

1 EXECUTIVE COMMITTEE MEETING TO CONSIDER  
2 HEALTH CARE REFORM  
3 WEDNESDAY, SEPTEMBER 23, 2009  
4 U.S. Senate,  
5 Committee on Finance,  
6 Washington, DC.

7 The hearing was convened, pursuant to notice, at  
8 9:34 a.m., in room 216, Hart Senate Office Building, Hon.  
9 Max Baucus (chairman of the committee) presiding.

10 Present: Senators Rockefeller, Conrad, Bingaman,  
11 Kerry, Lincoln, Wyden, Schumer, Stabenow, Cantwell,  
12 Nelson, Menendez, Carper, Grassley, Hatch, Snowe, Kyl,  
13 Bunning, Crapo, Roberts, Ensign, Enzi, and Cornyn.

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

22 Republican Staff: Kolan Davis, Staff Director and Chief  
23 Counsel; Michael Park, Health Policy Counsel; Chris  
24 Condeluci, Tax Benefits Counsel; Mark Hayes, Health  
25 Policy Director and Chief Health Counsel; and Randoe  
26 Dice, Detailee.

1           Also present: Thomas Barthold, Chief of Staff of  
2           the Joint Committee on Taxation; Thomas Reeder, Senior  
3           Benefits Counsel; Tony Clapsis, Professional Staff; Chris  
4           Dawe, Professional Staff; Neleen Eisinger, Professional  
5           Staff; Shawn Bishop, Professional Staff; Athena Schritz,  
6           Archivist; and Josh Levassuer, Deputy Chief Clerk and  
7           Historian.

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1 OPENING STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM  
2 MONTANA, CHAIRMAN, COMMITTEE ON FINANCE

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

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

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

24 Okay, Senator Lincoln.

1 OPENING STATEMENT OF HON. BLANCHE L. LINCOLN, A U.S.  
2 SENATOR FROM ARKANSAS

3  
4 Senator Lincoln. Well, thank you, Mr. Chairman. I  
5 want to especially thank you for allowing me to deliver  
6 my statement this morning after being in Arkansas  
7 yesterday. I thank you particularly for your leadership,  
8 the hard work of your staff and all the staff on the  
9 Committee have spent these past 20-plus months as we have  
10 worked together and they have worked with all the members  
11 of the Committee in a bipartisan way to find real  
12 solutions to this enormous problem we face in this  
13 country in terms of health care reform. I appreciate the  
14 hard work and diligence that Senator Grassley has put  
15 into this effort, and we are looking forward to coming up  
16 with something that is really good.

17 Yesterday, I was home in Arkansas to attend a  
18 funeral service for my husband's grandmother who was  
19 about a week shy of turning 112, which is pretty amazing.

20 To us, Mama Ruth was an extraordinary woman. As I  
21 mentioned, she was just shy of turning 112 and was the  
22 oldest documented living person in our State of Arkansas  
23 and was the 14th oldest living person in America. And  
24 through the years, she had continued to amaze us with her  
25 vitality and active lifestyle.

1           She used to say that one of the keys to her long  
2           life and her longevity was that she continued to keep her  
3           mind active. She was blessed with amazing genes,  
4           obviously, and my husband has inherited those, so I am  
5           excited about that. But I cannot recall her--probably  
6           counting--I can count on one hand the number of times she  
7           was in the hospital or even the pharmaceuticals that she  
8           took. She really worked hard at maintaining her own  
9           health, and she did say that her mind was the key to  
10          that. And although we would all like to be so lucky to  
11          live as long and such a healthy life as Mama Ruth, she  
12          was definitely the exception and not the norm. She would  
13          tell you, though, it was clearly the mind that could keep  
14          you alert, and she did three or four crossword puzzles a  
15          morning. She played bridge three or four times a week,  
16          was a ferocious reader, and really paid attention.

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

23                 In the current system, average costs of health  
24                 insurance coverage for a family cost just below \$10,000  
25                 in Arkansas in 2006. The cost of that same plan is

1 projected to jump by more than 100 percent to over  
2 \$21,000 by 2016. Our families in Arkansas and families  
3 across this country cannot sustain this current rate of  
4 growth in their health care costs. And our Government  
5 cannot sustain this current rate of growth with respect  
6 to expenditures in Medicare and Medicaid.

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

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

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

23 In addition, throughout this process, it has been my  
24 goal to ensure that health insurance reform works for  
25 small businesses and the self-employed so that they have

1 quality health care options just like we do as Federal  
2 employees. And I am very pleased that the mark  
3 establishes Small Business Health Options Program, a SHOP  
4 exchange, such as those included in the bipartisan SHOP  
5 Act that I introduced with Senator Snowe and Senator  
6 Durbin. It will allow enhanced choice and competition  
7 along with lower costs for our small business employees  
8 who make up approximately half or better than half of the  
9 uninsured in America.

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

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

24 These changes can and must be made without harming  
25 those who have health insurance and are content with

1 their current coverage.

2 Mr. Chairman, thank you again for your great work to  
3 advance comprehensive health care reform and to all the  
4 staff that has put tireless hours into this over the 20-  
5 plus months. We have worked hard on it. The problems in  
6 our health care system did not occur overnight, and we  
7 cannot expect to solve them with just any one silver  
8 bullet. It is going to take time, and it is going to  
9 take a very large dose of patience in this bill to  
10 understand that over the next 10 years we are going to  
11 shift our Nation and the Government environment we have  
12 created around health care from one that is focused on  
13 quantity to one that is focused in value and quality and  
14 making sure that we are using all of the efficiencies we  
15 know how in our health care system to ensure that all  
16 Americans get the health care that they need.

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

24 Thank you, Mr. Chairman, and I appreciate your  
25 allowing me to give my statement today.



1           The Chairman.    Thank you, Senator, very much, and  
2   we are all inspired by your husband's grandmother.  You  
3   told me earlier about her and how her belief was if you  
4   keep an active mind, your active body follows.  You just  
5   keep active.  That is good advice for all of us.

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

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

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

15          Is there any other discussion on the amendment?

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

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

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

23          The Chairman.  No.  Other statements on--

24          Senator Kerry.  Well, Mr. Chairman, I want to  
25  engage in that discussion, but likewise I will wait.

1           The Chairman.    Maybe we ought to defer then until  
2    Senator Nelson is present, and Senator Rockefeller and  
3    more Senators.

4           Are there any other Senators who wish to speak on  
5    the bill generally?

6           [No response.]

7           Senator Kerry.    Let's vote.

8           [Laughter.]

9           The Chairman.    Well, seeing none, my predilection--  
10   yes, Senator Lincoln.

11          Senator Lincoln.   Well, Mr. Chairman, I would just  
12   like to say a special thanks.  I was keeping up with what  
13   you all were doing as I was traveling and in Arkansas,  
14   but thank you so much for the Committee's accepting of  
15   several amendments that I thought were very important.

16          Senator Hatch is not here, but it goes back to  
17   Senator Chafee as well as Senator Breaux, the hard work  
18   that has gone into the Elder Justice Act, which was  
19   included as one of the amendments.  And I am extremely  
20   appreciative of that.

21          I also wanted to let you know how appreciative I was  
22   of the inclusion of the amendment I had on DEXA and bone  
23   scanning, which I think is critically important as a  
24   diagnostic tool and one that is virtually non-existent  
25   anymore because of the lack of reimbursement.  I think

1 these are some good amendments--the Medicare Advantage,  
2 the lemon law amendment that we also had.

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

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

12 Senator Bunning. I am ready.

13 The Chairman. Sure. Go right ahead.

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

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

18 Senator Bunning. Okay. Thank you.

19 The Chairman. You bet.

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

24 The amendment is, as I believe, very simple--

25 The Chairman. And, Senator, you passed out a

1 modification. Is that correct?

2 Senator Bunning. That is correct.

3 The Chairman. Okay.

4 Senator Bunning. As you required.

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

6 Senator Bunning. Shall I--

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

9 Senator Bunning. Okay.

10 [Pause.]

11 The Chairman. Okay, Senator. We--

12 Senator Bunning. All set?

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

22 Senator Bunning. That is correct.

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

25 The second line, the word "legislative," change--

1 Senator Bunning. The "legislative language"?

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

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

4 And--

5 Senator Bunning. I cannot agree to that.

6 The Chairman. I am sorry?

7 Senator Bunning. I cannot agree.

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

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

12 The Chairman. Okay. Fine, go ahead.

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

19 I realize that this is a very big change for the  
20 Committee since we normally use only conceptual language.

21 But this is not a normal bill for us or the American  
22 people, and an exception should be made today.

23 For people listening to me, let us take a minute to  
24 describe the way the Finance Committee usually operates.

25 When we consider a bill like we are today, we do not

1 actually have legislative language in front of us. In  
2 fact, we have not seen the language, and some of it  
3 probably has not even been written yet. Instead, we have  
4 a description of the changes the Chairman wants to make.

5 It is called the Chairman's modified mark.

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

12 This probably sounds a little crazy to most people  
13 that we would be voting on something where we have not  
14 actually seen legislative language. Well, they would be  
15 right. It is a little crazy, particularly when you  
16 consider that with legislation the devil is in the  
17 details. The way legislative language is written, you  
18 could have a large impact on the way the policy is  
19 actually implemented and even the cost of the provision.

20 That is why I modified my amendment slightly to require  
21 CBO to also provide a final and complete score at least  
22 72 hours before the Committee votes on final passage.

23 It is critically important that we know the true  
24 cost of this legislation before we pass it, particularly  
25 because the CBO Director just seemed to indicate

1       yesterday that after this conceptual bill passes, CBO may  
2       begin to shift their focus on providing cost estimates  
3       for the merged package between the Finance Committee and  
4       the Senate HELP Committee bills, which means we may never  
5       know what the real cost of this bill is.

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

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

17            America cares deeply about the issue of health care  
18      reform, regardless of what side of the debate they are  
19      on. The town hall meetings this summer were eye openers.

20            Americans who had never been politically active were  
21      taking time out of their days to attend and voice their  
22      opinions. Americans have flooded our office with phone  
23      calls and letters about this conceptual bill, and  
24      Americans are talking about health care reform with their  
25      friends and neighbors. This bill will impact every

1 American, and I believe they realize it. Changes will be  
2 coming through the type of health care coverage they have  
3 and the amount of taxes they pay.

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

11 So let us go through all the amendments and get to a  
12 point where we are finished and about to vote on final  
13 passage of this bill. And then let us take a minute to  
14 get the legislative language and cost analysis finalized.

15 Let us post it on the website so Members of Congress and  
16 members of the public can actually read it. Then vote on  
17 final passage.

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

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

25 [Laughter.]



1           Senator Bunning.    That is a Freudian slip.

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

4           [Laughter.]

5           The Chairman.    Okay.    Senator Stabenow?

6           Senator Bunning.    Sorry, John.

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

14           I guess what I would just offer is that we know that  
15   the Finance Committee's is not the final bill going to  
16   the floor.   It is going to be merged.   And so I would be  
17   concerned we would be adding to confusion by not waiting,  
18   as CBO recommended, to actually wait until they are  
19   merged and then see the final numbers and then give  
20   people an opportunity to see what, in fact, will be  
21   coming to the floor.   Because while we will be an  
22   incredibly important part of the work, we are not the  
23   total work.   And so it has been, I think, confusing for  
24   people because there have been a number of committees in  
25   the House, two committees in the Senate, and, Mr.

1 Chairman, I guess I would just suggest that rather than  
2 adding to that confusion, that from the public's  
3 standpoint merging the bills and then seeing all the  
4 final numbers and giving the public an opportunity to  
5 evaluate what, in fact, we have done as both committees  
6 would be more helpful to people and actually make more  
7 sense.

8 Senator Cornyn. Mr. Chairman?

9 The Chairman. Senator Cornyn.

10 Senator Cornyn. Thank you, Mr. Chairman.

11 Mr. Chairman, I--

12 The Chairman. Not Corzine. Cornyn.

13 Senator Cornyn. Not Corzine. Cornyn. Thank you.

14 I strongly support this amendment. I remember  
15 sitting on the dais when President Obama was inaugurated,  
16 gave his inaugural speech where he talked about the  
17 importance of transparency in Government. He said,  
18 "Transparency breeds accountability and builds public  
19 confidence." And I think this Committee has done a good  
20 job under your leadership putting the amendments that  
21 have been filed on the website on Saturday. I have  
22 gotten e-mails, I have gotten Tweets, I have gotten all  
23 sorts of communications about amendments that I have  
24 filed and other people have filed. And I would suggest  
25 to you that this legislation has captured the imagination

1 and certainly the attention of the American people. And  
2 there are a lot of people across America who are reading  
3 these bills. They have read the House bill. They have  
4 read the HELP Committee bill. And they are intensely  
5 interested in what this Committee is doing.

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

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

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

23 Senator Kerry. Mr. Chairman?

24 The Chairman. Senator Kerry?

25 Senator Kerry. Mr. Chairman, this would be the

1 first time in the history of this Committee, which has  
2 considered some of the most complicated, most historical  
3 legislation in the country, that we have ever been  
4 required to provide the legislative language.

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

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

24 Moreover, if you want to get technical here, the  
25 Finance Committee does not vote on final passage. We

1 report a bill out. So it is impossible for us to vote on  
2 "final passage of the act." And, secondly, we will not  
3 be able to get a final and complete cost analysis.

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

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

21 Senator Grassley. Mr. Chairman?

22 Senator Bunning. Mr. Chairman, may I respond?

23 The Chairman. Senator Grassley.

24 Senator Grassley. Mr. Chairman, members of the  
25 Committee, you know, a lot of things we do around here

1 are kind of mundane and maybe complicated, and you might  
2 not expect the American people to understand exactly what  
3 we are doing and assume some things that they would not  
4 otherwise assume. But when it comes to the American  
5 people asking us to sign petitions, would you read a bill  
6 before--promise that you are going to read a bill before  
7 you vote on it, or coming to our town meetings, as they  
8 did during August, and maybe even before then, would you  
9 pledge to read a bill before you vote for it, it is  
10 pretty simple for the American people to understand the  
11 issue that is before this Committee right now and before  
12 the entire Congress, and particularly in light of the  
13 fact that the President in so many different ways and on  
14 so many different occasions promised a great deal of  
15 transparency in American Government, that this is one of  
16 these things where you do not want to insult the  
17 intelligence of the American people because they  
18 understand what the issue is, because it is kind of what  
19 they expect us to do anyway--read a bill before you vote  
20 on it. Know what you are voting on.

21 And so I think that this is something that we better  
22 take very seriously because the American people  
23 understand this issue. Maybe they understand most of the  
24 issues we are working on, but some of them are kind of  
25 complicated. But this one is not complicated. This is

1 pretty simple. You know, what are you voting on? And  
2 they ask us for these pledges. They ask us to sign.

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

10 Now, we did not end up with a bipartisan agreement,  
11 so that was not violated in the Group of Six by what the  
12 Chairman decided to move ahead on his own text. But at  
13 one point it was not a case of just doing it in this  
14 Committee. It was not a case of waiting until it is  
15 merged with the HELP bill or on the floor of the Senate.

16 It was a case that when six people were done with it, we  
17 wanted to review the text and have a score.

18 So I hope that this is not considered inordinate.  
19 It might be considered inordinate on some sort of tax  
20 legislation that we deal with on a regular basis or other  
21 issues, but on restructuring one-sixth of our economy and  
22 health affecting life or death of every citizen, it is an  
23 entirely different issue and a very important issue that  
24 I think we ought to take consideration. And I do not  
25 consider it any effort to slow things up, because in the

1 final analysis, you know, there was some talk last week  
2 that we would vote a bill out of Committee this week and  
3 it would be on the floor Monday. Now, it looks like the  
4 defense bill is coming up next week, but somebody had to  
5 be ready to get this bill ready for the floor for next  
6 week.

