer. Yes. It is Amendment D1.
Anyway, so biologics are important. We are coming up
with generic biologics which obviously could save the
government, private insurance money and there has been in
the past a sort of anomaly of where a doctor prescribes
the brand, the generic they get less money for
prescribing it.

Doctors always get a fee, if it is $10,000 say for
the drug, they get a 4 percent fee for handling it,
prescribing it. It is the same thing if you prescribe
the original drug or the generic. But the fee if it is 4
percent of $20,000 versus 4 percent of $10,000 say gives
the doc a lean to not prescribe the biologic and cost
money. Here we allow the Secretary to set a fee that
applies similarly to each.

As I said, whatever our views are on biologics and
generics, this amendment is supported just about by everyone because it saves money at no cost to the government. So I would ask that it be accepted.

The Chairman. Any discussion to the amendment? As I understand, Senator, you have talked to various groups about this amendment.

Senator Schumer. Various groups. Pharma supports it and the biogeneric people support it. Both sides.

The Chairman. All right. I think we can either accept it or voice it. It is your preference.

Senator Schumer. Let us voice it.

The Chairman. Okay. The amendment before us is offered by Senator from New York. All those in favor say aye. Those opposed, no. The ayes have it, the amendment is passed.

The next amendment on the list is by Senator Kyl but I see Senator Bingaman.

Senator Bingaman. Go ahead. I had one that related to coverage, but whenever you get to that point, Mr. Chairman.

The Chairman. Well, I just think if you are ready, let us go.

Senator Bingaman. Mr. Chairman, this is the amendment C7 that is also in the booklets here, in the notebooks.
This a very simple, straightforward amendment. It makes a relatively modest change in the Chairman’s market to ensure that working Americans will have access to health insurance tax credits.

In the mark as it was modified by change, Senator Snowe urged employees who receive an offer of employer sponsored insurance will be eligible to come to the exchange to receive a health insurance tax credit if one of two things exists.

The offer does not meet a minimum creditable coverage standard or second, the offer is unaffordable. That is the premiums cost more than 10 percent of income. That employee’s income.

In such circumstances the employee is required to seek an affordability waiver from the state exchange and then is required to present the waiver to --

The Chairman. Could we quiet down a little bit? Go ahead, Senator Bingaman.

Senator Bingaman. Okay.

The Chairman. Thank you very much. We are going to coverage now. There may be a couple of delivery system amendments yet to be offered. That is fine. When the Senator has a way to offer them, that’s better. But at this point -- go ahead with Senator Bingaman with coverage, so we are going ahead. Go ahead, Senator.
Senator Bingaman. Okay. In these circumstances, the employee is required to seek an affordability waiver from the state exchange and then that same employee is required to present that waiver to his or her employer. In turn, the employer is required to reimburse the federal government for the cost of any tax credit received by the employee up to a cap.

I am concerned that requiring an employee to submit a waiver directly to his or her employer may deter employees from seeking an affordability exception. This amendment would strike the requirement that the employee submit the waiver to the employer and require instead that the exchange provide the waiver directly to the employer.

The Congressional Budget Office has provided a preliminary estimate that this amendment would have a negligible impact on the score of the bill. I hope my colleagues will support this change.

The Chairman. Senator, so I can get it straight here, who would present the --

Senator Bingaman. Under the bill the way it now stands, the employee, if the employee wants to claim that coverage is unaffordable, the employee has to seek an affordability waiver from the state exchange and then present that waiver to the employer and the employer then
has to reimburse the federal government for the cost of any tax credits that were received by the employee up to a certain cap.

This change would say that the employee instead of submitting the waiver directly to the employer, we would say that the exchange would do that.

The Chairman. They would submit the information?

Senator Bingaman. Would go ahead and provide that to the employer and then the employer would have to reimburse the federal government.

The Chairman. All right. And your reason for that change?

Senator Bingaman. The reason is I think that requiring employees to go ahead and present this to their employers would likely cause, deter employees from actually going ahead and seeking this affordability exception which I think would be unfortunate.

The Chairman. Ms. Fontenot, do you see any technical problems with this? On the face of it I think it is probably a pretty good idea.

Ms. Fontenot. Yes. We were waiting to hear from CBO and they assure us that it is a negligible cost.

Senator Enzi. Mr. Chairman?

The Chairman. Yes, Senator Enzi?

Senator Enzi. I do not know how much it affects it
by having the waiver presented or not presented, but one
of the problems with this kind of a situation is that the
younger, healthier people are going to be the ones that
are going to cash out of this and the sicker ones are
going to be left with the employer which is going to
drive up their affordability dramatically and would be
the cause of it.

There has to be somewhere to make sure that there is
an insurance adjustment or something because the
employers are not going to be able to afford who is left
and we are going to have a whole bunch more people
dropped from the insurance.

The Chairman. I hear you, but that is a separate
issue. That does not go to the amendment offered by the
Senator from Mexico.

Senator Enzi. And whether you have to provide a
waiver or not?

The Chairman. When a waiver is sought, the
question, I will let the Senator explain his amendment,
but that is, he is talking about a different issue.

Senator Bingaman. I think the employer still
receives notice that the employee has dropped out of the
program and sought this waiver and obtained this waiver.
It is just that the employee would not have the
responsibility of presenting this waiver to the employer.
The exchange would send it to the employer. That is the only change that my amendment would accomplish.

The problem that you identified exists today and still would even after this amendment.

The Chairman. Right. Any further

Senator Snowe. Mr. Chairman? I just would like to inquire of Senator Bingaman. Is there any estimate of the employer’s assessment?

I understand the value of redistributing the burden in terms of demonstration of an individual being exempted under the waiver. But I am concerned about imposing any additional costs on the employer.

Senator Bingaman. I do not think this would, I mean, the way as I understand the way the bill now stands, the employer does have to reimburse the federal government for the cost of any tax credits received by an employee if the employee seeks and obtains one of these affordability waivers. We have already made that decision.

Senator Snowe. We already made that decision, but they do not have to pay the cost?

Senator Bingaman. The payer --

Senator Snowe. I understand that on the exemption. But also in the fact of the individual having to present, to demonstrate its waiver to the employer.
Additional cost beyond the assessment.

Senator Bingaman. There is no additional cost.

Now, the exchange just provides the waiver instead of the employee having to provide the waiver.

The Chairman. Is there any further discussion? If not, we will vote on the amendment. All those in favor signify by saying aye. Those opposed, no. The ayes have it, the amendment is passed. Moving onto the next amendment.

Senator Hatch. Mr. Chairman?

The Chairman. I am trying to go back and forth here. Senator Hatch, I understand you have an amendment on the first list, is that correct? Could you identify it, please?

Senator Hatch. It is Amendment Number D3, the American’s Future Healthy Act of 2009.

The Chairman. D3.

Senator Hatch. D3. Let me just take a minute to explain the Hatch Kyl amendment. This amendment would replace the Medicare disproportionate share reductions contained in this bill with the Government Accountability office report to Congress on the insurance coverage levels in each state including the projected impact of the coverage provisions included in the Chairman’s mark at the end of fiscal year 2018.
First, since I represent a state that depends heavily on both Medicare and Medicaid disproportionate share payment funding, and if we lose that funding it will affect both patients and providers, especially those living in rural areas.

Providers will no longer be able to care for the uninsured.

The Chairman. I am sorry, Senator. Is this a modified D3? Just so we have the same paper here.

Senator Hatch. Not that I know of.

The Chairman. Mine says modified. Hatch Amendment D3. I want to make sure we have the same amendment. Mine says modified at the top.

Senator Hatch. Well then we have the same amendment.

The Chairman. Okay.

Senator Hatch. Okay. As committee members know, Medicare disproportionate share payments are necessary to offset costs hospitals incur when providing care to low income individuals. The rationale of the policy contained in the Chairman’s mark seems to be that if the expected coverage expansions in the bill come to fruition, disproportionate share payments become redundant expenditures.

Now, I understand the logic of the Chairman’s mark
once it is fully implemented it will provide coverage to individuals who are currently uninsured. I still believe that it is going to be extremely difficult to achieve that goal and therefore reducing the state disproportionate share payment dollars is a big mistake.

It will have a tremendous impact on my home state of Utah and I think others as well. CBO estimates that the Medicare disproportionate share payments would be cut by $23 billion over 10 years. With the exception of Wyoming, a state that receives no disproportionate share payment money, Utah is the lowest disproportionate share payment state in the country. In fact, my state receives so little disproportionate share payment funding that Utah has never had enough funding to offset the cost of providing care to the uninsured.

Caring for the uninsured creates a heavier burden on Utah hospitals because the state’s disproportionate share payment is so low. If Utah disproportionate share payments are reduced, the impact would be serious if hospital margins, particularly in rural areas, are particularly thin. I suspect that Utah is not the only state that will be affected this way.