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

15 Senator Kyl. Mr. Chairman?

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

18 Senator Kyl. Well, I have something to say.

19 The Chairman. Sure. Go ahead.

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



1 kinds of things in conceptual language.

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

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

23 So I think Senator Grassley makes a good point, that  
24 this Committee frequently needs to deal in conceptual  
25 language because of the nature of the tax legislation we

1 are writing. This bill is mostly not that.

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

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

16 We even have laws--I know at least in my State we  
17 have a State law, and I think there are some Federal  
18 laws--that provide like a 3-day grace period when you  
19 sign a mortgage or certain kinds of real estate  
20 contracts. You have got 3 days to think it over. And I  
21 remember one of the things you have to sign, or at least  
22 initial, is that you have read the thing that says you  
23 have got 3 days to think it over. Well, there is a  
24 reason for that. There is a lot of legal language in  
25 those contracts, and it is important to talk to people

1 who can read the legal language and tell you what it  
2 really means. And if you decide that it is not what you  
3 thought it was, you have got 3 days to change your mind  
4 and say, "No, I am not going to go ahead with this  
5 contract."

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

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

21 A final comment, two parts. Our colleague, the  
22 Senator from Michigan, said this would add to the  
23 confusion. I do not think so. I think what would be  
24 confusing is if we make--you know, we spend a week or so  
25 in this markup, and we work very hard on almost 500

1 amendments, and we end up producing a bill that is very  
2 complicated, that is very long--it will probably be 1,000  
3 pages--and it is not important for the American people or  
4 it would be confusing for them to know how much it cost  
5 and what we voted on? Simply because there is going to  
6 be another stage at which some unknown group of people  
7 take the HELP Committee bill and somehow or other meld it  
8 with this bill. I doubt that I will be a part of that  
9 process. My constituents are not going to have any  
10 representation in that room, will have no idea what--that  
11 is not transparency. And that is what gets the American  
12 people up in arms here. They see us doing a lot of stuff  
13 behind closed doors, and this is the argument that is  
14 made.

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

25 So, Mr. Chairman, I think this is a very important

1 amendment. The American people are watching this here.  
2 This is the least that we can do for the people that we  
3 represent. They are our bosses. They deserve to have  
4 some time to understand what we have done and how much it  
5 costs before this bill is mysteriously massaged into  
6 another bill and then brought to the Senate floor.

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

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

22 I am reminded of what CBO Director Elmendorf said  
23 yesterday. He said that after we finish, he will then  
24 probably take about 3 days to get a preliminary analysis,  
25 about 3 days after we complete. And he also said that

1 then after that it is going to take 2 more weeks to look  
2 at his final analysis looking at the legislative  
3 language. We have never, ever, ever, ever done that in  
4 this Committee. Nothing close to it in this Committee.

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

10 First of all, the mark has been on the website since  
11 last Wednesday. The modified mark has been up recently.

12 And all amendments are public. That is a new process.  
13 All amendments are transparent. That is new. This  
14 Committee started that. I do not know of any Committee  
15 that has been more transparent than this Committee.

16 But let me go back further. When we started  
17 thinking about health care, our Committee last November  
18 put together an options paper, a white paper, which  
19 basically is the framework and the foundation for most  
20 health care reform legislation in all of the committees.

21 That was on the website for everybody to see it and work  
22 on it.

23 Then we had a whole series of roundtables and walk-  
24 throughs, all public, results on the website. We sat  
25 here--one of them I think was in this room, one of the

1 first roundtables. We had experts, this whole Committee  
2 here, bipartisan, asking questions of all the experts of  
3 what health care reform should look like. We did that  
4 first on delivery system reform. Then we had the walk-  
5 through, same subject, delivery system reform, more and  
6 more details, let's figure out what it is that is going  
7 on here.

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

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

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

1           Senator Conrad.   Sixty-one meetings.

2           The Chairman.   Sorry?

3           Senator Conrad.   Sixty-one meetings.

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

5           And we worked so hard to get this right, and, frankly,

6           the mark we have here is in many respects the basis of

7           that Group of Six meeting, and I am very proud of all

8           those efforts.

9           But the main point I want to make is the effect of

10          this amendment is that we have got to wait 2 to 3 weeks

11          after we have completed everything before we can vote.

12          Senator Conrad.   Mr. Chairman?

13          The Chairman.   And I just do not think that is

14          acceptable, and I frankly would urge the Senator to

15          withdraw his amendment and maybe in the meantime figure

16          out some other way to deal with it.

17          Now, my final--

18          Senator Kerry.   Would the Chairman yield for one

19          question?

20          The Chairman.   My final point, my final point is

21          this:  As Chairman of this Committee, I am going to

22          insist that we get numbers on the cost of this bill

23          before we vote on it, good, solid numbers.  I want that.

24          I think every member of this Committee wants it.  Every

25          member of this Committee has insisted on it, as they



1 should. We are going to get those numbers. We are going  
2 to get those numbers. But the reading of this amendment  
3 has the effect that we cannot vote for 2 to 3 weeks after  
4 we have completed--I do not think the Senator intends  
5 that. And if the Senator does not intend that, then I  
6 suggest that he withdraw the amendment so we can rewrite  
7 it in a way that accomplishes our objectives, which is  
8 that we have got numbers, and good, solid numbers, before  
9 we vote on this bill.

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

12 The Chairman. They are all accurate.

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

16 The Chairman. No, not a merger.

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

19 The Chairman. That is not what he said.

20 Senator Bunning. Well, we also understand that if  
21 all this openness is so apparent, why is Congress'  
22 approval rating at 12 percent? I mean, this is not what  
23 the American people expect of their leaders. They expect  
24 them to be open, completely open, and put things--every  
25 other Committee that I work on, Banking, Energy, whatever

1 it might be, always has legislative language, and the  
2 scoring of this bill before we merge with the HELP bill  
3 ought to be known by the American people.

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

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

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

15 The Chairman. Senator Snowe?

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

24 But what was, you know, overriding in all of those  
25 discussions in working hand in glove with the

1 Congressional Budget Office Director, Dr. Elmendorf, is  
2 that legislative specifications matter. And he  
3 reiterated that on a number of occasions, and in a  
4 document on July 28th and a preliminary analysis of our  
5 coverage specifications, he indicated, "We have not  
6 received any legislative language to translate those  
7 specifications into law. A review of that language could  
8 have a significant effect on our analysis."

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

25 So, obviously, it matters to the Congressional

1 Budget Office. It ought to matter to us. These are  
2 unprecedented times that require unprecedented measures,  
3 and I do believe that the American people are rightly  
4 entitled to see exactly what we are doing, what we are  
5 legislating. We should not be afraid of having a better  
6 and complete understanding of exactly what we are doing.

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

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

22 So why wouldn't people be concerned about whether or  
23 not we would get it right in reordering or reorganizing  
24 \$2.4 trillion in health care expenditures in one year,  
25 let alone over 10 years?

1           So I would urge the Chairman and members of this  
2           Committee to support this effort. That we did not do it  
3           before is not a rationale for saying we should not be  
4           doing it now.

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

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

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

1           So I would hope that we would adopt this amendment.

2           The Chairman.    Senator Carper?

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

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

11          The Chairman.    That is my understanding.

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

16          The Chairman.    That is correct.

17          Senator Carper.    So when we come to the end of the  
18  week when we hopefully will have a chance to vote on an  
19  amended package, we will have, first of all, the CBO  
20  estimate for your modified mark, we will essentially  
21  have--on an amendment-by-amendment basis, we will know  
22  what our amendments cost, if they cost anything, or if  
23  they generate money, and we will have to have an offset.

24          And so we will have, I think, a pretty good idea at the  
25  end of the week when we--

1           The Chairman.    From my understanding, that is  
2           correct, but remember, Director Elmendorf is also saying  
3           there are interactive effects.   So it is not a 100-  
4           percent correlation.   But I think common sense dictates  
5           it is pretty close.

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

21          What we would like to tell the banks, and what we  
22          have told them, is to give us--pardon?   Yes, plain  
23          language.   Plain language so that even I can understand  
24          it.   And that is basically where we have gone.   That is  
25          really, I think, in part what we are talking about here.

1           Before we vote on this bill at the end of the day on  
2 the floor, after we have merged this bill together with  
3 the HELP bill, do we want legislative language? Of  
4 course we do. Do we want to have a final CBO score of  
5 the merged bill before we actually vote--

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

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

10           Do we want to have from CBO in hand their final  
11 numbers, if you will, on the merged bill? I think we do.

12           And I think we ought to be able to get it.

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

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

22           My guess is that we are not going to finish debate  
23 on that bill in a week. It is going to take a couple of  
24 weeks, at best. During that period of time, CBO will  
25 have the opportunity before we vote on the bill, the



1 final bill as amended in the Senate, and we will have not  
2 only the legislative language, but we will have CBO's  
3 down-to-the-dime kind of estimate.

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

14 And for the end of the beginning for me, conceptual  
15 language is, I think, better frankly in some ways than  
16 legislative language. And for me, having CBO's  
17 preliminary estimates on the Chairman's mark as modified,  
18 and then step by step amendment analysis of cost and  
19 effect, that is not bad. And for me that is sufficient.

20 The last point. I have said--and some people are  
21 tired of hearing me say it--I am not going to vote for a  
22 bill in the Senate at the end of the day, I am not going  
23 to vote for a bill out of this Committee that I think  
24 unbalances the budget, increases the deficit. I am not  
25 going to vote for a bill in this Committee that I believe

1 fails to rein in the growth in health care costs. And I  
2 sure am not going to vote for a bill after a couple of  
3 weeks of debate that does not bend the cost curve, does  
4 not restrain the growth of health care costs, and that  
5 increases the budget deficit. I am not going to vote for  
6 that bill. The President says he is not going to sign  
7 that bill. I am not going to vote for it. So we are on  
8 the same wavelength here.

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

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

20 Senator Conrad. Mr. Chairman?

21 The Chairman. Senator Conrad.

22 Senator Conrad. Mr. Chairman, listening to this  
23 debate--and I, too, want to thank Senator Bunning for  
24 raising this because as the Chairman of the Budget  
25 Committee, one thing I have insisted on throughout is

1 that this be a package that we can say with certainty  
2 will reduce the deficit, will reduce long-term costs in  
3 health care from what they would otherwise be. And I  
4 have said in closed and open meetings, if we fail to meet  
5 those tests, we will be condemned in history, because we  
6 are at a point in time where the United States is on a  
7 totally unsustainable budget path. The deficits are too  
8 large, the debt is growing too rapidly, and we simply  
9 cannot permit that to continue.

10 Reforming health care is a key part of a strategy to  
11 rein in deficits and debt, because the largest unfunded  
12 liability of the United States is in Medicare. The  
13 unfunded liability in Medicare is seven times the  
14 unfunded liability in Social Security. We have an  
15 unfunded liability in Medicare of more than \$35 trillion.

16 That is over 75 years. But that is the reality of what  
17 we confront, and it is absolutely imperative that we pass  
18 a package that reduces deficits and debt.

19 The Chairman's mark does that, according to CBO.  
20 What we know is that revisions are being made, and what  
21 we have got to be certain on before we cast a final vote  
22 in this Committee--which, as the Senator from Delaware  
23 says, very appropriately, is the end of the beginning,  
24 because there are many steps in this process. But what  
25 we are going to be faced with is CBO's looking at this

1 entire package before we are done and having an assurance  
2 that we know what CBO's analysis is before we vote. That  
3 is what Senator Bunning has described.

4 I would ask the Chairman, can you assure us that we  
5 will see a CBO analysis before we have a final vote in  
6 this Committee?

7 The Chairman. I say to my good friend from North  
8 Dakota, absolutely yes, because I think that is the only  
9 responsible thing to do. That is certainly what I want  
10 to see. I think it is what each member of this Committee  
11 wants to see.

12 Senator Conrad. And will that CBO analysis be  
13 available on the Committee website?

14 The Chairman. Absolutely.

15 Senator Conrad. And the language that we would be  
16 voting on--talk about conceptual language. That has been  
17 the history of this Committee for more than 30 years.  
18 What is conceptual language? It is plain English. That  
19 is what we are talking about--plain English.

20 I am not a lawyer. A key reason this Committee  
21 writes its bill in plain English is so that members can  
22 understand it and so the public can understand it. And  
23 it is absolutely--Senator Roberts says that is going too  
24 far?

25 [Laughter.]

1           Senator Conrad.    No, I think in fairness, if you  
2    read a bill that comes from this Committee in legislative  
3    language and you read a bill that comes in plain English,  
4    plain English is a lot more transparent than the  
5    legislative language, because the legislative language  
6    refers to different places in the law that are being  
7    amended, and so it reads like--I do not even know how to  
8    describe it.  It is gobbledy-gook to most people.  That  
9    is why this Committee writes its bills in plain English  
10   so that people can actually understand what is being  
11   done.  It is not just a bunch of references to various  
12   parts of the Code.

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

25           So what will happen here is we will have, before we

1       vote, an analysis by the Congressional Budget Office that  
2       will be on the website that says what the cost is. We  
3       will have in plain English what the bill contains. That  
4       is transparent. That is in the interest of the people of  
5       this country and certainly in the interest of the members  
6       of this Committee.

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

20             The Chairman. I would just like to follow up on  
21      that point. Some are asking why conceptual language, why  
22      do we do that in this Committee. Senator Kyl explained  
23      part of it is because we tend to deal with tax issues and  
24      if we voted on the statutory language, it would be just  
25      impossible to understand. Section 426, refer to subpart

1 D, then further subpart Q, whatever it is, and what the  
2 heck is that? And so on and so forth. I mean, we would  
3 not know what the heck is going on here. So that is--

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

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

8 Second, though, it has been stated here that  
9 conceptual language is more plain English and people  
10 understand, et cetera. It also helps us at our Committee  
11 to debate issues. If it is conceptual language, we have  
12 a better idea what we are talking about. We may not know  
13 all that we are talking about, but at least it is a  
14 better idea of what we are talking about. It helps the  
15 spirit of comity. It helps develop trust. We see the  
16 language that we think we understand. It is in English.

17 It is conceptual language, not statutory but conceptual.

18 And it does very much help us reach agreement in this  
19 Committee, and this Committee has a tradition of comity,  
20 a tradition of bipartisanship, a tradition of working  
21 together, I think by far more than any other Committee.

22 I might also just remind ourselves, to my knowledge  
23 this Committee has never had legislative language, and we  
24 should not, in my judgment. Don't forget, when we offer  
25 amendments, if we required legislative language always,

1 we would have to write them in legislative language and  
2 we would not understand them as well. They would be  
3 harder to draft, harder to modify. But since we are  
4 doing conceptual language, it is easier to draft  
5 amendments. It is easier for us to understand what it is  
6 that the author has in mind.

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

20 The argument we have to have statutory language here  
21 is based on a premise that because this is a bigger bill  
22 it should be transparent. Well, does that mean in  
23 smaller bills we do not care? If it is only maybe 10  
24 pages long, we do not care? I do not think that is a  
25 valid premise, to say the premise being that larger bills



1 are more important than bills that may be of fewer pages.

2 I just think basically a bill is a bill, and we follow a  
3 procedure that has worked for us. Otherwise, we are  
4 going to get this terrible question: Well, does the size  
5 of this bill require conceptual or does the size of this  
6 bill require statutory? I do not think we want to go  
7 down that road.