With respect to the Medicare disproportionate share payment cuts beginning no later than 2015 and continuing annually, the Secretary will make disproportionate share
payments equal to only 25 percent of the disproportionate share payments that would otherwise be made. An additional payment would be made to reflect continued uncompensated care costs.

Again, the Chairman’s solution is a creative effort to tie disproportionate share payment cuts to reductions of the number of uninsured. For every one point reduction in the uninsured population, the percentage of funding available for the continuing cost of uncompensated care will be reduced by a proportionate amount.

One of my biggest concerns is how do we know that the data that we are using to determine the number of uninsured individuals is completely reliable? We need to confirm that the data is completely reliable since disproportionate share payment cuts will be tied to statewide reductions in the number of insured. That is only right.

As someone who represents the rural state, I am deeply concerned about the impact that this policy will have on those individuals living in rural America. Individuals in rural areas are more likely to be uninsured than those in urban areas.

Rural communities contain high percentages of some of the most vulnerable segments in the population,
including self-employed individuals with no access to insurance, company insurance. Those self-employed and part time workers are more likely to be uninsured than are their counterparts in urban areas or areas adjacent to non-rural population centers.

In short, America is both poorer than urban America. Rural America is both poorer than urban America and more likely due to unemployment circumstances to lack health coverage. They are in the whole older and uninsured or under insured.

Meanwhile, the rural hospitals that serve these communities are already struggling to survive and the provisions in the Chairman’s mark did not help them. I am not satisfied that statewide statistics on reduction of the number of uninsured will accurately reflect the situation on the disproportionate share payment communities which have greater levels of poverty and uninsurance than their urban counterparts. Therefore, I believe that it makes sense that before the Medicare disproportionate share payment cuts go into effect, we need to conduct a GAO study to report to Congress on the insurance coverage levels in each state to determine whether or not we are headed in the right direction with this policy.

So I would urge my colleagues to support the Hatch
Kyl amendment.

    Senator Kyl.   Mr. Chairman?

    The Chairman.   Okay. Thank you, Senator. Any comments?

    Senator Kyl.   Mr. Chairman?

    The Chairman.   I’m sorry. Senator Conrad?

    Senator Conrad.   Mr. Chairman, the disproportionate share payments help to give assistance to hospitals that provide uncompensated care and are distributed through a percentage increase to a hospital’s perspective payment rate.

    In 2007, MedPAC sent us a very clear message and their message was that disproportionate share payments are very poorly targeted to hospital’s share of uncompensated care.

    In the Chairman’s mark, it is seeking to reduce disproportionate share payments in light of the fact with more people being covered there would be less uncompensated care. So, you know, it makes perfect logic when you expand coverage to reduce disproportionate share payments because disproportionate share payments are for uncompensated care.

    The mark also assures that hospitals will receive Medicare payments, although at reduced levels for this uncompensated care because less money will be needed.
The amendment by the Senator from Utah would continue these poorly targeted payments, and that is not my assessment, that is the assessment of MedPAC. They told us in 2007 there is a big mismatch and then they just conclude anybody who has looked into disproportionate share payments knows this is a system that cannot bear much scrutiny. That is what MedPAC told us and anybody, any objective observer who has looked into disproportionate share payments has come back with the same conclusion MedPAC did.

So I would hope that we not accept the amendment.

Senator Hatch. Let me just say, we are not continuing the payments. We are saying we want general accountability office to do a report to Congress on the insurance coverage levels in each state including the projected impact of the coverage provisions in the Act by the end of fiscal year 2018.

We want it studied so that these people are not left high and dry, which is why we did disproportionate share payments to begin with.

The Chairman. Can I ask, Ms. Eisinger. Give us a sense of provisions in the mark. First of all, these reductions do not start until 2015 as I recall, and that is designed to make sure that we do not incorrectly cut disproportionate share payments.
As I understand for the hospitals they generally agree to the Chairman’s mark. That is including these disproportionate share payment reductions that take effect in 2015. But more importantly to me, we want to make sure we get this right. That is not overpaid, not underpaid. So if you could give us a sense of what the census provisions are and the recording provisions are so that Medicare knows what payments to make to disproportionate share hospitals. If you could, please.

Ms. Eisinger. Sure. Thank you, Senator. So the Chairman’s mark requires in this area in 2015 the Census to report on what the change in insurance coverage levels are relative to 2012 and 2013 and to look back at what the uninsured rates were in those years relative to 2015 and only if there has been, as we hope and project, a reduction in the level of uninsured would there then be a commensurate reduction in disproportionate share payments.

There may be a way to marry your amendment with our provision and add an extra layer of protection so to speak and in that interim between 2012 and 2013 or between then and 2015 have the GAO also do an additional report to verify what the Census is looking at.

But the bottom line is, as the Chairman suggested, the reason the hospitals have been able to support this
is we build in time up front to make sure that we have all of the data in and that no reduction would be made until we were ensured that the insurance coverage levels had gone down.

Senator Hatch. Mr. Chairman, can I ask, who makes the determination and what data will be used?

Ms. Eisinger. The data source would be the Census through the American Community Survey and then it would be used by the Department of Health and Human Services.

Senator Conrad. Mr. Chairman, might I inquire of the gentleman. Is your amendment, is this the amendment that was filed? Because the amendment that is filed, Hatch D3, strikes the provisions of the mark that modify Medicare disproportionate share payments. Now you are saying that this just has a GAO study.

The Chairman asked you if you had modified and you said there as no modified.

Senator Hatch. It is modified.

The Chairman. Whether it is modified or not, it still strikes. It strikes the provisions --

Senator Conrad. Then it is exactly as I described it. All I am going by is the amendment that you filed. It says very clearly that the amendment would strike the provisions of the mark that modified Medicare disproportionate share payments.
You responded to the Chairman that you did not modify it. That is the amendment that is filed here.

Senator Hatch. This is the amendment. That is right.

Senator Kyl. Mr. Chairman, this is an amendment we both had and that is correct. But we have also said that a GAO study, and this is what Senator Hatch I think has pointed out, could help us to understand that. Can I make a couple of comments here?

I share the same concerns that Senator Hatch does. It is true Senator Baucus said that the hospitals generally agree because the problem is the Hospital Association doesn’t represent all the hospitals. After this agreement was announced, I wrote to a whole group of Arizona hospitals and asked them for their reaction to this.

Now, a lot of the hospitals serve communities near the border with Mexico and this is one of the areas where you have got a real problem because you have got a lot of uncompensated care. Part of that goes up and down depending upon whether you are in a recession or not.

Now, when the statistics were at least the last statistics were taken, those hospitals were getting killed because we had a very high level of uncompensated care to illegal immigrants. Now the number of illegal
immigrants has gone down because we are in the recession, but it will go back again when times get good.

But these hospitals wrote back to me and let me just note a couple of, what a couple of them said in response to my letter.

Here is one. “I am just as concerned as you are over the position taken by the American Hospital Association as we have analyzed each set of proposals it becomes readily apparent that they could have extensive adverse impact on the Arizona health care system, especially in rural areas.” I had talked about disproportionate share payments. “There are too many variables and unrelated factors to accurately forecast and determine whether we would reduce or eliminate services in the communities we serve as a result of the agreement.”

By the way, this particular letter also added, “addressing the practice of defensive medicine would perhaps have the most meaningful impact on health care costs,’ getting back to the malpractice debate that we are going to have to have again.

There are some of course that say well, hospitals make up for the loss of disproportionate share payment cuts because we are going to have an expansion of private insured patients. But I wanted to insert into the record
a story and I would ask unanimous consent, Mr. Chairman, to insert into the record at this point a story by Carla Cage of Associated Press dated September 7th of this year. Thank you.

It is entitled Safety net Hospitals, Last Resort for the Poor may suffer under health care overhaul. A quick read of the story underscores how the mark in this respect is wrong and I am quoting that from the story.

To all the -- issues involved in the health care, I add one more. The proposals of Congress may threaten the funding and future of the nation’s already struggling safety net hospitals.

They point to Massachusetts. The laboratory for health are overhaul. But one safety net hospital, Boston Medical Center, is suing the state, claiming it is covering too much of the cost for expanding coverage.

Another safety net standby. Cambridge health alliance has closed health centers and cut services. Its Somerville Hospital no longer keeps patients overnight. “It looks like a national plan will be modeled after Massachusetts and it is a disaster for poor people” said Stephanie Wilahnger, Harvard Medical School professor and a doctor at Cambridge Hospital.

The point that Senator Hatch I think was making is that we shouldn’t touch these disproportionate share
payments until we know that the reform that we have
implemented here is covering the uninsured.

Getting back to the problem of the state like mine,
and I can, if my colleagues would like, add additional
letters and I would want to put them in the record
because they will identify the names, but I can certainly
quote from them.

Many of which make the same point that was made in
the one that I quoted here. But the point is that it is
correct that this is supposed to result in less
uncompensated care. For those of us that represent
states like the state of Arizona, that is not necessarily
going to be the case simply because there are more
insureds.

We still have the problem of illegal immigration and
people have to be covered by that. I think the
suggestion that we get more data before this is
implemented that Senator Hatch has made is a good
suggestion.

The Chairman. Just for a second because I do not
want to go back and forth here.

Senator Bingaman. I just wanted to clarify
something. Senator Hatch’s amendment relates to Medicare
disproportionate share payment provisions related to
Medicare.
The federal government will not reimburse the hospital under Medicare disproportionate share payments unless the person is a Medicare beneficiary. Am I right about that?

I mean, the Medicare, the disproportionate share payments reimbursements by the federal government relate to Medicare beneficiaries and by definition undocumented immigrants are not Medicare beneficiaries.

So I just do not understand the relevance of all this discussion about undocumented immigrants and Senator Hatch’s amendment.

Senator Kyl. Mr. Chairman, that is a good point and let me clarify it for you. The point here is that we are supposed to have less uncompensated care. And therefore we can reduce these payments. That will not be the case in the case of an undocumented immigrant for exactly the reason that my colleague points out.

They are not covered anyway. These hospitals must provide care to them under Mtala. For a period of 4.5 years we actually had a modest compensation for their emergency room treatment at least to the point that they were stabilized. That has now gone away.

Senator Bingaman. But there is no change being made in the law with regard to federal government compensation or reimbursement for Medicare dis.
Senator Kyl. Mr. Chairman and Senator Bingaman, that is correct. But the rationale for the marks provisions is that there is going to be less uncompensated care, therefore we can reduce dis. I am saying that isn’t necessarily true in some states.

The Chairman. Sometime facts help. Let me ask the staff to shed some light on this.

Senator Kyl. Yes. Let us ask council how disproportionate share payments are made.

The Chairman. Ms. Eisinger, can you?

Ms. Eisinger. In one sense both Senator Bingaman and Senator Kyl were right. This is very much about Medicare and add on payment for Medicare relative to Medicare patients.

However, in the Chairman’s mark recognizing the uncompensated care case load, and this was very much a priority of particularly the public and safety net hospitals that you speak of, Senator Kyl, we suggest that on hospital’s cost reports, they should begin more robustly reporting on an individual hospital basis what their uncompensated care loads are.

That means any type of patient. And so the way that this is developed, we would say again going back to the Census survey that I referenced, there would be a national look at what the changing insurance levels were
nationally. That would relate to how much the broad pool
of disproportionate share payment funding would be
reduced.

However, then the money that is left in this
disproportionate share payment pot would then be
distributed on a hospital by hospital basis based on
their actual specific uncompensated care loads.

So in other words if in Arizona there are certain
hospitals in certain areas that still have high
uncompensated care for whatever reason because people
choose not to get insurance or other reasons, it would be
targeted in a way that it hasn’t been in the past. So
that is the distinction.

The Chairman. Okay. Senator Stabenow?

Senator Stabenow. Thank you, Mr. Chairman. I am
supportive of what we are doing in terms of uncompensated
care and addressing disproportionate share payments, in
making those adjustments.

I just wanted to add for the record that there is
another piece of this in states that have very difficult
economic situations and that is the interplay between
disproportionate share payments and Medicaid.

As Medicaid has gone down because states have cut
Medicaid so drastically, disproportionate share payments
have filled in for that. I say that only at this point
that it is something that we need to be evaluating as we go along. It goes back to Senator Grassley’s comment about providers, but there really is an interplay for safety net hospitals between disproportionate share payments and Medicaid and I think as we go forward, we just need to be aware and be sensitive to that.

The Chairman. The only question here is whether the reductions in disproportionate share payments that begin in 2015 should be retained or not. That is really the only question here. I suggest that we keep them because of several reasons.

One, it is many years off. It is five, six years away. Second, that is a little incentive for hospitals to be more efficient and increase their productivity. It is an incentive, it helps us find solutions here. In the meantime, we are doing these studies. In the meantime we are getting the Census data.

If we are correct in the amount of payments here that do not take effect until 2015, then we will have made the right decision. If we are not correct, the Census data will show that and we will make appropriate adjustments.

In the whole scheme of health care reform and because generally the hospitals support this and I understand Senator -- that some hospitals may not, but
all in all I think the better decision is to keep the provisions in the mark -- not in effect until 2015 and with the -- little incentive to kind of help us find the right solution here.

I just urge us therefore I have the highest regard to Utah, I do not know if this is the right amendment.

Senator Kyl. Let me add Senator Cornyn is a cosponsor of this amendment. I am very grateful that he is willing to do it.

All we did, the original amendment basically said this amendment will strike the provisions on page 149 making changes to Medicare disproportionate share payments. We modified it with this. This amendment would strike the provisions on page 149 making changes to Medicare disproportionate share payments and would replace it with the following language.

The Government Accountability Office shall submit a report to Congress on the insurance coverage levels in which state including the projected impact of the coverage provisions in this Act by the end of fiscal year 2018.

Now, we have been getting the information from the American Community Survey, okay?

The Chairman. And you have it right there with you?
Senator Kyl. I have it right here. It says the results of -- the first time the ACS has had health insurance estimates. It may become a new standard since it will be able to provide uninsured estimates by state and even congressional districts with much smaller margins of error than the current population survey.

In the past, CRS has published state level uninsured estimates using the CPS. They probably will rely on the ACS henceforth. Now probably the only down side to the ACS is that it is a mail back survey. So people just check boxes among 11 different types of insurance, not the same as having a person interviewing either by phone or in person, but with the additional state district estimates for reliability it might be worth the trade.

You do not get any more info on the health insurance except simply whether it was ESI, Medicare, Medicaid, et cetera.

The Chairman. You understand?

Senator Kyl. No.

The Chairman. Neither do I.

Senator Kyl. What else is new? It just makes my point, this is a very complex bill. We basically strike in the Chairman’s mark this language, starting no later than 2015, and it certainly isn’t striking all disproportionate share payments.
The Chairman.   Well, it is, isn’t it?

Senator Kyl.   No. Starting no later than 2015 and continuing on an annual basis, the Secretary would make the share payments equal to 25 percent of the disproportionate share payments that would otherwise be made.

The payment that represent the imperially justified amount as determined by the Medicare Payment Advisory Committee in its March, 2007 report to Congress.

The empirically justified funding amount is intended to reimburse hospitals for the additional cost of treating glow income beneficiaries. It goes on for two more paragraphs. Basically all we are saying is that we would get the real facts with this amendment by having the Government Accountability Office submit this report so that we know what the insurance coverage levels in each state really are, including the projected impact of the coverage provisions in this Act by the end of the fiscal year 2018.

It is just an intelligent way it seems to me to try and get to the bottom of it of whether we are moving in the right direction.

The Chairman.   I have a suggestion. When you are reading your Blackberry comments, it struck me that the major issue here is whether we are getting the right
data. That is a question here, whether we are getting the proper or right data.

So my suggestion is that, if you are willing, to modify your amendment, if you are willing to do so, modify your amendment but to delete revision deleting savings. I mean, I do not think we should cut $23 billion out right here.

So we work overnight, try to find the better GAO, whatever it is, make sure we have got the better data so we know what we are doing. I must say that I do not think it is proper to --

Senator Kyl. I will be happy to work with you.

The Chairman. Let’s find a good way to get the right data. Okay. Good. So that is also being deferred.

Senator Wyden. D16 relating to the cuts in hospice in the mark. Are you ready to go to another amendment?

The Chairman. Yes.

Senator Wyden. D16.

The Chairman. D16.

Senator Wyden. Yes.

The Chairman. I’m sorry, Senator. What number is yours?

Senator Wyden. D16.

The Chairman. Not that it matters that much, but
which list was that on? It is not in these list, it is another one. Okay Senator. You are on.

Senator Wyden. Mr. Chairman and colleagues, dollar for dollar there is no better investment in American health care than hospice. They are constantly developing new techniques for pain management and I think we all understand that they are a lifeline for thousands of American families.

In the mark, you would have a significant round of additional cuts in this program that now operates on an exceptionally low margin. According to independent authorities, hospices operate at just over 3 percent over cost. I think it is fair to say you cannot get any leaner than that.

Now, the additional round of cuts start in the year 2013 and according to the hospice programs that we talked to, and I think they know what colleagues are going to hear from around the country, these programs just do not have the ability to shift costs anywhere else.