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

22 At the proper time I am going to offer a side-by-  
23 side amendment which I think more accurately reflects and  
24 more efficiently helps us get to the goal we want,  
25 namely, know what the Congressional Budget Office

1 estimate is on this bill, but in a way that lets us do  
2 our work, in a way that does not unnecessarily strangle  
3 us, in a way that does not unnecessarily cause a couple  
4 of weeks of delay. But we still want to make sure we are  
5 doing our job. We want the numbers. Senator Conrad  
6 asked the right question, if we could have numbers, at  
7 least preliminary analysis, by CBO prior to the vote, and  
8 the answer is absolutely yes. We are going to make sure  
9 we have those numbers.

10 Senator Roberts. Mr. Chairman?

11 The Chairman. Senator Roberts.

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

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

1 respect your integrity and your dedication to this.

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

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

23 Now, I am going to do my usual thing here and say in  
24 my previous life I was a reporter, editor, so on and so  
25 forth. If you look in the bio, it says that Roberts is a

1       journalist.  Actually, that is an unemployed  
2       newspaperman.  But at any rate, I know the press is here  
3       and I know national press is here, and I think the thing  
4       is that if you just read this, this amendment requires  
5       that before the Finance Committee can vote on final  
6       passage of America's Healthy Future Act of 2009, the  
7       legislative language and the final and complete cost  
8       analysis by the CBO must be publicly available on the  
9       Finance Committee's website for at least 72 hours.  If  
10      you ask the American people to vote on that, never mind  
11      the great debate between concepts, or legislative  
12      language, that is not the issue.  And the integrity of  
13      the Committee is not the issue.  The issue is just four  
14      lines here--or three and a half lines here that will get  
15      a 90-percent vote in regards to the American people.  I  
16      think we ought to vote for it, and I think you are going  
17      to provide those numbers anyway.  Why don't we do go down  
18      the road and just vote for this, and you have already  
19      indicated to the Committee that that is exactly what is  
20      going to take place.

21             Senator Snowe.  Mr. Chairman?

22             Senator Roberts.  And the Chairman has disappeared--  
23      --no, he has not.  There he is.

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

1           Senator Snowe.    Thank you.

2           Senator Grassley.   Then Senator Lincoln.

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

10          Legislative specifications matter to the  
11    Congressional Budget Office.  That is a fact.  It is a  
12    fact that has been stated and restated.  And it is  
13    certainly something that Dr. Elmendorf had indicated to  
14    us during the course of our meetings in the Group of Six.

15          So if it matters to the Congressional Budget Office, it  
16    should matter to us.  It is not second-guessing whether  
17    or not, who can read it, and how they will interpret the  
18    legislative specifications.  But it is important and  
19    central to the final number on this legislation, and that  
20    should concern all of us, and that is exactly what  
21    concerns the American people.  You can have conceptual  
22    language.  That is fine.  But the legislative language is  
23    ultimately what becomes law.  That is what affects the  
24    bottom line.

25          Now, if the Director of the Congressional Budget

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

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

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

22 This is all about good government, and we have an  
23 obligation to understand that. And I do not understand  
24 what is happening in 2 weeks that we need to drive this  
25 on a legislative fast track. I do not understand it. I

1 do not know what is happening in 2 weeks that we cannot  
2 wait to get the final number if that is what it is going  
3 to take for the Congressional Budget Office Director to  
4 get it done. He said that very clearly yesterday. He  
5 was very precise, as he has been all along in this  
6 process.

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

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

21 So I hope that we would defer to the Congressional  
22 Budget Office Director. When he says the legislative  
23 language matters, then it should matter to each and every  
24 one of us, and it matters to the American people, and we  
25 should respect that.

1           Senator Grassley.    Senator Hatch and then Senator  
2 Lincoln.

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

10           We have some of the best staff on both sides who  
11 have ever served in the United States Senate.  Our staffs  
12 understand legislative language, and many of us even do.

13           The fact of the matter is--now maybe I have exaggerated  
14 that to a degree.

15           [Laughter.]

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



1 statement.

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

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

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

23 Look, I think the distinguished Senator from  
24 Kentucky has raised a worthy amendment. I really believe  
25 we ought to vote for it and get it over with.

1           The Chairman.    Okay.   Who else seeks recognition?  
2   Senator Lincoln.

3           Senator Lincoln.   Thank you, Mr. Chairman.

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

21           As others have said, this is a step in the process.

22           We will still be going further.  There will be more  
23   amendments on the floor, and there will be a merger with  
24   the HELP bill and others.  So maybe if we just were to  
25   eliminate the word "final" and use "complete cost

1 analysis," it gives us those tables that we are so used  
2 to and that are so thorough and have a good track record.

3 And then you would actually probably cut out the largest  
4 portion of the time that is going to really slow us down,  
5 or maybe perhaps we just want to hold this amendment  
6 until we can get Dr. Elmendorf here to tell us exactly  
7 what kind of time.

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

20 Senator Bunning. May I respond?

21 The Chairman. Yes, Senator.

22 Senator Bunning. I thought that Senator Snowe and  
23 Senator Hatch's response put it in perspective better  
24 than I can when they referred to the letter that the CBO  
25 Director sent and said conceptual language is fine, but

1 the devils are in the detail when you write, you know,  
2 the language, and then they have to score it.

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

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

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

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

14 Senator Conrad. Mr. Chairman?

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

18 The Chairman. Senator Conrad?

19 Senator Conrad. Mr. Chairman, you know, this is  
20 almost a classic case, as I listen to this, of talking  
21 past each other. I have served on this Committee I think  
22 17 years, and conceptual language is language that is in  
23 plain English. That is then scored on a preliminary  
24 basis by the Congressional Budget Office, and the  
25 Chairman has made clear that he would insist on that

1       scoring be available to the Committee before we vote. We  
2       would also have the legislation in plain English before  
3       us and before the American people before we vote.

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

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

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

1 precisely what the legislation provides.

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

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

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

16 Senator Crapo. Mr. Chairman?

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

19 Senator Crapo?

20 Senator Crapo. Thank you very much, Mr. Chairman.

21 I had not intended to debate on this issue, but as I  
22 have listened to the debate I feel compelled to.

23 As we have done through the discussion here today, a  
24 number of reasons have been put forward for opposition to  
25 the Bunning amendment, including that the amendment

1 breaks with the precedent of the Committee; that the  
2 utilization of legislative language would add to the  
3 confusion; or that legislative language is too complex  
4 and we need to be dealing in more simple language; that  
5 the amendment would delay action on the issue by 2 to 3  
6 weeks; that this would not be the final bill that we vote  
7 on anyway and we should wait until the final bill is  
8 merged with the HELP Committee before we see legislative  
9 language; and that the plain English approach which  
10 Senator Conrad has talked about is closer to the  
11 realities of how the Committee ought to operate.

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

16 With regard to the precedent of this Committee, I  
17 actually was surprised when I became a member of the  
18 Committee that we did not deal with legislative language.

19 And I believe that the Committee ought to change that  
20 precedent, that this Committee should operate on  
21 legislative language as we act, not just on this bill but  
22 on all legislation. I think that is a much better way  
23 for us to approach our job as legislating.

24 With regard to the question of whether the  
25 legislative language is too complex, I also have received

1 those notices in the mail, the privacy notices from  
2 different credit cards or bank statements, and I agree,  
3 they are mind-boggling as you try to read them. But they  
4 mean something. And, in fact, those are actually  
5 summaries, somebody's attempt, I think, to try to make  
6 plain English out of some legislative requirements. And  
7 the fact is that even though this language, the  
8 legislative language with which we deal, is complex and  
9 is very difficult to read, it is very, very important.

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

17 In addition, the question of whether the action of  
18 this Committee would be delayed by several weeks if we  
19 adopted this amendment, it may or may not be. There has  
20 been some disagreement about that. But assuming that it  
21 did cause us to slow down for a couple of weeks, while we  
22 and the American public reviewed carefully what the exact  
23 language we were voting on was going to be, I think it  
24 would cause the people of this country to breathe a  
25 collective sigh of relief, if just for a few weeks, while



1 they saw the Committee and the Congress stepping back to  
2 take a look at and to let the American public take a look  
3 at and to vet the language that we are about to vote on,  
4 on such an important piece of legislation.

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

11 Senator Ensign. Mr. Chairman?

12 The Chairman. Okay. Senator Ensign?

13 Senator Ensign. Thank you, Mr. Chairman. I want  
14 to make a couple of points.

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

23 Mr. Chairman, we should not just do things one way  
24 because that is the way we have done things for the last  
25 20 years. We should ask: Is that the right way to do

1 it?

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

7 Artificial deadlines get us in trouble around here.

8 We have all seen it. I harken back to the stimulus  
9 package. Do we all remember the AIG bonuses and the  
10 little loophole that was allowed with AIG? Well, you  
11 remember we had a false artificial deadline with the  
12 stimulus package where something that was like that did  
13 not get caught because it was not out there for people to  
14 take a closer look at. That was rushed through because  
15 of an artificial deadline.

16 Mr. Chairman, when we are talking about one-sixth of  
17 the economy, we cannot afford to get this wrong. We need  
18 to have time to study and analyze the legislative  
19 language. It is critically important for us and others to  
20 have this language. I actually like the idea of having  
21 conceptual language alongside legislative language  
22 because the conceptual language is a good idea as it is  
23 in plain English, but then you also need to have people  
24 who understand legal language ensure that the conceptual  
25 language matches the legislative language. This is

1 critically important, particularly on the most complex,  
2 important domestic issue that maybe any of us will ever  
3 vote on. This is important not only for us, but it is  
4 important for the American people. It is important for  
5 all those who are out there in the health care industry,  
6 understanding that their livelihoods may be affected by  
7 this bill.

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

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

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

1 legislative language.

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

9 Thank you, Mr. Chairman.

10 Senator Conrad. Mr. Chairman?

11 Senator Snowe. Mr. Chairman?

12 The Chairman. Senator Conrad?

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

22 I said, "Mr. Secretary, this is really an honor.  
23 Why did you invite just me?" He said, "Well, you know, I  
24 am Danish and you are Danish, so you kind of inherited  
25 the Danish seat on the Finance Committee." And he said,

1 "There are some things I wanted to share with you about  
2 the history of that Committee and how it is different  
3 from other committees."

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

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

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

19 I said to him in the course of the conversation,  
20 "Mr. Secretary, why does the Finance Committee work from  
21 conceptual language, language that is in plain English,  
22 rather than legal language?" Because every other  
23 committee I had served on operated on the basis of  
24 legislative language. He said, "We made that change  
25 years ago because we concluded that for the members to

1 make decisions that were fully knowledgeable, they needed  
2 in plain English what the effect of the legislation is.  
3 And when it is in legal language"--and I wish I had an  
4 example here right now of what the language that comes  
5 out of this Committee reads like when it is in legal  
6 language. Anybody who thinks that is going to be  
7 transparent to the American people is really not telling  
8 it like it is.

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

15 On the question of whether or not there might be a  
16 discrepancy, as the Director of CBO has said, absolutely.

17 And what is the guard against that? The guard against  
18 that is when the legal language is written, if it does  
19 not comply with the plain English that the Committee has  
20 passed, that the Chairman alters the mark through a  
21 manager's amendment to conform with what the Committee  
22 passed.

23 That is the history and tradition of this Committee,  
24 and it is a good one, it is a professional one, and it is  
25 a transparent one.

1           Senator Snowe.    Mr. Chairman?

2           The Chairman.    Senator Snowe.

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

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

19           In fact, it seems to me that he was very precise in  
20   what he was requesting of us, and at least being very  
21   specific about the fact that he could not give us a final  
22   number because he did not have the legislative language.

23           It was not conceptual language.  It was not plain  
24   English language.  He said "that could have a significant  
25   effect on the analysis."

1           Now, the CBO, as we all know, is the final arbiter  
2 of costs. We rely on the CBO. The Finance Committee  
3 relies on the CBO in determining the true costs of this  
4 legislation. So I do not understand the hesitancy or the  
5 reluctance. No one is saying we should not have  
6 conceptual language, but CBO must have the legislative  
7 language. And that is what this is all about. And I  
8 truly do not understand the skepticism about this  
9 request. I do not understand the reluctance, nor do I  
10 understand the resistance. This is about doing our jobs.

11          If it takes 2 more weeks, it takes 2 more weeks. I  
12 mean, we are talking about trillions dollars in the final  
13 analysis. I do not understand it. What is the rush.  
14 What is happening in 2 weeks? If it takes the CBO  
15 Director, who I thought was abundantly clear yesterday  
16 that it might take 2 weeks--maybe it will take less,  
17 maybe it will take more. Is there something happening in  
18 2 weeks that we cannot wait? Is it the Columbus Day  
19 recess? What is it? Because I am not quite clear.

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

24          When I started in the State legislature back in the  
25 1970s, we did read the legislative language, because we



1 knew it mattered. And perhaps we ought to return to that  
2 tradition, whether it is this Committee or the entire  
3 United States Congress. But we ought to be very familiar  
4 about what we do. And if the CBO Director is asking for  
5 legislative language, then we ought to give it to him.  
6 And we ought to know those true numbers.

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

12 Maybe it is because we do not have a requirement to  
13 balance the budget. States do. Governors do. State  
14 legislatures do. Maybe we do not think it matters. But  
15 I want to know what the final number is on any bill that  
16 I vote on in this Committee, and we should know it every  
17 step of the way. There is no rationality other than this  
18 one, is getting the number right with the right language.

19 And if the CBO Director says he needs it for the true  
20 cost and the comprehensive cost, which tells me all of  
21 the costs, then that should get our attention.

22 Senator Conrad. Mr. Chairman?

23 The Chairman. Senator Conrad.

24 Senator Conrad. Mr. Chairman, the Senator is  
25 absolutely right that we should know the true cost. And

1 the Senator is also right that, before you know the final  
2 cost, you have got to have legislative language. That is  
3 absolutely the case.

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

14 Let me just read you some legislative language that  
15 comes out of this committee. Tell me if this will help  
16 the American people understand what we are really doing:  
17 "MA benchmark based on plans' competitive bids. One, in  
18 general, Section 1853, Sub J of the Social Security Act,  
19 42 U.S.C. 1935W/23J is amended, A) by striking amounts  
20 for purposes and inserting amounts. Number one, in  
21 general, for purposes: B) by redesignating paragraphs one  
22 and two as subparagraphs A and B respectively, and  
23 indenting the subparagraphs appropriately. Section K1  
24 for the area for the year and BB12 and BB 1/3rd of the MA  
25 competitive benchmark amount determined under paragraph 2

1 for the area for the month.

2 IV, for 2013, the sum of aa, 1/3rd of the quotient  
3 of AA, the applicable amount is defined in the subsection  
4 K1 for the area for the year, and BB12 and bb 2/3rds of  
5 the MA competitive benchmark amount, as so determined for  
6 the area for the month. V, for 2014, the MA competitive  
7 benchmark amount for the area for a month, and 2013, as  
8 so determined, increased by the national per capita MA  
9 growth percentage described in Subsection C6 for 2013,  
10 Section K1 for the area for the year, and BB." I will  
11 not go further. Does anybody think that is transparent?

12 Senator Roberts. Would the Senator yield?

13 Senator Conrad. I would be happy to yield.

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

24 The other thing you have to understand is, how will  
25 CMS interpret this bill in terms of content, as well as

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

12 Senator Conrad. But the regulations come after the  
13 legislation.

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

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

22 Senator Roberts. No, the legislative language --

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

25 When you have a chance to write legislative language

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

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

13 The Chairman. We have discussed this and discussed  
14 this.

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

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

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

21 I think the Senator has made my point. You go first  
22 with the legislative language, and all the Senator from  
23 Kentucky is asking is for 72 hours to determine the cost.  
24 Senator Snowe has spoken eloquently about sunshine and  
25 openness, and the fact that the American people would

1 support this, 90 percent, 95 percent.

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

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

11 Senator Crapo. I will be very brief, Mr. Chairman.

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

25 But that is not a replacement or a substitute for

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

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

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

25           The Chairman. All right. Let us vote. Let us

1 vote. Just, we have two votes. One is the amendment  
2 offered by Senator Bunning.

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

5 [Laughter].

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

10 Senator Bunning. But we have not discussed it.

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

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

24 The second, is to make sure that we can go ahead and  
25 proceed. Frankly, if we take the first extreme, we could



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

13             Senator Conrad.     Elmendorf.

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

22             Senator Bunning.    Mr. Chairman?

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

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

1 said.

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

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

6 The Chairman. We discussed this. We discussed  
7 this.

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

11 The Chairman. All right.

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

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

17 Senator Bunning. It will take me very few minutes.

18 The Chairman. All right.

19 Senator Bunning. If you vote for the Baucus  
20 modification, it guts the intention of my amendment. It  
21 does not give us, or the public, legislative language or  
22 a final cost. It is simply keeping the status quo of  
23 this committee, relying on concepts to base our votes.  
24 Regardless of what the other side said, legislative  
25 language is important. That is why every bill that the

1 full Senator considers, and every other committee  
2 considers, is written in legislative language. That is  
3 why CBO needs the language for a final cost.

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

9 Thank you.

10 The Chairman. All right. Let us vote.

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

16 The Clerk will call the roll on the Bunning  
17 amendment.

18 The Clerk. Mr. Rockefeller?

19 Senator Rockefeller. No.

20 The Clerk. Mr. Conrad?

21 Senator Conrad. No.

22 The Clerk. Mr. Bingaman?

23 The Chairman. No by proxy.

24 The Clerk. Mr. Kerry?

25 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?  
18          Senator Grassley.    Aye.  
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?

1           Senator Bunning.    Aye.  
2           The Clerk.    Mr. Crapo?  
3           Senator Crapo.    Aye.  
4           The Clerk.    Mr. Roberts?  
5           Senator Roberts.   Aye.  
6           The Clerk.    Mr. Ensign?  
7           Senator Ensign.   Aye.  
8           The Clerk.    Mr. Enzi?  
9           Senator Enzi.    Aye.  
10          The Clerk.    Mr. Cornyn?  
11          Senator Cornyn.   Aye.  
12          The Clerk.    Mr. Chairman?  
13          The Chairman.   No.  
14          The Clerk will tally the vote.  
15          The Clerk.    Mr. Chairman, the tally is 11 ayes, 12  
16          nays.  
17          The Chairman.   The amendment fails.  
18          Now we will vote on the Chairman's amendment.  A  
19          recorded vote has been requested.  The Clerk will call  
20          the roll.  
21          The Clerk.    Mr. Rockefeller?  
22          Senator Rockefeller.   Aye.  
23          The Clerk.    Mr. Conrad?  
24          Senator Conrad.   Aye.  
25          The Clerk.    Mr. Bingaman?

1           The Chairman.    Aye by proxy.  
2           The Clerk.     Mr. Kerry?  
3           The Chairman.    Aye by proxy.  
4           The Clerk.     Mrs. Lincoln?  
5           Senator Lincoln.   Aye.  
6           The Clerk.     Mr. Wyden?  
7           Senator Wyden.    Aye.  
8           The Clerk.     Mr. Schumer?  
9           The Chairman.    Aye by proxy.  
10          The Clerk.     Ms. Stabenow?  
11          Senator Stabenow.   Aye.  
12          The Clerk.     Ms. Cantwell?  
13          Senator Cantwell.   Aye.  
14          The Clerk.     Mr. Nelson?  
15          Senator Nelson.    Aye.  
16          The Clerk.     Mr. Menendez?  
17          The Chairman.    Aye by proxy.  
18          The Clerk.     Mr. Carper?  
19          Senator Carper.    Aye.  
20          The Clerk.     Mr. Grassley?  
21          Senator Grassley.   No.  
22          The Clerk.     Mr. Hatch?  
23          Senator Hatch.    No.  
24          The Clerk.     Ms. Snowe?  
25          Senator Snowe.    No.

1           The Clerk.    Mr. Kyl?  
2           Senator Kyl.    No.  
3           The Clerk.    Mr. Bunning?  
4           Senator Bunning.   No.  
5           The Clerk.    Mr. Crapo?  
6           Senator Crapo.   No.  
7           The Clerk.    Mr. Roberts?  
8           Senator Roberts.   No.  
9           The Clerk.    Mr. Ensign?  
10          Senator Ensign.   No.  
11          The Clerk.    Mr. Enzi?  
12          Senator Enzi.    No.  
13          The Clerk.    Mr. Cornyn?  
14          Senator Cornyn.   No.  
15          The Clerk.    Mr. Chairman?  
16          The Chairman.   Aye.  
17          The Clerk.    Mr. Chairman, the tally is 13 ayes, 10  
18          nays.  
19          The Chairman.   The amendment is adopted.  
20          All right.   The next amendment I have on the list is  
21          an amendment offered by the Senator from Arizona, Senator  
22          Kyl.  
23          Senator Kyl.    Mr. Chairman, I believe that the  
24          amendment is Amendment Number D1.   There is a  
25          modification.

1           The Chairman.    That is correct.

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

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

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

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

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

16          The Chairman.    And this is a modification?

17          Senator Kyl.    Yes.

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

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

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

24          Senator Kyl.    Sure.  Sure.  You can characterize  
25 them as significant or not for yourself.



1           The Chairman.    Why do we not go ahead?  I have it  
2 here.  Make sure other Senators have it, too.

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

6           The Chairman.   All right.

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

10          The Chairman.   All right.

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

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

22          America's seniors are not wrong, they are not  
23 confused about this.  They have reason to be worried that  
24 portions of this bill could affect their care.  That is  
25 clear.  They are expressing those concerns to us.  I have

1 opinion surveys here that I can quote which reveal that  
2 fact, but I think we can stipulate that a lot of American  
3 seniors are worried that portions of this bill,  
4 particularly in Title 3, will adversely affect their  
5 medical care. This title does, in fact, have provisions  
6 of it that could dramatically and significantly affect  
7 seniors' care.

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

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

24 Then there are \$22.6 billion in savings from a  
25 Medicare rationing commission. Now, when Medicare sets

1 up a commission to figure out whether it is spending too  
2 much money and it is too costly to provide certain  
3 services and CBO says we are going to say \$22.6 billion,  
4 something had to give there. There is \$22.6 billion less  
5 care being given. Maybe some of that can be justified on  
6 grounds that it is not really going to affect anybody's  
7 care. We cannot know that today. America's seniors are  
8 right to be concerned about it.

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

15 I think, Mr. Chairman, that it is disingenuous to  
16 say that Congress can cut this much spending from  
17 Medicare without having an adverse affect on seniors'  
18 access to health care. It is just absolutely  
19 counterintuitive. We all support health care reform. I  
20 am very much supportive of improving Medicare solvency.  
21 Of course, if we were to do that we would apply the  
22 savings that are achieved, if there are any, back to  
23 Medicare. We would not go buy somebody else insurance  
24 with that money and leave Medicare in the financially  
25 strapped condition that it is in.

1           I also believe strongly that we have to strengthen  
2           the quality of care provided to Medicare beneficiaries.  
3           But Medicare savings, as I said, if there are any, should  
4           be used to preserve and strengthen Medicare, not shift it  
5           to pay for a new entitlement program. When seniors  
6           really understand what is in store, as we have already  
7           begun to see during the town hall meetings and other  
8           meetings and visits that we had with our constituents  
9           during the August recess, they will rightly give Congress  
10          a failing mark for not upholding the President's promise  
11          of "not reducing Medicare benefits".

12          I simply find it unthinkable that the President  
13          could make that commitment and then support taking almost  
14          \$400 or \$500 billion out of Medicare. So my amendment  
15          gives every member of the committee an opportunity to be  
16          on record. Should seniors foot the bill for the  
17          uninsured? Should a program scheduled to go bankrupt in  
18          2017 be leveraged to spend nearly \$1 trillion? My  
19          response is, of course, no.

20          The amendment is very simple. It strikes the main  
21          provisions of the Medicare title, Title 3, that contain  
22          most of the cuts that we have been talking about. It  
23          would strike the arbitrary payment cuts and the Medicare  
24          commission which are being used primarily to fund the  
25          program for the uninsured. I think that the reform

1       should focus on providing high-quality care so we would  
2       preserve the quality improvement provisions, the annual  
3       Medicare extenders, the rural protections, and other  
4       provisions, as the modified amendment makes clear.

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

17             So, Mr. Chairman, if you want, we can go through  
18      some of the specific provisions of the modification. The  
19      exemptions to the striking--in other words, things that  
20      are not stricken, and I will put this in plain language,  
21      the conceptual language rather than legislative language  
22      so that it is easy for people to follow here--there are  
23      basically 14 things that are not taken out there: the  
24      value-based purchasing and quality reporting, reducing  
25      hospitals' acquired conditions; a national strategy to

1 improve health care quality; accountable care  
2 organizations; CMS's innovation center. We are going to  
3 have an amendment to that later that ensures there is no  
4 rationing of care that comes from that, so I left it in,  
5 hoping that we could agree on that amendment that would  
6 protect against rationing by the innovation center.

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

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

21 The Chairman. All right. First, the Medicare  
22 trust fund is projected by the latest trustees report to  
23 go broke in the year 2017. The mark before us addresses  
24 that challenge and improves Medicare solvency. In fact,  
25 it will extend Medicare insolvency, the Chairman's mark,

1 by four to five years, so it protects seniors, helps  
2 seniors, extends insolvency four or five more years.  
3 Those who support this amendment essentially are harming  
4 seniors. They are hurting the solvency of the trust  
5 fund. I do not think seniors want to do that.

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

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

18 Senator Kyl. Mr. Chairman, I know that is what you  
19 told us that we had to do. I just explained why I  
20 believe, in this situation, that is not required. It is  
21 also not required because, first of all, what you are  
22 talking about that MedPAC recommended -- first of all,  
23 much of what MedPAC recommended to help the solvency of  
24 Medicare is retained in my amendment. This mark does not  
25 improve the solvency, it takes savings to fund a new

1 entitlement, which is why I do not think there needs to  
2 be an offset because I am not taking the money from  
3 Medicare.

4 The Chairman. Anyway, it is not offset.

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

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

15 Senator Kyl. Well, Mr. Chairman --

16 The Chairman. I rule the amendment out of order.

17 Senator Kyl. And I would ask to appeal the ruling  
18 of the Chair, and would ask for you to explain how it is  
19 that you can make the statement that this amendment would  
20 hurt seniors' care under Medicare, especially counter-  
21 posed to my point, confirmed by Dr. Elmendorf of the CBO  
22 yesterday, that about 20 percent of seniors who will rely  
23 on Medicare Advantage will not have that coverage  
24 available to them as a result of the fact that Medicare  
25 Advantage plans are going to reduce their coverage.



1           I think it is from -- what is the number? They are  
2 reduced from \$42 from \$135. So here is what hurts  
3 seniors. Today, Medicare Advantage, a \$132 value, they  
4 are going to go down to \$42. That is 90 bucks' reduction  
5 in the value off of \$132 base. That is what hurts  
6 seniors. So I really do not understand how you can argue  
7 that taking out the provisions that reduce the value of  
8 care to seniors is not good for seniors, whereas leaving  
9 it in will help seniors.

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

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

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

23           The Chairman. I will just read the committee's  
24 rules: "Under Rule 2A of the Committee rules, for the  
25 committee to consider the amendment, notwithstanding the

1 ruling of the Chair, two-thirds of the members present  
2 must agree. Thus, for this purpose, proxies are not in  
3 order." The question before the committee is, shall the  
4 committee consider the amendment, notwithstanding the  
5 rule of the Chair? A "yes" vote would allow  
6 consideration of the amendment, a "no" vote will sustain  
7 the ruling of the Chair.

8 The Clerk will call the roll.

9 The Clerk. Mr. Rockefeller?

10 Senator Rockefeller. No.

11 The Clerk. Mr. Bingaman?

12 Senator Bingaman. No.

13 The Clerk. Mrs. Lincoln?

14 Senator Lincoln. No.

15 The Clerk. Mr. Wyden?

16 Senator Wyden. No.

17 The Clerk. Ms. Stabenow?

18 Senator Stabenow. No.

19 The Clerk. Ms. Cantwell?

20 Senator Cantwell. No.

21 The Clerk. Mr. Carper?

22 Senator Carper. No.

23 The Clerk. Mr. Grassley?

24 Senator Grassley. Aye.

25 The Clerk. Ms. Snowe?

1           Senator Snowe.    Aye.

2           The Clerk.    Mr. Kyl?

3           Senator Kyl.    Aye.

4           The Clerk.    Mr. Bunning?

5           Senator Bunning.    Aye.

6           The Clerk.    Mr. Roberts?

7           Senator Roberts.    Aye.

8           The Clerk.    Mr. Ensign?

9           Senator Ensign.    Aye.

10          The Clerk.    Mr. Enzi?

11          Senator Enzi.    Aye.

12          The Clerk.    Mr. Cornyn?

13          Senator Cornyn.    Aye.

14          The Clerk.    Mr. Chairman?

15          The Chairman.    No.

16          The Clerk.    Mr. Chairman, the final tally is 8 ayes

17          and 8 nays.

18          The Chairman.    Two-thirds of the Committee not

19          having voted in the affirmative, the ruling of the Chair

20          is sustained.

21          The next amendment is Senator Roberts'. I believe,

22          Senator Roberts, you are next on the list.

23          Senator Roberts.    Thank you. Mr. Chairman, my

24          amendment, D9, strikes the Medicare cuts in Title 3,

25          Subtitle E. This is the famous market basket that we are

1 talking about, the reimbursement rate to our providers--I  
2 think most members are familiar with this--and the cuts  
3 that are in the Chairman's mark. Basically, this is  
4 going to be sort of a repeat of what Senator Kyl has  
5 indicated, except instead of his amount, the \$227 billion  
6 in reimbursement updates to hospitals, doctors, home  
7 health care agencies, and all other providers, I think  
8 will have a very negative effect on the Medicare  
9 beneficiaries.

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

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

16 Senator Roberts. Yes. As modified.

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

21 Senator Roberts. I understand that, Mr. Chairman.

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

23 Senator Roberts. What is your prerogative?

24 The Chairman. Let me hold it.

25 Senator Roberts. I would be happy to give --

1           The Chairman.    The reason why a little notice,  
2   because right here you say, "offset to be provided".  So  
3   I am asking, have you specified your offset?

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

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

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

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

15          Senator Roberts.   All right.

16          The Chairman.    And then be ruled out of order.

17          Senator Roberts.   Story of my life.

18          [Laughter].

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

1 over that. But the total is \$500 billion.

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

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

19 That is what I am trying to save, because I think  
20 that sometimes we lose sight of the fact that it is the  
21 health care provider and their patients who are really  
22 affected by this. We can have the best insurance in the  
23 world, but if you do not have a doctor within about a 50-  
24 mile radius, you are in trouble. If you do not have a  
25 hospital that is still operating, you are in trouble.

1 How many times have we seen this market basket cut by 1  
2 percent, or 2 percent, or 0.5 percent, or 3 percent, and  
3 then you have every hospital administrator in your State  
4 and every doctor in your State, nurses, home health care  
5 folks, not to mention the pharmacists and the clinical  
6 lab people, saying, wait a minute, we cannot absorb these  
7 cuts. This time around, the cuts are significant, \$227  
8 billion. My amendment would simply strike those cuts.

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

18 So instead of owning up to this and this enormous  
19 threat to our financial future, instead of considering a  
20 Medicare reform bill to address this threat to future  
21 generations of Americans--and I am sure that Senator  
22 Conrad could come up with a Medicare reform bill probably  
23 in five minutes--but instead of guaranteeing that the  
24 government-run plan that we currently have remains  
25 solvent, we are cutting \$500 billion from the program in

1 order to start this new entitlement program that I think  
2 everybody has to admit, we have some serious questions  
3 about it. That is probably the least I can say. That  
4 just does not make any sense to me.