In other words, when you have cuts in these programs, they simply have no capacity to shift to others in the health care system the cuts that they would endure.

I am especially concerned that those who are going to be hit hardest are going to be seniors and the
vulnerable in rural areas. The evidence suggests that cuts in hospice will also cause a real hardship in a number of under served urban areas, but my sense is that in many rural parts of the country --

The Chairman. Senator? This is, I must say, we just got this. This is not your D16. Rather, this is D16 modified and the modifications are a very different animal. So it is going to take us a little while to figure this out. But we just go it, so you are on notice to know that this is going to be something we have to look at.

Senator Wyden. Mr. Chairman, I would be prepared to set this aside for now.

The Chairman. That is a lot better. I would prefer that. Are there other amendments that do not require further study so we can actually take action?

Senator Stabenow?

Senator Stabenow. Mr. Chairman, I think this is a very straightforward amendment and it is budget neutral according to CBO. This just clarifies that --

The Chairman. I’m sorry?


The Chairman. C2. Stabenow C2?

Senator Stabenow. Yes. It is, clarifies the application of mental health requirements by plans
offered in the exchange. It basically just clarifies that the Wellstone Mental Health Clarity Act applies to plans offered in the exchange and would ensure that individuals and families with mental health and substance abuse disorders receive health care with other medical conditions that are covered through the exchange.

We know that the Institute of Mental Health has shown that success rates of treatment for disorders such as schizophrenia, depression and panic disorders surpass those of their medical conditions. So we know when there is treatment there is success. We know that when there is not treatment, there are tremendous economic burdens on families and communities and employers and so on.

So this would just clarify that Wellstone Mental Health Clarity Act which is on the books would apply the insurance plans that are offered through the exchange and as I indicated, CBO said extending this is budget neutral and I am hopeful that we would be able to accept this.

Senator Wyden and Senator Kerry are co-sponsors and I appreciate that.

Senator Kyl. Mr. Chairman? Would the Senator yield for a question? I was just advised by Staff in Title 1 this is already included. I am just wondering if there is a reason therefore.

Senator Stabenow. It is my understanding there was
some clarification that was needed. There was some
specific statutory cross-references that were needed just
to clarify.

Senator Kyl. Would it be possible to have Staff
just explain that for us, then?

The Chairman. Okay. From my understanding, this
is budget neutral. Are there any questions?

Senator Kyl. Well, Mr. Chairman, I just have a
question. Does it have all the other features exempting
companies under 50 and all of that? In other words, is
it the same as what is in Title 1 already? Could Staff
explain why this is necessary since it was supposed to be
already covered and whether it is any different than any
of the other items that are covered, that are specified
in Title 1?

Ms. Fontenot. Currently the Wellstone Mental Health
Act does not apply to groups smaller than 50. So we had
not clarified in the mark that the categories of benefits
would apply to mental health. We simply specified that
mental health is a benefit that would have to be covered.

So we were waiting on a score from CBO to ensure
that this didn’t add extra costs, and they have told us
that it would be budget neutral.

The Chairman. Mr. Schwartz, do you want to add?

Mr. Schwartz. Thank you, Mr. Chairman. So I think
Senator Kyl, the difference is that mental health benefits are included as you see in the mark, but the Wellstone Mental Health Parity, the parity part is what is key there.

So that law says that if a plan covers traditional med surg and mental health, they have to be covered on par and it is the on par part that I think Senator Stabenow’s amendment would establish for plans in the exchange.

Senator Kyl. Mr. Chairman, I appreciate that. Is there a reason then why it is budget neutral? One would assume that it does add more coverage or more people or it wouldn’t be necessary. If that is the case, then how is it that it is budget neutral?

Ms. Fontenot. The benefit level specified in the mark are actually according to actuarial values. So as long as the benefits that are provided are maintained within a certain actuarial value, there is no additional cost.

So in other words, if you are providing a 65 percent actuarial plan and you cover the specific benefit categories, the insurer has the flexibly to arrange cost sharing within all those benefits to just stay within that actuarial value without adding additional cost to the premium.
Senator Kyl.   Thank you, Mr. Chairman. I think I understand that. So if you covered one thing, you could have 65 percent, if you covered two things they would have to be equal and total that amount and so on. I understand. Thank you.

Senator Kyl.   Mr. Chairman, Staff has said something to me earlier that I hadn’t processed.

Does the mental health parity apply to the individual market today and would the effect of this be to now make it apply to the individual market?

Ms. Fontenot.  I do not believe the mental health parity act applies to the individual market today.

Senator Kyl.   Right. And is the effect of this amendment to do that?

Ms. Fontenot.  I believe that is correct.

Senator Stabenow.   If I might just respond to my colleagues just to indicate we are in fact changing the marketplace though.

Now instead of an individual marketplace where someone is approaching a company on their own, we are creating a new group market essentially pooling people, correct?

So it really is not a question of what was done on the individual market versus now because we are creating a different pool. Is that correct?
Ms. Fontenot. That is correct. Part of the
difference would be that today a mental health parity in
the individual market would actually increase premiums
because it would be an additional benefit that insurers
had to provide.

Under our construct as I had mentioned, it is all
within particular actuarial value levels so it will not
raise the cost of the plans.

Senator Ensign. Can I ask a question? Let us just
take the bronze plan, for instance. If you included
this, then something else may have to be sacrificed, some
other kind of benefit.

If we went down this road of including mental
parity, whatever other types of treatments, could we
pretty much become so prescriptive as some of the things
that maybe the person wanted, they would not be able to
get.

Ms. Bishop. The benefit categories that the plan
will have to cover are specified. So there would not be
a service the person can get. The issue is the
difference in cost-sharing that will apply due to the
constraint to stay within the natural value.

Senator Ensign. But today, some states have up to
42 specific items that are covered. What I am saying is
if, for instance, we included all 42 of those, but maybe
there is something else, that somebody else would have
wanted to buy a policy that covered the particular item
that they wanted to make sure that was covered.

There is no preexisting condition. They happen to
have that and they wanted it covered. Is that something
they could maybe miss out on it?

Ms. Bishop. To the extent that we are already
requiring the mental health and substance abuse be part
of the defined benefit category, I do not believe it can
knock out some other benefit that they wanted covered,
because we have already specified that list, which would
include the state benefit mandate.

Senator Ensign. No. I am talking about right now,
in the individual market, we do not. This now would be
required. I am saying if we start going down the line of
requiring all of these various things that some states
require, could we be getting into that type of a
situation where somebody may not be able to get the kind
of benefits that they want.

They may not get the kind of plan they want, because
we start mandating. Not just with this. I am saying
that if we start going down this line, because once you
do one particular item, people want to -- we are going to
be lobbied on including the next one and the next one and
the next one. I just wanted to make that as a point.
Senator Stabenow. If I might respond to my colleague. First of all, we already have federal law we have passed setting up the Mental Health Parity Act. So that is already in law.

Senator Ensign. Yes, but it is not in the individual market.

Senator Stabenow. But we are not going to have an individual market, essentially, in the same way. We are pooling everybody in the exchange to be able to get large group plans.

Already in the plans, there is mental health coverage. This is just simply a clarifying amendment. It was not meant to be --

Senator Ensign. But there is still a separate small group market, correct, and a separate individual market?

Senator Stabenow. But in the bill right now, the basic plan includes mental health, as well as physical health, because one of the positive things about doing this is we are integrating care. We are bringing them together.

So we are allowing people to be treated, whether it is a physiological problem or a physical problem. We have a federal requirement right now, passed overwhelmingly, bipartisan bill on mental health parity.
This is just to clarify that it applies to this new marketplace.

Senator Conrad. Would the Senator yield for a question?

Senator Stabenow. Yes.

Senator Conrad. As I understand this -- and, Senator Ensign, if you would listen for a moment, see if I have got this. My understanding of it is you would not be able to discriminate. For example, you would not be able to make a 50 percent co-pay for mental health and a 20 percent co-pay for everything else.

That is really in line with what the federal law is previously in terms of not discriminating on mental health. Is that not what this does?

Senator Stabenow. That is correct.

Senator Ensign. The only point I was making is it is not in the individual or the group market or the small group market or individual market today. So this is in addition. We are changing that. I just want people to be aware we are changing that.

The Chairman. But if I might say, Senator, we are not talking about the state mandates here. We are talking mental health. I think that is a different category. People want mental health parity, basically, across the country. I think it is the right thing to do.
Now, you raise a separate issue and that is the degree to which any action we take here preempts state mandates or to which we add additional mandates. That is a separate issue.

I agree with you that that is a whole different ball of wax and that is something that we need to be very careful about. But we are just talking about mental health, making sure that there is, in fact, parity. That is all this is.