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

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

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

24 I thank the Chair.

25 Senator Kyl. Mr. Chairman, might I just a question



1 of Senator Roberts?

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

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

6 Senator Roberts. It is \$227 billion.

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

9 Senator Roberts. That is correct.

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

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

20 Senator Conrad. Mr. Chairman?

21 The Chairman. Senator Conrad?

22 Senator Roberts. And I ask for a vote.

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

25 Senator Roberts. Fine.

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

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

20          Now, why have these providers indicated a  
21          willingness to slow the rate of growth in their  
22          reimbursements?   They have made that commitment because  
23          they know, with 30 million additional people being  
24          covered, that they are going to get a lot more new  
25          business.   They are going to have a lot less

1 uncompensated care. So they have come forward,  
2 hospitals, nursing homes, and all the rest, and indicated  
3 they are willing to reduce their rate of growth in  
4 reimbursement in order to be on a more solid and stable  
5 long-term footing.

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

10 Senator Roberts. Can I respond to that?

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

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

16 The Chairman. The amendment is not in order.

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

19 The Chairman. Sure.

20 Senator Roberts. All right. My dear friend, you  
21 are cutting providers. You are saying that by cutting  
22 providers you are going to restore solvency to Medicare.  
23 You are also saying that the providers agree with this.  
24 When I first learned that the AMA and the American  
25 Hospital Association said we are going to take X amount

1 of cuts, I immediately contacted the Kansas Medical  
2 Society, the Kansas Hospital Association, our nurses, and  
3 also our home health care providers and the pharmacists.  
4 They said, no, we do not agree with that. They are  
5 losing membership because of it.

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

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

25 The Chairman. All right.

1 Senator Kyl. Mr. Chairman, may I ask a question?

2 The Chairman. I am sorry. I am sorry. I am  
3 sorry.

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

5 The Chairman. This is --

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

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

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

12 The Chairman. The amendment is out of order.

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

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

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

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

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

25 The Chairman. All right.

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

11           Senator Roberts.   That is true.

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

21           We are in a circumstance in which those providers  
22 have expressed a willingness to take reimbursements from  
23 the reductions in the reimbursements they would otherwise  
24 receive because they have the prospect of 30 million new  
25 people being covered by insurance, therefore providing

1       them a block of new business to offset these reductions.

2       And look, we are in a circumstance where there is no  
3       alternative but to deal with the long-term shortfall in  
4       Medicare and the other entitlement accounts.

5               The gentleman on the side opposite of me made this  
6       point repeatedly. They have offered budgets in the past  
7       that took reductions in Medicare that had imposed  
8       reductions in Medicare for this very reason. Now we have  
9       a circumstances where the providers are willing to take a  
10      reduction in their levels of reimbursement from what  
11      would otherwise be the case because they see a new block  
12      of business coming their way.

13             Senator Kyl.     Would the Senator yield for a  
14      question?

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

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

23             The Clerk will call the roll.

24             The Clerk.     Mr. Rockefeller?

25             Senator Rockefeller.   No.

1           The Clerk.    Mr. Conrad?  
2           Senator Conrad.   No.  
3           The Clerk.    Mr. Bingaman?  
4           Senator Bingaman.   No.  
5           The Clerk.    Mrs. Lincoln?  
6           Senator Lincoln.   No.  
7           The Clerk.    Mr. Wyden?  
8           Senator Wyden.    No.  
9           The Clerk.    Ms. Stabenow?  
10          Senator Stabenow.   No.  
11          The Clerk.    Ms. Cantwell?  
12          Senator Cantwell.   No.  
13          The Clerk.    Mr. Nelson?  
14          Senator Nelson.    No.  
15          The Clerk.    Mr. Menendez?  
16          Senator Menendez.   No.  
17          The Clerk.    Mr. Carper?  
18          Senator Carper.    No.  
19          The Clerk.    Mr. Grassley?  
20          Senator Grassley.   Aye.  
21          The Clerk.    Mr. Hatch?  
22          Senator Hatch.    Aye.  
23          The Clerk.    Ms. Snowe?  
24          Senator Snowe.    Aye.  
25          The Clerk.    Mr. Kyl?



1           Senator Kyl.    Aye.

2           The Clerk.    Mr. Bunning?

3           Senator Bunning.    Aye.

4           The Clerk.    Mr. Crapo?

5           Senator Crapo.    Aye.

6           The Clerk.    Mr. Roberts?

7           Senator Roberts.    Aye.

8           The Clerk.    Mr. Ensign?

9           Senator Ensign.    Aye.

10          The Clerk.    Mr. Enzi?

11          Senator Enzi.    Aye.

12          The Clerk.    Mr. Cornyn?

13          Senator Cornyn.    Aye.

14          The Clerk.    Mr. Chairman?

15          The Chairman.    No.

16          The Clerk will announce the vote.

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

18          11 nays.

19          The Chairman.    Two-thirds of the committee not

20          having voted in the affirmative, the ruling of the Chair

21          is sustained.

22          The next amendment I have is an amendment offered by

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

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

25          have modified the amendment.

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

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

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

21           I am not sure that they are going to like what they  
22 are going to get if the Chairman's mark becomes law.  
23 Again, President Obama has said over and over again that  
24 no one will lose their health benefits or their current  
25 health coverage. He has told the American people over

1 and over again, most recently this weekend, "If you are  
2 happy with your coverage you may keep it." The Finance  
3 mark includes \$113 billion in reductions for the Medicare  
4 Advantage program.

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

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

20 So my amendment ensures that President Obama's  
21 commitment to allow individuals to keep their current  
22 coverage applies to all Medicare beneficiaries, including  
23 those participating in Medicare Part C. The Chairman's  
24 mark proposes to phase in competitive bidding in the  
25 Medicare Advantage program beginning 2012. For many of

1 the more than 10 million beneficiaries now enrolled in  
2 Medicare Advantage plans, this proposal will likely mean  
3 significant increases in out-of-pocket costs and reduced  
4 access to additional benefits beyond those available in  
5 traditional Medicare.

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

10 Senator Grassley. Mr. Chairman?

11 The Chairman. Senator Grassley?

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

22 President Obama has promised that these seniors will  
23 not see reductions in benefits. I would like to quote  
24 him: "People currently signed up for Medicare Advantage  
25 are going to have Medicare and the same level of

1 benefits. These folks will be able to get Medicare just  
2 as good to provide the same benefits." So I want to make  
3 sure, as Senator Hatch does, that the people receive the  
4 benefits of the President's promise. This amendment will  
5 make sure that seniors continue to have the benefits that  
6 they have come to rely upon. I urge support for this  
7 amendment.

8 The Chairman. Senator Rockefeller?

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

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

25 I am sorry, this is just stuffing money into the

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

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

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

25             Senator Bunning. Mr. Chairman?

1           Senator Hatch.    Mr. Chairman?

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

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

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

20           Senator Wyden.    Mr. Chairman?

21           Senator Nelson.    Will the Senator yield?

22           Senator Hatch.    Sure.

23           Senator Nelson.    If the Senator will yield, Senator  
24 Hatch, you are supporting the wrong amendment.   You are  
25 supporting an amendment that is going to prohibit us from

1 getting cost savings out of Medicare Advantage. Medicare  
2 Advantage, on the average, costs 14 percent more than  
3 Medicare fee-for-service. The amendment that you ought  
4 to be supporting is my amendment to say that if you have  
5 Medicare Advantage, we are not going to take it away from  
6 you. We are going to grandfather you in, and on a going-  
7 forward basis, you are going to get these cost  
8 efficiencies out of Medicare Advantage.

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

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



1 billion, I guarantee you that.

2 Senator Conrad. Mr. Chairman?

3 Senator Stabenow. Mr. Chairman?

4 The Chairman. Senator Stabenow?

5 Senator Stabenow. Thank you, Mr. Chairman.

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

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

21 But on this amendment, Mr. Chairman, this, to me,  
22 is a classic example of how tough it is to do what we are  
23 trying to do. I appreciate that Medicare Advantage is  
24 out of the box. We are about 20 percent of the seniors  
25 that are getting their insurance, their Medicare, through

1 private for-profit companies who are now taking a piece  
2 of this. Eighty percent of the seniors get their Medicare  
3 the traditional way, lower cost. They actually see a  
4 cost shift onto them.

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

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

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

24 Under the Medicare Advantage, there are a number of  
25 limitations. Consumer costs may be greater, actually, in

1 Medicare Advantage than traditional Medicare, which we  
2 are strengthening in this bill. There is no guarantee  
3 that plans offer any more than traditional Medicare. You  
4 may not be able to get emergency care coverage when you  
5 need it under these plans. Your doctor may not be in the  
6 plan or accept it, which puts a senior at a disadvantage.

7 They can change every year. Plans may withdraw, leaving  
8 seniors holding the bag. So, there are a number of  
9 concerns that I have overall about coverage.

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

20 The Chairman. I would like to ask the author of  
21 the amendment if he would agree to modify the amendment  
22 in two respects. First of all, the amendment is  
23 unconstitutional. It is unconstitutional because it  
24 requires a congressional agency to issue an order that  
25 has consequences for the executive branch. Under the

1        *Chada* decision and under also the *Baucher v. Synart*  
2        decisions, basically only an executive branch agency  
3        official must make these kinds of determinations. So,  
4        having CBO do this would be unconstitutional. In fact,  
5        it is not CBO's business anyway.

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

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

21               I think it is important to remind ourselves--Senator  
22       Stabenow has made this point--that Uncle Sam pays private  
23       insurance companies about 14 percent, on average, more  
24       for providing coverage to our seniors than it would pay  
25       for the same senior in traditional Medicare, and that is

1 as high as 20 percent in some parts of the country.  
2 There is not much evidence that this extra payment leads  
3 to better quality for seniors.

4 I might also add that these extra payments will add  
5 \$3.60 per month to premiums for all Medicare  
6 beneficiaries in the year 2010, which means that a  
7 typical older couple in traditional Medicare will pay a  
8 Medicare Advantage tax of nearly \$90 next year, on  
9 average, to subsidize private insurance who are not  
10 providing the benefits.

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

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

25 Senator Hatch. Mr. Chairman, let me just say this

1 before I make any modification to my amendment. AHIP has  
2 analyzed the Nelson amendment and it has come to the  
3 conclusion that only about 30 counties will benefit from  
4 his amendment, 30 counties in the whole country.  
5 Naturally, some Florida counties--Broward, Miami-Dade,  
6 Palm Beach--would benefit; some in Kansas, two in Kansas;  
7 in Louisiana, a number of counties; in Massachusetts,  
8 Nantucket; in Mississippi, Clayborne; Oklahoma, Kittland;  
9 Tallahatchee, Warren; in New York, Bronx, Kings, Nassau,  
10 New York, Putnam, Queens, Richmond, Rockland, Suffolk,  
11 Westchester; in Oklahoma, Choctau; and then in Texas,  
12 Mailand. Those are the only counties, according to AHIP,  
13 that will be benefitted by the distinguished Senator from  
14 Florida's amendment. I know that he is sincere in this  
15 amendment, and I commend him for trying to resolve this  
16 problem.

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

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

21 Senator Hatch. All right.

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

24 Senator Hatch. That is what I was told. But let  
25 me just say this. Mr. Chairman, let me ask unanimous

1 consent to modify my amendment to say, instead of  
2 requiring CBO to certify Medicare benefits, the Chief  
3 Actuary of the Centers for Medicare and Medicaid Services  
4 would be responsible for making that certification.

5 The Chairman. What about the other change?

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

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

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

13 Senator Wyden. Mr. Chairman?

14 The Chairman. Senator Wyden?

15 Senator Wyden. Mr. Chairman, Oregon has the  
16 highest percentage of Medicare Advantage in the country,  
17 the highest percentage by far. One of the things that we  
18 have learned over the years is that not all Medicare  
19 Advantage is created equal. Oregon and Washington have  
20 good quality, efficient care. In our part of the  
21 country, it is a lifeline. It is, essentially, access.  
22 We have been hammered under the traditional fee-for-  
23 service approach, so without the good-quality, affordable  
24 Medicare Advantage, we simply do not have access to care  
25 for seniors.

1           Now, the reality is--and this is why I make the  
2 point of, not all Medicare Advantage is created equal--  
3 Oregon and Washington have very good Medicare Advantage.  
4 It was not very long ago when Senator Lincoln and I sat  
5 in the Senate Finance Committee and saw practices  
6 involving Medicare Advantage where the people, the  
7 executives, ought to really go to jail. We heard, for  
8 example, about people selling Medicare Advantage door-to-  
9 door, essentially dressed up as providers, essentially in  
10 scrubs. Senator Lincoln and I recall it. We had never  
11 seen anything quite like it. So what we have got to do  
12 is make a distinction between good-quality Medicare  
13 Advantage and those kinds of practices.

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

25           One of the questions I have, Senator Hatch, is with



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

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

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

17 Senator Wyden. In everything? We would reduce --

18 Senator Hatch. With the exception of the Medicare  
19 program.

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

22 Senator Hatch. It would be a modest reduction.

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

25 Senator Hatch. Well, it would be nice if we had

1 estimates. That is one of the problems around here. Let  
2 me see if this offset would work. I would like to  
3 further modify the amendment to include the following  
4 offset in place of reducing the subsidies, the new offset  
5 that would set the Federal matching rate for all Medicare  
6 administrative costs at 50 percent.

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

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

12 The Chairman. All matching rates? Medicaid?

13 Senator Hatch. The Federal match.

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

16 Senator Hatch. Yes.

17 The Chairman. Oh, just for administrative costs?

18 Senator Hatch. Just for administrative costs, yes.

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

21 Senator Hatch. Probably around \$30 billion.

22 The Chairman. Thirty billion over 10 years.

23 Senator Hatch. That is my understanding.

24 The Chairman. So you are going to cut the States?  
25 You are going to cut the States. Most States, Federal

1 pays the greater percentage of Medicaid.

2 Senator Hatch. Just for administrative costs.

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

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

7 The Chairman. You have not talked to the NGA or --

8 Senator Hatch. No, I have not talked to the  
9 Governors Association.

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

12 Senator Hatch. About 30.

13 The Chairman. Whose estimate is 30?

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

16 Senator Ensign. Mr. Chairman?

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

19 The Chairman. I do not know who was first.  
20 Senator Ensign?

21 Senator Ensign. Thank you, Mr. Chairman. I think  
22 a couple of points need to be made about Medicare  
23 Advantage, first of all. It has been mentioned there is  
24 a 14 percent higher payment on Medicare Advantage. If  
25 you will remember, one of the reasons is that Medicare

1 Advantage was basically subsidized. Under  
2 Medicare+Choice, rural areas, especially in those under-  
3 served areas, were not getting an HMO/PPO type of an  
4 offering. Just, the modeling did not work.

5 So Medicare Advantage was set up with a subsidy so  
6 that plans would go out into the rural areas, especially  
7 across the country, and to those that were under-served.

8 Well, guess what the companies did? They may get paid  
9 14 percent more, but the average plan in Medicare  
10 Advantage makes about a 4 percent profit margin. What  
11 they do with the rest of the subsidized payments, is they  
12 offer better services, additional services to seniors who  
13 are on Medicare Advantage.

14 So Senator Stabenow, you said you do not want to see  
15 any benefits cut for seniors on Medicare. Well, under  
16 Medicare Advantage, if you cut seniors, you cut payments  
17 to them and programs end up being eliminated. In other  
18 words, you are going to cut additional benefits. There  
19 is no way around that. If you have, for instance,  
20 optometric coverage, if you have dental coverage, if you  
21 have gym coverage, if you have whatever, and now you lose  
22 your Medicare Advantage, those are benefits you had under  
23 Medicare Advantage and now you are in traditional  
24 Medicare fee-for-service and you no longer have that  
25 benefit, therefore your benefits are being cut.

1           Now, a couple other points to make. It is  
2 interesting that those who are for a public option want  
3 the government to compete with the private sector. But  
4 by virtually eliminating Medicare Advantage, you are  
5 eliminating the private sector competing with the  
6 government. I think it is very interesting that we want  
7 to have a program that competes with the private sector,  
8 but when the private sector is trying to compete with a  
9 government program, we want to eliminate that  
10 competition. I do not think that that is the direction  
11 that we should be going.

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

20           Thank you, Mr. Chairman.

21           Senator Stabenow. Mr. Chairman?

22           Senator Lincoln. Mr. Chairman?

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

25           The Chairman. Senator Rockefeller is seeking

1 recognition.

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

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

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

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

25 The offset would be a proportionate reduction as

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

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

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

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

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

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

20 Senator Hatch. Well, we do not have a score on it.

21 The Chairman. Earlier, you told me \$20 or \$30  
22 billion.

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

25 The Chairman. The next question is, is it not

1 true, if you exempt Medicare and exchange, the effect  
2 would be to cut Medicaid or add a burden on States to pay  
3 more for Medicaid than they otherwise are?

4 Senator Hatch. Not that I know of.

5 Senator Conrad. Yes. Yes.

6 The Chairman. I think that is, by definition, the  
7 result.

8 Senator Conrad. That is where the money is.

9 The Chairman. I might ask some of the experts  
10 here. I do not know. Mr. Hughes, I saw you nodding your  
11 head. Do you have a view on that? Or Ms. Bishop?  
12 Somebody who can tell us what the effect would be of  
13 exempting Medicare and exempting the exchange, who would  
14 pay the cost? A) what is the cost? If one of the staff  
15 wants to answer that question. And B) if Medicare  
16 exchange is exempted from the burden of cost, who would  
17 bear the burden? It is my impression that Medicaid would  
18 then bear the burden. But anyway, Ms. Bishop, what is  
19 the answer?

20 Ms. Bishop. Well, there are two questions. We are  
21 trying to get a read from CBO about the cost of the  
22 amendment, but as modified --

23 The Chairman. Well --

24 Ms. Bishop. CBO is looking at the modified  
25 amendment, as modified. The words "Medicare-covered" are



1 key here because that indicates whether or not we are  
2 talking about the benefits that beneficiaries are  
3 entitled to under the statute or the benefits that  
4 Medicare Advantage enrollees receive as extra, or in  
5 addition to what is mandatory or statutory under the law.  
6 So CBO is now looking at the modified amendment. They  
7 are going to --

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

13 Ms. Bishop. Yes. This is the --

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

16 Ms. Bishop. Oh. Okay.

17 The Chairman. That is not his.

18 Ms. Bishop. So CBO scored --

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

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

25 The Chairman. Right.

1 Senator Hatch. You mean the amendment or the --

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

4 Senator Hatch. All right. The Medicare benefits.

5 "The Chief Actuary of the Centers for Medicare and  
6 Medicaid Services" --

7 The Chairman. Which is good.

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

13 The Chairman. All right. Yes. So --

14 Ms. Bishop. So CBO has said that, as filed with  
15 those changes, the cost of that amendment is \$113  
16 billion. That is the loss in savings in the package, is  
17 \$113 billion. If the Medicare program and the exchange  
18 is exempted from being used as an offset for that, then  
19 the other parts of the bill would have to be reduced. So  
20 that would be Medicaid savings, and I will let David  
21 Schwartz talk about that.

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

24 Mr. Schwartz. Mr. Chairman, you are correct that  
25 there are, on the coverage side of all of the tables CBO

1 has produced through every iteration, there are two big  
2 pots of spending, a Medicaid and CHIP line and the tax  
3 credits that go with the exchange. So if you held one of  
4 those harmless, the other one becomes the primary target.  
5 So that covers the cost of the expansion of Medicaid for  
6 the Federal Government and the States.

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

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

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

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

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

17 The Chairman. Just a minute.

18 Senator Ensign. Could it be --

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

21 Senator Ensign. This is in addition to your  
22 question.

23 The Chairman. Sure.

24 Senator Ensign. Could it also, though, be, instead  
25 of just dumping the burden on the States and limitation

1 in coverage? I mean, why are you assuming it is going to  
2 be dumped on the States instead of limiting the coverage?  
3 Why is CBO assuming that?

4 Mr. Schwartz. I do not know what CBO was assuming.  
5 But let me be clear about what I was saying. So the  
6 number on the table, the September 16th table, is 287, so  
7 \$287 billion.

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

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

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

17 Senator Conrad. Reduction in the coverage.

18 Senator Ensign. Reduction in the coverage, right.

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

22 Mr. Schwartz. It sounds that way to me, Senator  
23 Stabenow. And Senator Ensign, I believe that the  
24 language of the amendment says "spending". So if you  
25 just reduced spending, I would interpret that as trying

1 to hold coverage constant. I certainly would defer to  
2 the author of the amendment, but the way it is written,  
3 it does say "reduce spending", not "reduce coverage".

4 Senator Wyden. Mr. Chairman?

5 The Chairman. Senator Wyden?

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

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

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

21 Senator Wyden. All right. Thank you.

22 Thank you, Mr. Chairman.

23 The Chairman. Let me ask this question. If the  
24 words "Medicare-covered" were inserted, that is, if CMS  
25 or the actuary certification were restricted to

1 Medicare-covered benefits, what would the score be there?

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

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

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

19 The Chairman. Gym memberships.

20 Ms. Bishop. And gym memberships. Those  
21 beneficiaries, all Medicare beneficiaries, pay the cost  
22 for those extra benefits in the form of higher Part B  
23 premiums. The Chief Actuary at CMS has estimated that  
24 they pay \$3.60 per month for the extra benefits that  
25 Medicare Advantage enrollees have. That is \$90 per year.

1           Senator Crapo.    Mr. Chairman?

2           The Chairman.    Go ahead, Senator Crapo.

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

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

22          In fact, yesterday I believe that the testimony of  
23          the CBO was that if this proposal in the mark were to be  
24          implemented, that the additional benefits above the  
25          statutory requirements for Medicare fee-for-service would

1 be reduced by just a little bit under 50 percent over 10  
2 years. So what we are seeing is that there is a category  
3 of recipients of Medicare, those who are under the  
4 Medicare Advantage plan, who will, in fact, see what they  
5 receive in their health care plan reduced by about 50  
6 percent of the addition over the basic Medicare benefit  
7 provided in statute. I do not think there is any way to  
8 get around that.

9 Now, when the President made his comment that in the  
10 plan that we adopt we should make it so that, I think his  
11 words were, that if anybody wants to keep the health care  
12 that they have today, their health care plan today, they  
13 will be able to keep it. That is not true. If this  
14 proposal were adopted, that is not true for Medicare  
15 Advantage recipients. The reason it is not true is  
16 because their benefits are going to be reduced by about  
17 50 percent of that increment over the basic statutory  
18 Medicare right.

19 Senator Nelson. Would the Senator yield?

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

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

24 Senator Crapo. I will be waiting for your  
25 amendment, Senator.



1           Senator Nelson.    That those with Medicare  
2    Advantage, existing, will be grandfathered in and will  
3    not lose that benefit, but on a going-forward basis we  
4    are going to squeeze the efficiencies out of that extra  
5    14 percent that has gone into Medicare Advantage.

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

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

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

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

19          But go ahead, Senator.

20          Senator Crapo.    All right.  Then let me just wrap  
21    up.  I mean, what are we talking about when we are  
22    talking about those who are currently under Medicare  
23    Advantage who will be deprived of their health care plan  
24    if this proposal is adopted?  Well, in Idaho, that is  
25    60,000 people.  That is 27 percent of the Medicare

1 population in Idaho who will face that circumstance. I  
2 think nationally the percentage is about 20 percent of  
3 the Medicare population that is under Medicare Advantage.

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

11 The reality, as has been indicated, is that they are  
12 operating on about a 4 percent margin and that extra is  
13 plowed back in to extra benefits for Medicare  
14 beneficiaries who choose the Medicare Advantage plan over  
15 those who simply stick with fee-for-service. In terms of  
16 whether the people who are in Medicare today like this  
17 plan, my understanding is that nationally the  
18 satisfaction rate with Medicare Advantage is well over 80  
19 percent, maybe approaching 90 percent. In Idaho, it is  
20 80 percent, plus.

21 The point is, people like this part of Medicare.  
22 They like the fact that they can get an enhanced benefit  
23 by moving into Medicare Advantage. The whole purpose of  
24 Senator Hatch's amendment, and of which I am proud to be  
25 a co-sponsor, is to make it clear that we are not going

1 to allow those people, that significant proportion of our  
2 Medicare population, to lose that coverage.

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

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

23 Senator Conrad. Mr. Chairman?

24 The Chairman. Of course those are popular, because  
25 they get all those extra goodies. That is because we

1 made a mistake in MMA in 2003 and gave all these plans so  
2 much more money. Now we are trying to correct that  
3 mistake in a fair and appropriate way.

4 Senator Conrad. Mr. Chairman?

5 The Chairman. Senator Conrad?

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

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

21 In fact, when I asked CBO for scores, they showed  
22 that, at 150 percent of traditional fee-for-service  
23 Medicare, there were still savings at putting a cap on  
24 Medicare Advantage. So that tells you, the Medicare  
25 Advantage plans that cost 150 percent of traditional fee-

1 for-service Medicare, it is one of the key reasons  
2 Medicare is headed for insolvency.

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

8 Senator Hatch. Mr. Chairman?

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

11 Senator Hatch. Look --

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

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

24 Let me just ask Shawn Bishop, Ms. Bishop, this  
25 question. You were telling me that you are all right

1 cutting so-called extra benefits like vision care for  
2 nearly 10 million seniors. Now, was the Nelson amendment  
3 not brought forth to protect these costs? Ms. Bishop?

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

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

11 Ms. Bishop. No.

12 Senator Hatch. Mainly in the South and the  
13 Northeast.

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

22 Senator Hatch. All right. So they are going to  
23 get really high benefits if the Nelson amendment passes  
24 and we are going to protect those, but we are not going  
25 to protect other people in the system? See, it works in

1 my State. It works in a lot of other States. We are  
2 just basically not going to protect those other States,  
3 so we can take care of -- and I appreciate the  
4 distinguished Senator from Florida and his desire to take  
5 care of his own State, but I have an equal desire to take  
6 care of my State, and a whole bunch of States beside  
7 mine. With all due respect --

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

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

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

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

15 Senator Nelson. Thank you.

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

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

25 I think I am coming a lot closer to doing what the

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

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

15 Senator Nelson. Mr. Chairman?

16 The Chairman. All right.

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

19 Senator Nelson. What happened to my yielding?

20 Senator Stabenow. I would yield.

21 The Chairman. Yes. Senator Nelson, go ahead.

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

24 Senator Nelson. I thank the Senator for yielding.

25 First of all, the Nelson amendment has been



1 characterized many different ways, and I want to make  
2 sure that everybody understands what it is, including the  
3 lady at the front table on the staff. Any Medicare  
4 Advantage firm that would be bidding below Medicare fee-  
5 for-service, those Medicare Advantage beneficiaries would  
6 be grandfathered as of the date of the bill becoming law  
7 and would not have their benefits cut.

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

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

23 Senator Stabenow. And if I might add, Mr.  
24 Chairman, two issues from my perspective. I appreciate  
25 the concerns of my friend from Utah, but unfortunately,

1 without the Chairman's modification, we are pitting  
2 children and low-income seniors against not all seniors,  
3 but a small group. We heard from Ms. Bishop that, in  
4 fact, 80 percent of the seniors right now in Medicare,  
5 traditional Medicare, are paying \$90 more a year in their  
6 premiums so that some folks can be subsidized through the  
7 for-profit insurance companies to get, frankly, services  
8 I think we all should be providing for seniors: dental,  
9 vision. I would be happy to support and join with my  
10 colleagues in offering an amendment to provide dental and  
11 vision and other, what I view as critical services for  
12 all seniors.

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

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

24 Senator Hatch. Mr. Chairman, let me just say this  
25 in conclusion.

1           The Chairman.    Senator Hatch?

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

17          Senator Ensign.    Mr. Chairman?

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

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

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

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

1 that.

2 The Chairman. Yes, Senator Ensign?

3 Senator Ensign. The Senator from North Dakota has  
4 talked about needing to shore up the Medicare trust fund.

5 Senator Stabenow just mentioned that these cuts, if  
6 Senator Hatch, the way he has his offsets, will go to  
7 cutting other types of programs. I think that clearly  
8 establishes that we are taking Medicare funds for other  
9 programs.

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

16 So that indicates that the Medicare Advantage  
17 savings, savings from Medicare, are going to other  
18 programs. Now, I will have an amendment in a little  
19 while that will say, any savings in Medicare, including  
20 Medicare Advantage savings, should stay in Medicare to  
21 shore up the trust fund. That is what we should be doing  
22 with Medicare savings. You make some very good points  
23 about these extra benefits, but if we are going to do it  
24 we should not be using the Medicare savings to expand  
25 other programs. We should be doing it to ensure the

1 solvency of the Medicare programs far into the future.  
2 Under the current bill, it does not do that. It uses  
3 Medicare savings to pay for other programs.

4 Senator Cornyn. Mr. Chairman?

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

7 Senator Cornyn. Mr. Chairman?

8 The Chairman. Senator Cornyn?

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

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

24 What that means in my State is about 42 percent of  
25 the people in my State who quality for Medicare cannot

1 find a physician who will accept Medicare fee-for-  
2 service. Some of them live in rural areas where they are  
3 under served, others just find that doctors are unable to  
4 pay their bills and accept Medicare rates. In some of  
5 the more populous counties, like Travis County, Austin,  
6 Texas, only 17 percent of physicians will see a new  
7 Medicare patient.

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

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

24 The Chairman. Senator Kyl?

25 Senator Kyl. Thank you, Mr. Chairman.

1           Since Arizona has one of the highest percentage of  
2           its citizens covered by these policies, this is a very  
3           important amendment. I support Senator Hatch's  
4           amendment.

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

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

25          Let me just conclude by quoting from a couple of our

1 colleagues--one colleague and one former colleague--about  
2 this program. Our colleague from Massachusetts, Senator  
3 Kerry: "I urge my colleagues to support the additional  
4 funding that is urgently needed to strengthen the  
5 Medicare+Choice program for seniors. This should be  
6 among our highest priorities in this year's Medicare  
7 debate." This was the 2003 Medicare debate.

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

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

21 Senator Hatch has requested a roll call vote on his  
22 amendment. Just one word or two, just to clear up some  
23 misconceptions here. One, is in this bill there is no  
24 cut in beneficiary payments, none. There has been  
25 implication sometimes that the fact of this bill is to



1 cut beneficiary payments to seniors. The answer is,  
2 there is not one red cent cut under this bill. Well, it  
3 has been implied many, many times today and in previous  
4 days.

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

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

20 Senator Hatch. You are the ones that are cutting  
21 \$113 billion out of the Medicare Advantage program. How  
22 are you accusing us of cutting \$113 billion?