Senator Stabenow. That is right. That is correct.

The Chairman. And I, therefore, suggest that we have a voice vote on the Senator's amendment.

All those in favor, say aye.

[A Chorus of Ayes.]

The Chairman. Those opposed, no.

[No response.]

The Chairman. The ayes have it and the amendment is agreed to.

Senator Stabenow. Thank you, Mr. Chairman.

The Chairman. You are welcome. All right. I think I found some more amendments and the delivery system for amendments, and they are basically all by Senator Cornyn.

So, Senator, you can choose whichever one you want first and we will try to do the others, unless there are
Senators on this side who want to offer their amendments, too, go back and forth.

Senator Cornyn?

Senator Cornyn. Thank you, Mr. Chairman. I would call up amendment D-2.

The Chairman. Cornyn D-2.

Senator Cornyn. This is along the lines that we discussed earlier, making sure that the coverage under Medicaid would actually produce access to a physician.

Because of low reimbursement rates, more and more physicians, as we know, are refusing to see new Medicaid patients or refusing to see them at all and many Medicaid patients are struggling to find doctors.

According to the 2002 MedPAC report, 40 percent of physician restricted access for Medicaid patients because of concerns about reimbursement and billing paperwork.

Since Medicaid patients cannot find doctors in large numbers who will see them, many are not getting the care that they need. In California, only 51 percent of family physicians participate in Medicaid, while, in Michigan, the number of doctors who will see Medicaid patients has fallen from 88 percent in 1999 to 64 percent in 2005.

According to an article in the Journal of Health Affairs this summer, physicians typically have been less willing to take on new Medicaid patients than patients
covered by other types of health insurance.

Medicaid fees are reimbursed at a national average of 72 percent of Medicare, which we know Medicare does not reimburse like private insurance, and Medicaid is 72 percent of Medicare.

In real terms, Medicaid physician fees, on average, are declining about 1 percent annually relative to general inflation over the last five years and this, of course, has a direct impact on patients.

Numerous studies have documented the poor patient outcomes in the Medicaid program relative to patients in private plans. For example, Medicaid patients are almost 50 percent more likely to die after coronary artery bypass surgery than patients with private coverage or Medicare.

Let me say that again. Medicaid patients are almost 50 percent more likely to die after coronary artery bypass surgery than patients with private coverage or Medicare.

One study published in the Journal of the American College of Cardiology in 2005 found that Medicaid patients were almost 50 percent more likely to die after coronary artery bypass surgery than patients with private coverage.

There is an acute lack of access to medical
specialists for Medicaid patients. A recent Merritt Hawkins survey found that Medicaid is not widely accepted in most markets surveyed, in at least some of the medical specialties reviewed and, in some cases, all of them.

The Chairman's mark provides Medicaid coverage to individuals up to 133 percent of the poverty level, but it does not give the Medicaid patient access to a physician, because the reimbursement rates are low, even though it goes from 100 percent to 133 percent of poverty.

I would just note that the President said in his inaugural address, "The question we ask today is not whether our government is too big or too small, but whether it works, whether it helps families."

Where the answer is yes, we intend to move forward. When the answer is no, programs will end.

Mr. Chairman, the Medicaid program is not working today for patients and my amendment would simply say that before Congress expands the Medicaid program, we should ensure that the patients we are promising coverage to have access to a doctor.

So what this does, in conclusion, is prior to implementing the mandatory Medicaid program expansions in the Chairman's mark, the Secretary of Health and Human Services must certify that at least 75 percent of
physicians in the country accept Medicaid patients.

The Chairman. If I could just ask a question, Senator, for clarification. Are you talking about new Medicaid patients or current Medicaid patients? How does that work?

Senator Cornyn. That is a good question, Mr. Chairman. In my state, for example, we have roughly 900,000 Medicaid and SCHIP eligible children that are not even signed up for existing programs. It is something we have been chipping away at, but have not been successful in reversing.

But this would apply to the expansion, going from 100 to 133 percent. Those expansions would not be implemented until at least 75 percent of physicians in the country accept Medicaid patients.

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad?

Senator Conrad. Mr. Chairman, I am just not sure that is a realistic test. I am not sure any public or private plan could get 75 percent of the doctors in the country signed up.

I would just tell you, we have got, under a federal employee health benefit plan, my wife and I have coverage. Not a single one of my wife's doctors will take it in this town. Not a single one of my wife's ...
doctors will take Blue Cross/Blue Shield patients, not one.

So now we are talking Medicaid. To have a standard that you have got to get 75 percent of the doctors to take Medicaid patients, that is not going to happen.

So I think it is well intended as an amendment, but I do not think it is realistic.

The Chairman. If I might say, too, it is my understanding, following along the lines of the point made by the Senator from North Dakota, that 75 percent would be higher than the acceptance rate of doctors in either Medicare or in private practice or the private sector -- I mean, private health insurance.

It is my understanding that for Medicare and for private health insurance, about 70 percent of doctors take new patients under Medicare or under private health insurance.

So to set a level at 75 percent would be higher than for private health insurance, and I think the rate for Medicaid is quite low. There is no doubt about that.

So you identify a problem, but I do not know that this is the solution. I am just trying to figure out how we skin this cat, basically. How do we find a solution to a real problem that you have put your finger on. I do not think it is 75 percent.
Senator Cornyn. For example, in Texas, the percentage of physicians that will see a new Medicare patient is 58 percent.

The Chairman. Nationwide, I think it is 70.

Senator Cornyn. So you are right. But I would suggest that, in a way, Medicaid is sort of like a shell game. We promise coverage, but have not done whatever we need to do to provide access.

I think Senator Wyden and some other people have proposed some Medicaid reforms which would basically make -- and we have got some ideas along those lines -- make Medicaid beneficiaries eligible for basically a private health insurance coverage, which would compensate physicians at a higher level and provide meaningful access.

So I guess the question I would ask my colleagues is if 75 percent is too high, what would be realistic?

The Chairman. I was afraid you were going to ask that question. I do not know if it is wise to set arbitrary limits. I wonder if maybe Mr. Schwartz or Ms. Fontenot could perhaps shed some light on this.

Mr. Schwartz. I would be happy to try, Mr. Chairman.

The Chairman. Speak up, please, Mr. Schwartz.

Mr. Schwartz. I would be happy to try. I think a
number is very difficult and I wonder what is it that a physician would do. According to the amendment it says that they accept Medicaid patients, but I do not actually know how that is enforceable.

So picking a number and having the Secretary certify that that is the right thing, whatever that number is, and then where do we go from there. I think all of the members have shared their concern about the difference between a coverage level and an access level.

But I think picking a number arbitrarily, it will vary tremendously by state to depending -- the states that are less well off will have higher percentages of Medicaid beneficiaries and they might need a high number, but states that are wealthier might need a lower number.

I think this is another issue similar to Senator Grassley's amendment that is ripe for more investigation, and I think the Medicaid and CHIP Payment and Access Commission would probably be a great place to look at this.

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad?

Senator Conrad. Just very briefly. I would say to the Senator from Texas, maybe this is one place where we ought to look to the supply side of the issue. In the Chairman's mark, he has 10 percent bonus payments every
year for the next five years for doctors who are primary
care physicians.

One of the big problems that we have in Medicaid, I
am told by those that run the program in a number of the
states, is that the pool of primary care docs, who are
the primary pool that deal with Medicaid patients, is
inadequate.

We have got to change reimbursement levels. We have
got to change incentives to get more doctors into primary
care, and that is the intent of the Chairman's mark by
having 10 percent bonuses every year for the next five
years for primary care physicians.

Senator Cornyn. I would say to my colleague, I
believe that is just for Medicare in the Chairman's mark.

The Chairman. No, no. That is correct. Medicare
is reimbursing. That is correct.

Senator Conrad. But the idea, if I could just
complete the thought, is that that will encourage more
doctors to be in primary care, because that is a
significant component of many of their practices.

Now, maybe we need to go further and have something
like that for Medicaid.

Senator Cornyn. We do know, Mr. Chairman, the
states pay doctors and know who they are. So it is not a
mystery. We can find out who they are.
But I would submit that the most obvious explanation is the lousy reimbursement for Medicaid and we need to do something about that. I just wonder when we are going to deal with it.

Senator Wyden.  Mr. Chairman?

The Chairman.  I would like to vote on this very quickly, but go ahead.

Senator Wyden.  I will be very brief. I think the Senator from Texas is raising some important issues. The Medicaid program in this country is broken. If I had my way, we would have the poorest and most vulnerable in our society getting the same kind of choices that members of Congress have.

I think we ought to make it possible in this country in a doctor's office for the poor person to walk right by the Congressperson.