23 The Chairman. We are not --

24 Senator Hatch. Sure you are. You are taking it  
25 right out of Medicare Advantage.

1           The Chairman.    That figure is incorrect.  Let us  
2 just vote.

3           Senator Hatch.    All right.

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

7           The Clerk will call the roll.

8           The Clerk.    Mr. Rockefeller?

9           Senator Rockefeller.    No.

10          The Clerk.    Mr. Conrad?

11          Senator Conrad.    No.

12          The Clerk.    Mr. Bingaman?

13          The Chairman.    No by proxy.

14          The Clerk.    Mr. Kerry?

15          The Chairman.    No by proxy.

16          The Clerk.    Mrs. Lincoln?

17          The Chairman.    No by proxy.

18          The Clerk.    Mr. Wyden?

19          Senator Wyden.    No.

20          The Clerk.    Mr. Schumer?

21          The Chairman.    No by proxy.

22          The Clerk.    Ms. Stabenow?

23          Senator Stabenow.    No.

24          The Clerk.    Ms. Cantwell?

25          Senator Cantwell.    No.

1           The Clerk.    Mr. Nelson?  
2           Senator Nelson.   No.  
3           The Clerk.    Mr. Menendez?  
4           The Chairman.   No by proxy.  
5           The Clerk.    Mr. Carper?  
6           The Chairman.   No by proxy.  
7           The Clerk.    Mr. Grassley?  
8           Senator Hatch.   Aye by proxy.  
9           The Clerk.    Mr. Hatch?  
10          Senator Hatch.    Aye.  
11          The Clerk.    Ms. Snowe?  
12          Senator Snowe.   No.  
13          The Clerk.    Mr. Kyl?  
14          Senator Kyl.    Aye.  
15          The Clerk.    Mr. Bunning?  
16          Senator Bunning.   Aye.  
17          The Clerk.    Mr. Crapo?  
18          Senator Crapo.   Aye.  
19          The Clerk.    Mr. Roberts?  
20          Senator Hatch.   Aye by proxy.  
21          The Clerk.    Mr. Ensign?  
22          Senator Ensign.   Aye.  
23          The Clerk.    Mr. Enzi?  
24          Senator Enzi.    Aye.  
25          The Clerk.    Mr. Cornyn?

1 Senator Cornyn. Aye.  
2 The Clerk. Mr. Chairman?  
3 The Chairman. No.  
4 The Clerk will tally the vote.  
5 The Clerk. 9 ayes, 14 nays.  
6 The Chairman. The amendment fails.  
7 We will have a roll call vote on the Chairman's  
8 alternative.  
9 The Clerk. Mr. Rockefeller?  
10 Senator Rockefeller. Aye.  
11 The Clerk. Mr. Conrad?  
12 Senator Conrad. Aye.  
13 The Clerk. Mr. Bingaman?  
14 The Chairman. Aye by proxy.  
15 The Clerk. Mr. Kerry?  
16 The Chairman. Aye by proxy.  
17 The Clerk. Mrs. Lincoln?  
18 The Chairman. Aye by proxy.  
19 The Clerk. Mr. Wyden?  
20 Senator Wyden. Aye.  
21 The Clerk. Mr. Schumer?  
22 The Chairman. Aye by proxy.  
23 The Clerk. Ms. Stabenow?  
24 Senator Stabenow. Aye.  
25 The Clerk. Ms. Cantwell?

1 Senator Cantwell. Aye.  
2 The Clerk. Mr. Nelson?  
3 Senator Nelson. Aye.  
4 The Clerk. Mr. Menendez?  
5 The Chairman. Aye by proxy.  
6 The Clerk. Mr. Carper?  
7 The Chairman. Aye by proxy.  
8 The Clerk. Mr. Grassley?  
9 Senator Hatch. No by proxy.  
10 The Clerk. Mr. Hatch?  
11 Senator Hatch. No.  
12 The Clerk. Ms. Snowe?  
13 Senator Snowe. Aye.  
14 The Clerk. Mr. Kyl?  
15 Senator Kyl. No.  
16 The Clerk. Mr. Bunning?  
17 Senator Bunning. No.  
18 The Clerk. Mr. Crapo?  
19 Senator Crapo. No.  
20 The Clerk. Mr. Roberts?  
21 Senator Hatch. No by proxy.  
22 The Clerk. Mr. Ensign?  
23 Senator Ensign. No.  
24 The Clerk. Mr. Enzi?  
25 Senator Enzi. No.

1           The Clerk.    Mr. Cornyn?

2           Senator Cornyn.   No.

3           The Clerk.    Mr. Chairman?

4           The Chairman.   Aye.

5           The Clerk will tally the vote.

6           The Clerk.    14 ayes, 9 nays.

7           The Chairman.   The amendment passes.

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

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

13          The Chairman.   Sure.

14          Senator Wyden.   Can I be recognized after lunch?

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

16          Senator Wyden.   Good.

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

19          Senator Wyden.   Thank you.

20          The Chairman.   The committee is in recess until  
21 2:30, at which point Senator Wyden is recognized.

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

23

24

25

1 AFTER RECESS

2 [2:34 p.m.]

3 The Chairman. The committee will come to order.  
4 When we recessed, I said Senator Wyden was going to be  
5 next recognized. Senator Wyden, you are our man.

6 Senator Wyden. Thank you very much, Mr. Chairman.  
7 I would call up the Wyden-Carper amendment D-2.

8 The Chairman. D-2?

9 Senator Wyden. Yes, D-2.

10 The Chairman. The amendment, as modified.

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

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

23 The challenge, of course, as Senators know, is that  
24 something like two-thirds of the Medicare program, two-  
25 thirds of the Medicare spending goes toward roughly 10

1 percent of the Medicare population. These are  
2 individuals who are incurring significant multiple, often  
3 chronic conditions. They will have diabetes, heart  
4 disease, Alzheimer's.

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

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

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

23 We can have those benefits if we can pass this  
24 legislation. We have gone back and forth, Mr. Chairman  
25 and colleagues, with the Congressional Budget Office on



1       this idea. They are looking at some of our further  
2       modifications, but we would stipulate that providers  
3       would have to achieve minimum savings annually of 5  
4       percent on health care provided to the highest cost  
5       Medicare beneficiaries as a condition of participating in  
6       the program.

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

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

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

24            The Chairman. Thank you, Senator. I think you  
25      have a good idea. That is the kind of coordination that

1 we need. As you said, that is why the mark authorizes  
2 CMS to test a wide range of payment reforms that seek to  
3 reduce cost and improve quality.

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

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

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

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

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

19 Senator Kyl. Yes, I do.

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

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

24 The Chairman. Was it filed?

25 Senator Kyl. It has been provided to you all. It

1 is a modification of amendment number D-6.

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

4 Senator Kyl. About an your ago.

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

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

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

20 Let me read this memorandum, it is rather short, as  
21 an example of one of the most heavy-handed,  
22 unconstitutional actions that I can think of that our  
23 federal government has ever attempted to take against  
24 private citizens, private organizations in this country,  
25 because they disagree with the administration with

1 respect to its ideas on health care reform.

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

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

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

24 Further, we believe that such communications are  
25 potentially contrary to federal regulation and guidance

1 for the MA and Part D programs and other federal law,  
2 including HIPAA.

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

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

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

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

20 This appears to be precisely the kind of action that  
21 he threatened would occur. I submit to you, first of  
22 all, since I have not read what the precise objections of  
23 the insurance company was to what the President was  
24 proposing, that it may or may not have been accurate  
25 information about what the proposed legislation would do.

1           But, of course, in exercising the First Amendment,  
2           it does not matter whether it is accurate or not. You  
3           have the right to be wrong in expressing your free  
4           speech, and these entities do have the right of free  
5           speech.

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

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

1 about legislation or legislative proposals.

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

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

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

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

24 If American citizens cannot address their views, if  
25 people with a direct interest in serving constituencies,

1       like insurance companies that enroll senior citizens in  
2       Medicare Advantage plans, if they cannot exercise their  
3       First Amendment freedoms and discuss their beliefs as to  
4       how these plans might be affected by the pending  
5       legislation, then this country is going to be denied the  
6       benefit of the kind of free and robust debate that we all  
7       believe is important.

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

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

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



1 definitely affect the benefits that you receive.

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

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

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

25 Thank you.

1           The Chairman.   Are you finished?

2           Senator Kyl.     Yes.

3           The Chairman.   This is a very important question.  
4           We have laws governing how companies can communicate with  
5           seniors, especially companies that have a special  
6           relationship with seniors, especially companies that have  
7           a lot of personal information about seniors for which  
8           they offer plans and benefits.

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

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

21          The reason we have laws with respect to a company's  
22          communication with seniors, especially on Medicare  
23          Advantage plans, communication with seniors, is because  
24          seniors are vulnerable.  It is a very vulnerable  
25          population.

1           We have a long history of people and companies and  
2 individuals taking advantage of seniors. My mother just  
3 got a telephone call two weeks ago she told me about,  
4 somebody calling her up, unsolicited call. I said, "Mom,  
5 do not take those telephone calls."

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

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

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

23           That is why, in 1996, one reason we passed the law,  
24 HIPAA, to deal with these kinds of communications and to  
25 make sure that the communications between the plans and

1 the seniors to membership are truthful. We do not want  
2 plans putting out untruthful information.

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

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

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

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

1 rejected on the spot.

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

4 The Chairman. The gentleman from Arizona.

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

10 The Chairman. Even if untruthful?

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

13 The Chairman. Not a right to mislead to seniors.

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

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

22 Now, if CMS wants to try to prosecute somebody for  
23 fraudulent marketing, it can do that. That is not what  
24 it did here, because this was not fraudulent marketing.  
25 There was no effort in the communication that spawned

1 this from a particular insurance company, no effort to  
2 market a product whatsoever, number one.

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

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

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

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

1       you.

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

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

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

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

25              Exactly the facts. It does not take away Medicare

1 rights. It does potentially reduce from Medicare  
2 Advantage plans benefits that these seniors already  
3 receive from \$132 down to \$42 in value.

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

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

15 So it does not affect the laws that currently need  
16 to be enforced to protect people from fraudulent  
17 marketing. All it does is say you "have a right to  
18 express your views about legislative proposals," that is  
19 a direct quotation, "to communicate with enrollees about  
20 information about the legislation or legislative  
21 proposals that could affect the terms of the enrollee's  
22 plan" -- anything wrong with that -- to maintain a  
23 Website that contains the information, same thing, or  
24 encourage enrollees to contact their elected  
25 representatives to express their views about the



1 legislation or legislative proposals. Nothing wrong with  
2 that.

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

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

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

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

22 The Chairman. Without objection. Senator Schumer?

23 Senator Schumer. I would just make a couple of  
24 points here. First of all, they got these lists, this  
25 company, and probably some of the solicitation with a lot

1 of federal help and subsidy. So this is not just  
2 somebody writing somebody out of their own pocket like  
3 you would in other ways.

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

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

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

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

23 I am sympathetic to what my friend from Arizona  
24 says, that the First Amendment protects false  
25 information, but this is a little different here. This

1 is not a pure First Amendment case, it is not close to  
2 being a pure First Amendment case.

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

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

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

18 The Chairman. Senator Roberts?

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

25 Think of what your CEO is going to do in sitting

1 around with the board of directors and he takes a look at  
2 this bill or she takes a look at this bill and says "We  
3 think that this bill will really harm our patients and  
4 our customers, not to mention our company," and they  
5 would like to send some information out about it, but,  
6 whoops, they see what's happened to Humana, and they  
7 think, "We are not going to go down that road. We do not  
8 feel free to contact Senator Roberts or Senator Kyl or,  
9 for that matter, Senator Schumer."

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

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

21 Now, the Supreme Court has been very clear on the  
22 issue. In 1980, it held, in a 7-2 decision, that a  
23 public utility commission could not prohibit a utility  
24 from putting policy position papers in its customers'  
25 bills.

1           Now, we just had a huge debate here about Medicare  
2 Advantage, in which everybody on your side not only  
3 admitted, but were very proud of the fact, in regards to  
4 the point, that Medicare Advantage cuts were to reduce  
5 benefits, and that is the fact.

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

10           Let me just point out that the Senate Finance mark,  
11 private Medicare plans, known as Medicare Advantage, will  
12 receive a \$124.5 billion cut, 2.7 million seniors will  
13 lose their Medicare plan by 2010. Further CBO estimates  
14 that the extra benefits Medicare Advantage recipients  
15 receive will drop from a projected \$135 per month to only  
16 \$42 per month.

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

22           So I think what the Senator is doing, as I  
23 understand it, one, the Constitution protects the rights  
24 of companies to criticize or support legislation pending  
25 in the Congress.

1           Do you mean that if you get involved in any kind of  
2 federal help, that you cannot petition the federal  
3 government? Every farmer and rancher in my state should  
4 not be complaining about the farm bill or want this or  
5 that in a farm bill, and you can pick any subject that  
6 you want.

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

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

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

25           This is not right. Quite frankly, it smells exactly

1       like tough, hardball Chicago politics, abridging the  
2       First Amendment.  If we are not able to pass this  
3       amendment, we have reached a very dark day here on this  
4       committee and it strikes at all of the speeches that we  
5       say that we are fair and we are bipartisan, to the extent  
6       that we can be, and we certainly respect each other's  
7       opinion.

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

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

23             I might just remind all of us that nothing in this  
24      discussion, either side, in any way infringes upon the  
25      right of seniors to petition government, and they

1 certainly do. We have received a lot of letters and  
2 telephone calls from a lot of seniors about seniors'  
3 issues, whether it is Social Security, Medicare or  
4 whatever, and, clearly, we want seniors to tell us what  
5 they think, and, believe me, I know they will. There is  
6 just no question about that.

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

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

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

22 Senator Roberts. Well, Mr. Chairman, it does not  
23 make any difference. Pardon me for interrupting, sir.  
24 But if you are 60 -- what is the number, 65 and older is  
25 a senior citizen now or whatever?



1           What if somebody is 64 and they wanted to let them  
2 know that?

3           The Chairman.   No, no, no.  That is not the --  
4           Senator Roberts.   I know they are vulnerable, sir,  
5 but they have to be informed and they at least want to  
6 have the right to know.

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

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

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

24           So all I am saying is -- I am not going to get into  
25 that letter, because that is a whole separate issue --

1 maybe the law was not properly executed. Maybe CMS  
2 overstepped, I do not know. I am only addressing this  
3 amendment, the amendment before us.

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

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

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

17 This side of the aisle. Senator Bingaman?

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

24 I think it is clear that the government should not  
25 in any way impede the ability of that government

1 contractors to take out TV ads, to run radio ads, do  
2 whatever they want to do to try to influence legislation  
3 in the Congress.

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

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

14 Senator Ensign. Would the Senator yield?

15 Senator Bingaman. Certainly.

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

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

24 The Chairman. Let us clear up that question. Ms.  
25 Bishop, do you want to address that question?

1           Ms. Bishop.    Medicare Advantage plans have agreed  
2           to contracts with CMS to provide Medicare benefits.  They  
3           operate under contract.  The contract regulates their  
4           payments.  It regulates the activities of the plan, the  
5           marketing of the plan.

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

9           The Chairman.    Senator Bingaman?

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

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

23          The Chairman.    Is there anymore debate?  Senator  
24          Bunning?

25          Senator Bunning.   Thank you.  Why are certain

1 organizations allowed to run ads in favor of your bill,  
2 but Humana cannot even communicate with certain people  
3 that they serve?

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

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

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

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

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

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

22 Ms. Bishop. Right. Even though that there would  
23 be a disclaimer that said this is not official, as  
24 Senator Baucus said, as a fiduciary entity that is acting  
25 on behalf of Medicare --

1           Senator Bunning.   How are you interpreting the  
2 First Amendment then?

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

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

11          The Chairman.   That is really unfair.

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

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

15          Senator Bunning.   Then she just consulted with one.

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

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

22          Senator Bunning.   You have made that perfectly  
23 clear.

24          Ms. Bishop.   And part of that contract, they also  
25 sign data use agreements with them, as part of their

1 contract with Medicare, to say "We will only communicate  
2 with Medicare beneficiaries under certain conditions."