I just want you to know that I am going to keep working with you on this issue. I think dollar for dollar, we can get a better deal for the poorest and most vulnerable in our society than we are doing today and we are going to have this issue come up further in the debate about health reform.

Thank you, Mr. Chairman.

The Chairman.  I would like to wrap it up, if we could, please. First of all, states do set provider
rates. That is up to states. If they want to compensate doctors more, that is their choice. I encourage them to do so, because they get a federal match when they do so.

Second, as Senator Conrad pointed out, we do give a significant bump to primary care docs, which will help the situation. But the amendment basically would have the effect of reducing, not increasing, significantly reducing coverage for poor people. That is the effect of this amendment, significantly reducing, not only not increasing, but significantly reducing health coverage for poor people.

I do not think that is the direction in which we want to go and, for that reason, I would urge us to -- Senator Kyl. Mr. Chairman, how is that so? I am sorry.

The Chairman. Because it is going to be difficult to certify 75 percent. It is going to be so difficult to certify 75 percent that essentially the states will be unable to certify the 75 percent, so they are cutting back on coverage on Medicaid.

Senator Kyl. Mr. Chairman, maybe I could ask my colleague from Texas a question. Is there anything in your amendment that reduces the people that are covered by Medicaid if the certification is not possible?

The Chairman. Say again.
Senator Kyl. Is there anything in his amendment that reduces -- you said it will reduce the number -- Mr. Chairman, you said that it would reduce the number of people covered by Medicaid.

The Chairman. It is mandatory expansion. I am talking about expansion.

Senator Kyl. So it is not true that it will reduce. It may not allow --

The Chairman. I overstated the point, but it will certainly prevent the expansion of coverage.

Senator Kyl. And if that is a certainty, then we have got a big problem.

The Chairman. We have got a problem.

Senator Kyl. Yes. And what we are going to do is promise folks care that we are not going to be able to deliver, which is the point of the Senator's amendment.

The Chairman. No, no, that is not fair.

Senator Kyl. Well, we are going to promise that people have new coverage. We are going to add more people to Medicaid, but we are already certain that there are not going to be enough doctors to take care of them. I think that is promising them something that they are not going to get.

The Chairman. All right. Let us vote.

Senator Kyl. Well, let me just make the point
here. This is a huge, huge problem. In my state, in particular, it is a big problem and, frankly, one of the things that bothers me the most is that in a lot of places and a lot of times, there is a dual standard here. Folks on Medicaid do not get the same quality of care as everybody else, because there is a subtle kind of rationing that occurs in Medicaid.

If you ask the physicians in the Senate, like Dr. Coburn and Dr. Barrasso, they will tell you that is exactly true. And if you ask friends of yours in the medical profession, they will you it is true.

There are a variety of reasons for it. These are not the patients that are the best about follow-through and making their appointments and all of those kinds of things and they also are the patients that provide the least reimbursement to the physicians.

As one of them said to me, they look around -- being semi-facetious here -- you look around the waiting room and you wait until the last patient there is the Medicaid patient to take that patient.

The bottom line here is that if, in fact, we are adding more patients and we cannot ensure that we are going to have enough physicians to take care of them, we are going to provide a higher degree of this kind of subtle rationing, and it is not right.
It is not fair and I think it would point out that we have a lot of reasons why we do not have enough physicians that are due to federal government policies or a lack of attention to things like medical malpractice. The reimbursement levels are the first and foremost. There are a lot of other factors, like medical school and other factors. But this is something that deserves attention and Senator Cornyn's amendment, I think, is right on point to provide the kind of attention that it deserves.

The Chairman. I think sometimes we forget what one of the underlying purposes of health care reform is and that is delivery system reform, where we just change the way we pay docs and providers, away from quantity and volume and much more toward value and outcomes. It is going to take a little while for us to get down that road, but I would say 75-80 percent of providers in this country agree that that is a direction in which we need to go. It will take a little while for us to get there.

How do we do this? We do it with pilot projects and bundling. We do it with increasing primary care reimbursement. We do it with accountable care organizations. We do it with addressing excessive hospital readmission rates. We do it with comparative
effectiveness analysis.

There are a whole host of ways that will help get at some of these problems that we are talking about here indirectly. So when we are talking about Medicaid doctors' participation, et cetera, it is a big issue.

But it also is important to remember the underlying, game-changing, transformative changes in this bill which are going to help down the road address a lot of these problems that we are now talking about, because we are going to have a system in this country which is much more patient focused. It is much more coordinated.

It is similar to the integrated systems that we all talk about, the Geisinger system, as we all know, Mayo, Kaiser and InterMountain. In my State of Montana, there is a Billings clinic. There are lots of these integrated systems.

I just think it is important for us to remember the good here, so we get this legislation passed. Otherwise, if this is not passed, it is the status quo. The status quo would mean that doctors' participation in Medicaid is going to get worse, not better.

The status quo is we are not going to address the insurance market reform. So a lot people are denied coverage based upon a preexisting condition or health care status. The status quo is that the Medicare costs
are going to go up so high that we are going to have to
start whacking Medicare, whacking Medicaid. The cost for
business is going to go so high that it is going to make
American business anticompetitive.

Let me tell a little story. Three or four years
ago, I took a bunch of Montanans to Asia and to India and
we were in Bangalore, India, Jack Welch Technology
Center. I think Senator Enzi has written me and said to
tell this story.

General Electric has three major research facilities
worldwide. One of them is in Bangalore and it is a "gee
whiz" research center, you go through it and they are
developing all these new products.

There are lots of people that are working there.
They basically all were Indians. I ran up to the head
man, the manager, afterwards and said, "Why are you here
in Bangalore?" His answer is "greatest talent pool."

I asked him, "What country has the next greatest
talent pool?" He said, "China." I asked him, "Where are
we? Where are we Americans? How is our talent pool?
"Oh, you're pretty far down there," he said.

"How do we get up there," I asked him. Without
skipping a beat, he looked right at me and he said,
"Education and health care." He said, "You Americans are
just going to have to educate your people better and,
second, you have got a health care system that is making your companies anticompetitive."

So we have got to start addressing that. This is not an education bill. This is a health care bill. So when we start to reduce the rate of growth of health care costs in America by the passage of this bill, we are going to help make American companies more competitive.

I talked to the head of Boeing just four days ago and he told me that 40 percent of his personnel costs are health care. We all know what happened to GE. We know the airline stories. We know the legacy costs.

The status quo, by not passing this bill, is to say to those companies, "We want you to remain anticompetitive because it increased the health care cost."

So I just want to remind all of us here that when we are talking about the Cornyn amendment, that there is a lot in this bill that we should be working on so that we Americans and our people that we work for can have a health care system we can all be proud of.

I am sorry, I spoke too long. We have got to bring this debate to a close. I am the biggest culprit here.

Senator Conrad. Mr. Chairman, may I respond just briefly?

The Chairman. Senator Conrad.
Senator Conrad. Well, I just wanted to make the point again that the federal government does not decide the reimbursement rates for doctors in Medicaid. We do not do that. The states do.

So to Senator Kyl, if you are unhappy with Medicaid reimbursement in your state, the answer is to write a letter to the governor and talk to your state legislators, because they decide. We do not decide that. And if they improve their rates, we match it. They get increased federal match.

The Chairman. All right. All in favor of the amendment --

Senator Cornyn. Mr. Chairman, may I please respond just briefly?

The Chairman. Sure.

Senator Cornyn. Under the Medicaid expansion in this bill, my state estimates that it will cost, in an unfunded mandate on my state, $20 billion over the next 10 years.

I have heard people talk about the public option, government options. I have heard people say we need Medicare for all. We need another government plan to deliver health care to the American people.

Well, the fact is Medicaid is broken, Senator Wyden said. We have the promise of coverage, but no access for
so many low income people. I just would respectfully
suggest that we need to spend time to fix the system
before we expand it.

I agree with you on delivery system reform and there
are actually people who do handle Medicaid and the kind
of continuity of care that you are talking about, where
they can actually break even. But that does not work
everywhere, particularly in big states and particularly
in rural areas where that is just not possible.

The Chairman. I hear you, Senator. But in Texas,
Texas is going to make out to the good the first three
years under this bill in the Medicaid FMAP payments.
Texas will come out ahead in the first three years.

I do not know what Texas is over 10 years. I can
say this. On an average, nationwide, the increase that
states are going to have to pay, on a net basis, it is
FMAP plus the Medicaid rebate, drug rebate, et cetera.

On a net basis, in our country, nationwide, the
average is 0.89 percent increase in the obligation on
states. I do not know what it is in Texas. Mr.
Schwartz, what is it in Texas?

Mr. Schwartz. Mr. Chairman, I need to start,
unfortunately, by correcting you. We have data numbers.
The updated number is based on new information from CBO.
I realize that is risky, especially at this hour.
But the national average has gone up slightly. It is 1.3 and the Texas-specific number, it is still, obviously, a saver over the first three years and, over the 10-year window, would be a 2.8 percentage point increase over baseline spending, which means whatever Texas was planning to spend on Medicaid and CHIP, which we show as 102.8, so it is $102 billion, would be almost a $3 billion increase. It is 2.892.

Senator Cornyn. Mr. Chairman, if I can just respond.

The Chairman. I would like to vote, sir. We are going back and forth.

Senator Cornyn. Mr. Chairman, you made the point we need accurate data.

The Chairman. Well, they gave the data.

Senator Cornyn. Well, I would suggest that the data just being provided and the data being provided to me by Medicaid experts in the state are vastly different. So we need to get to the bottom of it.

The Chairman. But the data has nothing to do with the amendment. If we are talking about a 75 percent reduction and if states do not get 75 percent, that is what this amendment is all about.

It has nothing to do with the FMAP payments. That is just a whole different issue.
So all those in favor of the current amendment --

Senator Kyl. Mr. Chairman, I would like to respond to three things you said, very quickly.

The Chairman. I am sorry, Senator. You still have got about five minutes and then we are voting.

Senator Kyl. Well, that is fine. It will not take me long at all.

The Chairman. Five minutes.

Senator Kyl. You talked about the un-competitiveness of American business as the result of their health costs. Every economist will tell you that is false. The companies pass their health care costs on to their employees. This is not a cost of business that makes them less competitive, number one.

Second, you said that the delivery system is going to be changed by the way we pay the providers, including the doctors. And while I know that is the way that a lot of folks here look at it, that is not the right way to look at it.

I appreciate the fact that you can use what you pay as a disincentive or an incentive to change behavior of doctors and providers. I happen to think that is a false choice and not the best way to get quality health care change. That is precisely what results in rationing.

The Chairman. All right. All those in favor of
the amendment, signify --

        Senator Kyl. The third point is, Mr. Chairman, that you talked about integrated systems and while it is true that integrated systems can make a lot of difference, it is also true that they are the exception. They can never be the rule. Not every physician wants to be an employee of the Mayo Clinic.

        If you talk to the folks at these clinics that you cite, they will all tell you that they are in unique environments and that their situations represent very good care, but that they do represent the exception, not the rule.

        And finally, the alternative is not the status quo. In my opening statement, I pointed out at least three specific things that would reduce costs. We do not just have to reduce the pay that physicians receive in order to change the nature of the costs in our system and, therefore, make insurance more affordable.

        I know you basically ignored our suggestions, but do not continue to repeat that the alternative is the status quo, because, in effect, what you are saying is that those of us who have continually come up with other alternatives do not have alternatives, and that is simply not true.

        The Chairman. All right. Thank you, Senator.
That was under five, appreciate that very much.

The question is on the amendment. All those in favor of the Cornyn amendment, signify by saying aye.

[A Chorus of Ayes.]

The Chairman. Those opposed, no.

[A Chorus of Nays.]

The Chairman. In the opinion of the Chair, the nays have it. The amendment is not agreed to. Senator Cornyn, do you have another amendment?

Senator Cornyn. Mr. Chairman, if everybody is listening and receptive to arguments, I will be glad to move to Cornyn amendment D-4. This amendment is designed to ensure that seniors have access to physicians beyond 2010.

The Chairman. This is D-4.

Senator Cornyn. Yes, sir. The Chairman's mark cuts $409 billion from Medicare payments, but fails to permanently ensure that seniors under the program have a stable access to a doctor.

The Chairman's mark provides only a one-year fix to the sustainable growth rate for 2010. As I recounted earlier, I believe every time that the Balanced Budget Act would whack doctor reimbursement payments, we have acted to reverse that and I predict that we will do so again.
In 2011, physicians serving Medicare face a 25 percent pay cut and we all know, as I say, from recent history, that Congress will not let that happen. We will have to rush to pass another DOC FIX at the last minute, but since this bill cuts $409 billion over the next 10 years, finding offsets will be difficult.

I am just asking a question of why we are not providing a lasting solution to a physician payment formula that we know is broken and we know we will have to fix, because a permanent fix here, of course, will add more than $200 billion to the cost of the bill, and that proves to be an inconvenient fact.

Instead of reducing the deficit by $49 billion, a real solution would result in a bill that substantially increases the deficit when you add the true cost of the DOC FIX over 10 years. I suggest this is strictly a matter of candor and honesty with the American people about the real costs of this bill and the real costs of keeping promises to seniors.

My amendment reduces outlays under the bill to ensure that seniors have access to their doctors through 2010.

The Chairman. For my information, Senator, is this a 10-year SGR fix, as they say? As I look at the amendment, it just says beyond 2011.
Senator Cornyn. It is a two-year fix.

The Chairman. So the mark is one year with a half-percent update in 2010. Your amendment is what?

Senator Cornyn. It goes two years, but, Mr. Chairman, we know we are going to do it over the 10 years, we might as well do it.

The Chairman. That is not my question. My question is what is this amendment.

Senator Cornyn. I answered your question.

The Chairman. So it is two years at what percent update?

Senator Cornyn. It is a zero update. It holds it flat.

The Chairman. All right. The mark gives a half-percentage update for 2010. Yours is no update for 2010 and 2011.

Senator Cornyn. It stops a 25 percent cut.

The Chairman. So does ours. The mark stops the cut and it replaces the cut with a half-percent update.

Senator Cornyn. For one year.

The Chairman. For one year. Yours stops the cut and replaces --

Senator Cornyn. Holds it flat for two years.

The Chairman. Holds it flat for two years.

Senator Cornyn. That is correct.
The Chairman. All right. Thanks. And it is offset by striking the tax credit for individuals between 300 percent and 400 percent of poverty, by striking that provision. Is that correct?

Senator Cornyn. Striking the premium tax credit for individual between 300 and 400 percent of poverty.

The Chairman. Let me ask Mr. Dawe. How much will that cost?

Senator Cornyn. And reducing the Medicaid administrative reimbursement rate to 50 percent.

The Chairman. Mr. Dawe, how much will that cost?

Mr. Dawe. We are checking with CBO, but it will depend on what the amendment does in the third year.

The Chairman. It is zero in the third year.

Mr. Dawe. Well, does it revert to current law?

The Chairman. Will there be a cut or dip in the third year? That is the question.

Mr. Dawe. That is correct. It sounds like there will be.

The Chairman. Is there? Will there be a dip and a cut in the third year?

Senator Cornyn. Well, it is a two-year fix, which I imagine we will come back in current three and do it all over again, as we will for every year during the 10-year budget window.
The Chairman. I just urge us to vote down this amendment. I mean, we should not be cutting the tax credits in the exchange. So I urge that we do not adopt this amendment.

Senator Ensign. Mr. Chairman?

The Chairman. The Senator from Nevada.

Senator Ensign. Mr. Chairman, I think an important point that Senator Cornyn is making with the amendment and with his previous amendment is access to care.

We know every year, because of the low reimbursement rates, that more and more doctors, more and more health care providers are not taking new Medicare patients, are not taking Medicare patients, or are opting out of Medicare. Same thing with Medicaid.

While cost is a significant issue, at the same time, access to care. We have all talked about access to care, how critical that is, because just because you have coverage, if you do not have access to care, the coverage does not get you anything.

We also know, and this point has been made over and over again, as a matter of fact, when you talk to the people from Mayo Clinic, you talk to people from the Cleveland Clinic, any of the folks that we had testifying in front of us, they talked about this cost shifting that goes on and the folks that I talk to say it is anywhere
from 20 to 30 percent, on a conservative estimate, the
cost shift from Medicaid and Medicare to private health
insurance plans.

The reason is because of the low reimbursement
rates. The bottom line is we need to figure out, if you
are going to continue with Medicare fee-for-service and
Medicaid, we have got to figure out a way to do it to
where physicians will continue to see senior citizens,
people that are disabled, the poor, or otherwise we are
going to be covering a lot of people, but nobody is going
to have access to health care, because there are not
going to be any health care providers that are going to
see these folks.

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad?

Senator Conrad. Mr. Chairman, if I could get
Senator Cornyn's attention. I just want to say to the
Senator I pushed for this position in terms of a two-year
pay-for for the DOC FIX very hard in the group of six and
until the very end, we had the two-year fix.

If you think about all the other things that are
coming due in two years, that would put everything on an
equivalent basis, the extenders, the tax cuts, the DOC
FIX, all of these things, put it on a two-year basis,
because then you would have before the Congress and the
American people the tradeoff.

So I very strongly support the first part of your amendment to have a two-year fix and I am very hopeful that before we are done with this process, we will have a two-year fix.

I wish you had not chosen that particular pay-for that you did, because that will hurt on the affordability side and I think most of us, in looking at the affordability tables, would say that is an area that still needs more work.

If you look at the percentage of income for people right over 300 percent of poverty, which is $66,000 for family of four, we have got a continuing problem. Then a substantial improvement by the work of the group of six and the Chairman's mark, but I think most of us would look at the potential out-of-pocket exposure and the potential percentage of income people would have to pay and say it is too high.

So unfortunately, in that way, your amendment would make it worse.

The Chairman. Thank you for the discussion.

Senator Conrad. So I very much hope we can solve this problem with the DOC FIX.

The Chairman. Senator Menendez?

Senator Menendez. Mr. Chairman, I have a problem
when we hear voices talking about the concern about
affordability in what we are trying to do and then the
amendments come and they strike at a affordability, and
that is the very essence of this.

And the Chairman's mark at least actually raises
somewhat the DOC FIX, not only takes care of it in the
first year, but gives them something extra.

So if the argument is that unless -- which I agree
-- unless the providers, in this case, the doctors, are
going to receive an incentive to continue to expand that
universe, the Chairman at least provides somewhat of an
incentive in his mark.

So it seems to me that the Chair's mark moves in the
right direction while not undermining the affordability
that this amendment would do. And so I hope we will
reject it based upon both of those issues.

The Chairman. Senator Stabenow?

Senator Stabenow. Thank you, Mr. Chairman. First
of all, I just want to say that I could not agree more
that we need to fix SGL. We need, in my book, to throw
out the sustainable growth rate and put something else in
its place.

Senator Kyl and I have had legislation now for more
than one Congress that would do that. I know that that
is a desire. I know when we started this process, that
was what the Chairman was hoping to do and there has been
discussion and commitment to, in the long run, be able to
do that, because that is exactly what we need to do.

I am pleased that the Secretary of HHS has taken an
important step in helping us do that by removing the cost
of medicine from this formula. So that lowers the cost
overall of what it will take to actually fix this and get
this done.

So we are moving in the right direction by a step
from the Secretary of HHS, but at this point, again, I
would share the concerns of my colleagues. At least this
is a half a percent increase for the coming year and we
know we are going to come back and address this long
term. We have to address it.

But at the same time, I want to make sure that
middle income families have the opportunity to be able to
afford health insurance. And so pitting one group
against the other is something that I do not believe is
wise.

Thank you, Mr. Chairman.

The Chairman. All right. Ready to vote? All
those in favor of the Cornyn amendment, say aye.

[A Chorus of Ayes.]

The Chairman. Those opposed, no.

[A Chorus of Nays.]
The Chairman. The nays appear to have it. The nays have it. The amendment is not agreed to.

Senator Cornyn. I have another amendment, Mr. Chairman. This is Cornyn amendment D-5. This is about a patient's right to information on quality. The amendment would require Medicare to release claims data to independent entities to create a Consumer Reports-like information repository for patients on the quality of their health care providers.

The amendment would mandate the protection of beneficiary privacy throughout the bill under both the HIPAA laws and the Privacy Act. I think if there is one thing we found with the advent of health savings accounts and giving people the opportunity to get a little skin in the game when it comes to health care costs, they have a greater awareness of the money that is being spent for their health care, which they do not necessarily have with a prepaid health plan, which is really not health insurance. It is prepaid health care.

I think this amendment would address, ultimately, through not a government entity, but a Consumer Reports-like entity, and I suspect there would be a cottage industry in producing this kind of information in the way that is most accessible and helpful to consumers, about quality of care and about costs in a way that creates a
true market and consumer awareness that will ultimately help bend the cost curve.

I think if we are interested in bending the cost curve, we have talked a lot about delivery system reform, we need to realign the incentives for the individual, and I think this will go a long way to do that.

So I would ask my colleagues for their support.

Senator Wyden. Mr. Chairman?

The Chairman. Senator Wyden?

Senator Wyden. Mr. Chairman, I am very attracted to the Cornyn idea. He and I have talked about this often over the years. The fact is if you are going to empower patients, and this is absolutely central, if you are going to change American health care anytime soon, one economist after another has said that unless you give people the opportunity to drive the decisions in this area, you are not going to get significant changes.

What Senator Cornyn is talking about is making sure that you empower individuals with the latest and most current information, objective information, essentially from the source that Senator Cornyn has described.

And it is my understanding, Senator, that you have kept the HIPAA privacy protections and I think the staff may have a question about one of the details about the issue, as I understand it, but I think we ought to work
this out.

I think this is one of the key issues in terms of promoting transparency, the public's right to know, and for those who want to make a market in American health care that empowers consumers, I think this is central to doing health care reform right. We ought to be taking the Cornyn amendment.

Thank you, Mr. Chairman.

The Chairman. Well, my concern -- and there are so many questions of first impression here of not knowing more about the subject -- is that this could cause a lot of confusion, because once this is -- this is commercialized.

It basically gets all the data. Medicare data would be commercialized in the sense that private entities take all this data and reach lots of different conclusions. And I do not know if we are going farther than we should have without giving this more careful thought.

So to be honest, I am kind of conflicted about this at this point.

Senator Snowe?

Senator Snowe. I share the Chairman's concerns. This may be unprecedented in terms of the extent to which we would be releasing de-identified claims data and it isn't narrow enough and there are concerns with having
this data shared even for purposes beyond consumer data and report-like information.

We considered this within the group of six and could not resolve the privacy question. I would wonder if the Senator would consider doing a study on the feasibility of it until we can have a better assessment in terms of privacy issues, because it would be far broader than has ever been done before.

Senator Cornyn. Mr. Chairman, I appreciate the concerns and as I said earlier and as Senator Wyden said, as well, both the protections under the Health Information Portability and Accounting Act and the Privacy Act would continue to apply here. So that should alleviate those concerns.

Rather than a study, which I am afraid that if we kick the can down the road with a study, if we are doing comprehensive health care reform, this has to be one of the cornerstones, I think.

So perhaps the better part of valor, given some of the reservations, if I could just ask the Chairman and Senator Snowe if we could try to work together to address your concerns, while providing a means to get this information to consumers, which I agree will empower them to make better decisions.

Let me just withdraw it at this time, if I can
please get your help to work together on it.

The Chairman. I appreciate that, Senator, and I very much want to work with you on this. I understand what you are trying to do and I generally believe that more information is better, but I am a little concerned that maybe there is just too much here.

Senator Cornyn. I would just note the Health Committee reported out a bill last year that had this type of provision, just FYI.

The Chairman. All right. So the amendment is withdrawn and we are going to work on it. I will take one more, if it is very quick, because I would like to give the staff a break.

Senator Stabenow. Mr. Chairman?

The Chairman. Let us find out what your amendments are before we act on them. What is your amendment, Senator Stabenow? What is it?

Senator Stabenow. Mr. Chairman, it is a modified version of C-7, which is actually in your modified mark. We thought it was set. There is just some clarification in the language. The language was not quite right.

You had already accepted it in your modified mark that deals with standalone dental plans, making sure they can be part of the change.

The Chairman. Let me just check with our staff and
see whether that has been worked out.

Senator Stabenow. And I believe that it has been all worked out with your staff. Which one is it?

Senator Stabenow. It is the dental plans, the standalone dental plans. We worked within your modified mark, but we evidently needed to clarify something.

The Chairman. I have been advised we still have to look at it, Senator.

Senator Wyden?

Senator Wyden. Mr. Chairman, Senator Grassley and I have worked with your staff on an amendment that I believe your staff and Senator Grassley's staff has agreed to. It is D-15. We are just getting it printed up.

Would it be acceptable to you, Mr. Chairman, if I just described it briefly?

The Chairman. It is my understanding it is acceptable on this side anyway, and I think Senator Grassley's. That is for Senator Grassley, too. Is that correct? I am told that is correct.

Senator Wyden. Would you like me just to describe it very briefly?

The Chairman. No. Just offer it.

Senator Wyden. All right. Offered, D-15. Quit while you are ahead.
The Chairman. All those in favor, say aye.

[A Chorus of Ayes.]

The Chairman. Those opposed, no.

[No response.]

The Chairman. The ayes have it. The amendment is agreed to. We are going to recess now until 9:30 tomorrow morning. The committee is in recess until 9:30.

[Whereupon, at 11:12 p.m., the Committee was adjourned, to reconvene Thursday, September 24, 2009 at 9:30 a.m.]
INDEX

STATEMENT OF:

THE HONORABLE MAX BAUCUS
A United States Senator
from the State of Montana 3

THE HONORABLE BLANCHE LINCOLN
A United States Senator
from the State of Arkansas 4