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

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

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

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

20 The Chairman. You mean it supersedes the contract?

21 Senator Bunning. Absolutely does.

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

24 Senator Bunning. Absolutely. Ask the bankruptcy  
25 courts in relationship to General Motors and Chrysler.

1           The Chairman.    Senator Stabenow?

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

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

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

20           Senator Bunning.    It is America.

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

24           So I would just tell you that this was something  
25   that was very unfortunate that happened in the sense that



1 it scared a lot of seniors unnecessarily and, in my mind,  
2 gave inaccurate information to people in an inappropriate  
3 and, I would argue, illegal way, because it broke a  
4 contract that they made.

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

11 The Chairman. Senator Kyl?

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

14 Senator Stabenow. Yes.

15 Senator Kyl. I really do want to get this debate  
16 back to where it needs to be and that is on my amendment.

17 I believe that Ms. Bishop and you are both making a key  
18 point and the Chairman alluded to a similar point  
19 earlier.

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

24 It is also true that the terms of that contract can  
25 be enforced by the federal government and I think it is

1 primarily administrative enforcement, though, if there  
2 were a criminal violation, there may be criminal laws  
3 applicable here, too, I am not sure, but certainly  
4 administrative action would be appropriate.

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

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

22         That is not what my amendment has anything to do  
23 with. So this is not about -- as Senator Baucus said, my  
24 amendment has the effect of repealing existing laws that  
25 provide protection to seniors. No. Those are valid.

1 Senator Stabenow is correct and I would not touch those  
2 and I do not touch those.

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

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

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

21 It says, first, you can express your views about  
22 legislation or legislative proposals. That is pure First  
23 Amendment stuff. That is basic. You can communicate to  
24 your enrollees information about legislation. You can  
25 maintain a Website that does that and you can encourage

1 enrollees to contact their elected representatives.

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

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

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

17 But we need to verify that today or, unfortunately,  
18 I am afraid that you are going to have government  
19 agencies, in effect, threatening entities. By the way,  
20 they did not just write to this particular insurance  
21 company and say "We think you violated your contract."  
22 That is what you would do in an administrative  
23 proceeding.

24 They sent a memo out, I am quoting now, "all  
25 Medicare Advantage organizations, Medicare Advantage

1 prescription drug organizations, cost-based organizations  
2 and demonstration plans, instructing you to immediately  
3 discontinue these mailings," as they believe here that  
4 there is misinformation about the pending legislation.

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

15 The Clerk. Mr. Rockefeller?

16 Senator Rockefeller. No.

17 The Clerk. Mr. Conrad?

18 The Chairman. No by proxy.

19 The Clerk. Mr. Bingaman?

20 Senator Bingaman. No.

21 The Clerk. Mr. Kerry?

22 The Chairman. No by proxy.

23 The Clerk. Mrs. Lincoln?

24 The Chairman. No by proxy.

25 The Clerk. Mr. Wyden?

1           The Chairman.   No by proxy.  
2           The Clerk.    Mr. Schumer?  
3           Senator Schumer.   No.  
4           The Clerk.    Ms. Stabenow?  
5           Senator Stabenow.   No.  
6           The Clerk.    Ms. Cantwell?  
7           Senator Cantwell.   No.  
8           The Clerk.    Mr. Nelson?  
9           The Chairman.   No by proxy.  
10          The Clerk.    Mr. Menendez?  
11          Senator Menendez.   No.  
12          The Clerk.    Mr. Carper?  
13          The Chairman.   No by proxy.  
14          The Clerk.    Mr. Grassley?  
15          Senator Grassley.   Aye.  
16          The Clerk.    Mr. Hatch?  
17          Senator Hatch.   Aye.  
18          The Clerk.    Ms. Snowe?  
19          Senator Snowe.   Aye.  
20          The Clerk.    Mr. Kyl?  
21          Senator Kyl.    Aye.  
22          The Clerk.    Mr. Bunning?  
23          Senator Bunning.   Aye.  
24          The Clerk.    Mr. Crapo?  
25          Senator Crapo.   Aye.

1           The Clerk.    Mr. Roberts?

2           Senator Roberts.    Aye.

3           The Clerk.    Mr. Ensign?

4           Senator Ensign.    Aye.

5           The Clerk.    Mr. Enzi?

6           Senator Enzi.    Aye.

7           The Clerk.    Mr. Cornyn?

8           Senator Cornyn.    Aye.

9           The Clerk.    Mr. Chairman?

10          The Chairman.    No.    The clerk will tally the roll.

11          The Clerk.    Mr. Chairman, the final tally is 10  
12          ayes, 13 nays.

13          The Chairman.    The amendment does not pass.

14          Senator Menendez, are you next?    Is that correct?

15          Senator Menendez.    Yes, sir.    Yes, Mr. Chairman.

16          The Chairman.    You are recognized.

17          Senator Menendez.    Mr. Chairman, thank you.    Mr.  
18          Chairman, I have amendment D-2, as modified, to your mark  
19          and I believe it has been distributed to all members, as  
20          well as that we gave an advance copy of this modification  
21          to both sides earlier and it is something I hope the  
22          Chairman can accept by voice vote.

23                 This modified amendment basically looks at the  
24          plight that some urban hospitals are highly dependent on  
25          Medicare payments, because they serve high proportions of

1 Medicare patients; but unlike many otherwise similar  
2 hospitals, they do not receive any special add-on  
3 payments, payments for indirect medical education or  
4 disproportionate share hospitals.

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

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

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

22 The Chairman. Thank you, Senator. You make a good  
23 point. Clearly, this is an area where there are no  
24 additional payments or adjustments under PPS in certain  
25 areas and I think it is only appropriate to conduct a



1 study to see the degree to which that is fair and  
2 appropriate. On the face of it, it sounds like it is. I  
3 accept the amendment.

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

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

9 Mr. Roberts, are you ready?

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

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

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

19 The Chairman. Thank you.

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

24 I believe that most seniors would agree that taking  
25 money from the Medicare program to pay for other

1 programs, especially when the Medicare program itself has  
2 serious solvency problems, and this money would be used  
3 to fund huge expansions in other health care programs, I  
4 believe that most seniors and those who are disabled, who  
5 are dependent on the Medicare system, believe that that  
6 would be wrong.

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

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

14 Unfortunately, the Chairman's mark achieves about  
15 \$379 billion in Medicare savings and uses it to create  
16 additional entitlements. That was already, even through  
17 Medicare Advantage, we talked about that this morning.  
18 There were people who argued that the savings or the  
19 money from Medicare Advantage would go into other  
20 programs.

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

1 almost run dry.

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

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

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

18 For example, if we were redirected the \$379 billion  
19 in Medicare savings into the Medicare Part A trust fund,  
20 27 percent of the 75-year unfunded liability could be  
21 eliminated and the Medicare Part A unfunded liability  
22 would decrease by almost \$4 trillion. In addition, we  
23 could push back the date of insolvency for the Medicare  
24 trust fund for five years.

25 Mr. Chairman, I strongly believe that we should fix

1       our current entitlement programs before funding new  
2       programs. We have a responsibility to the working people  
3       of American and to future generations to spend carefully  
4       and wisely.

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

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

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

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

20            Senator Ensign.    Say that again.

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

24            Senator Ensign.    The problem is that a lot of the  
25       benefits that folks have even talked about earlier today

1 is Medicare Advantage, when they said they are not  
2 cutting benefits in Medicare, that is because they do not  
3 consider some of the benefits in Medicare Advantage to be  
4 Medicare benefits.

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

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

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

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

20 The Chairman. Well, there is a technical question,  
21 because even though the effect of this legislation will  
22 not reduce beneficiaries' payments, and it is clear it  
23 will not, and even though the effect of this legislation  
24 will extend this all to the trust fund, it is clear that  
25 it will, technically, there is a question, if you read

1       it, which any reductions in Medicare outlays will be  
2       utilized any place else in the budget, even though we are  
3       going to achieve savings and even though the trust fund  
4       is shored up and is more solvent.

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

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

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

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

1 simple amendment.

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

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

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

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

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

23 We do not have to decide what would be eliminated,  
24 but we ought to have some sense of what you are talking  
25 about.

1           Senator Ensign.    This basically goes to this huge  
2 amount of money that is going into Medicare.

3           The Chairman.    You already used that three times.

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

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

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

20          Senator Bingaman.   Mr. Chairman?

21          The Chairman.    Senator Bingaman?

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

25          As I understand it, the Medicare funding reductions,



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

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

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

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

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

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

21 Ms. Eisinger. Correct.

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

25 Ms. Eisinger. No, just spent out more slowly. So

1 the obligation is reduced.

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

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

11 Senator Bingaman. Thank you.

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

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

1 people to stop participating in Medicare exists?

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

6 So as I think Senator Bingaman said, by reducing the  
7 Part A obligations, it reduces down the rate of growth,  
8 but that does not mean that spending is not going to  
9 continue to increase for each of these providers over  
10 time.

11 Senator Ensign. Well, I know, but we were accused  
12 for years of cutting Medicare spending by slowing the  
13 rate of growth. The other side accused us of cutting  
14 Medicare because we reduced the rate of growth.

15 So we need to talk apples with apples, just the same  
16 as the other side used to talk about. The bottom line is  
17 this is savings from Medicare and because of medical  
18 inflation, things are getting more expensive, we  
19 understand, medical inflation is faster than normal  
20 inflation, that there will be pressure to decrease  
21 benefits.

22 We are already seeing more and more health care  
23 providers take fewer and fewer Medicare patients. That  
24 is happening every year. If the money is not there --  
25 what I am saying is if the \$379 billion is not there for

1 Medicare, then there is going to be more and more  
2 pressure put on health care providers to provide less  
3 services and fewer and fewer people are going to take  
4 Medicare patients.

5 Senator Bingaman. Mr. Chairman?

6 The Chairman. Senator Bingaman?

7 Senator Bingaman. I think there is a basic  
8 disagreement here and I think it is a misunderstanding on  
9 the part of the Senator from Nevada. There is no money  
10 coming out of the Medicare trust fund as part of this  
11 legislation.

12 What we are doing is achieving savings in Medicare,  
13 which then, for purposes of the congressional unified  
14 budget calculation, are used as offsets. But that does  
15 not mean money is coming out of the Medicare trust fund  
16 and being used for other purposes. It is just not.

17 So I do not know how to say that more clearly. You  
18 just said just the opposite, that it is coming out of the  
19 Medicare trust fund and being used for other purposes.  
20 It is not.

21 Senator Ensign. No. I said it is coming out of  
22 Medicare. There is Medicare savings. There is Medicare  
23 savings in this bill of \$379 billion. If the money is  
24 not there, it is not there to fix, because it is not just  
25 the Medicare trust fund. It is spending on Medicare.

1           The Chairman.    Let me try to make the same point.  
2    We have got a trust fund over here, the Medicare trust  
3    fund.  How is the Medicare trust fund financed?  Payroll  
4    taxes.  Money from payroll taxes goes into the Medicare  
5    trust fund.

6           What dollars come out of the trust fund?  Well,  
7    dollars that go to pay beneficiary payments.  That is the  
8    trust fund.  That is over here.

9           Over here, we have the Medicare program; that is,  
10   providers, Part A, Part B, we have got C, we have got D,  
11   I do not know how many more letters we are going to have,  
12   that is Medicare.

13          Medicare costs are going up.  Costs for all of us  
14   are going up.  Costs for the country are going up.  So  
15   this legislation reduces the rate of growth of Medicare  
16   costs.

17          Now, that helps the trust fund, in effect, add  
18   dollars to the trust fund, in effect.  Why?  Because  
19   Medicare payments are being reduced from what they  
20   otherwise would be.  It does not cost Medicare as much;  
21   same benefits, same procedures, same everything, but it  
22   just does not cost Medicare as much.

23          So it is true that providers are not going to get  
24   the same dollars they were getting earlier, savings that  
25   they, by and large, all agreed to and they agreed to it

1       because they know that with universal coverage, they will  
2       have more volume.

3               They may lose some places, they make up on volume  
4       and they have agreed to it. But those are savings that,  
5       in effect, accrue to the trust fund and extend the  
6       solvency of the trust fund.

7               So when somebody says we are cutting Medicare, it is  
8       true that there are savings in providers' payments. It  
9       is true that there are savings in payments that Medicare  
10      pays to providers. That is true.

11              But it is also true that the effect of that is to  
12      extend the life of the Medicare trust fund, because those  
13      costs that hospitals otherwise pay to seniors and so  
14      forth are less. So the cost to the Medicare trust fund  
15      is next.

16              So let us just keep those two concepts totally  
17      separate. And the slight problem I have here, just to be  
18      totally honest, is it is true that some of the savings,  
19      for unified budget purposes, will be used for other  
20      purposes, maybe for universal coverage, let us say. That  
21      is true. That is true. You cannot deny it.

22              But we are not hurting Medicare beneficiaries. We  
23      are helping Medicare beneficiaries. If we want to help  
24      Medicare beneficiaries, in a sense -- now, this is two or  
25      three steps removed, I grant you -- we would like to have

1 universal coverage, so Americans have health insurance,  
2 because that is going to also help extend the life of the  
3 trust fund, because people have health insurance and,  
4 over the long run, they will not be needing as much  
5 emergency care. It also helps hospitals because of lower  
6 uncompensated care, for example.

7 So to be totally candid and honest about this, I  
8 understand, on the surface, it sounds like this amendment  
9 is a good idea, because we want to make sure Medicare  
10 savings go back into Medicare, but the implication of the  
11 amendment is that by the failure of this amendment, it is  
12 going to somehow hurt Medicare, it is going to somehow  
13 hurt beneficiaries, and the exact opposite is actually  
14 true.

15 I am not impugning your motive, but just saying that  
16 is the practical effect. So that is why, frankly, if we  
17 are totally candid with ourselves, we are not trying to  
18 score political points and we are not trying to play with  
19 seniors and cameras and all that kind of thing.

20 I do think that the practical or better approach is  
21 to be candid with ourselves and realize that the savings  
22 are not hurting Medicare, they are not hurting  
23 beneficiaries.

24 Senator Ensign. Two points. The way that they  
25 could hurt beneficiaries, I made this point earlier, but

1 it is if you take money out of the Medicare system, the  
2 spending out of the Medicare system, whether it affects  
3 the trust fund, which is just an accounting gimmick  
4 anyway, because we all know there is no money in the  
5 Medicare trust fund. It is just a way of accounting for  
6 funds.

7 If you take the future spending out of Medicare,  
8 which Medicare already pays less than market rates, you  
9 do two things. One is -- you encourage more and more  
10 providers to stop taking Medicare and two is that you do  
11 more cost shifting to the private sector, because  
12 Medicare is already a 20-30 percent cost shift from  
13 Medicare/Medicaid to the private sector.

14 If you are decreasing the reimbursement rates for  
15 providers in the future, the low market rates, you are  
16 going to, in effect, do more cost shifting to the private  
17 sector.

18 The Chairman. Well, let me say this. Despite what  
19 I just said, my assertion that this has potential adverse  
20 budgetary effects, I have just now been informed by CBO  
21 it has no budget effect.

22 So I suggest we adopt the amendment.

23 Senator Ensign. As long as we have a roll call,  
24 that would be fine.

25 The Chairman. Fine with me. The Senator wants a



1 roll call on the amendment. I suggest we adopt the  
2 amendment, accept the amendment. Do you still want a  
3 roll call? The clerk will call the roll.

4 The Clerk. Mr. Rockefeller?

5 Senator Rockefeller. Yes.

6 The Clerk. Mr. Conrad?

7 Senator Conrad. Aye.

8 The Clerk. Mr. Bingaman?

9 Senator Bingaman. Pass.

10 The Clerk. Mr. Kerry?

11 The Chairman. I guess he passes, too.

12 The Clerk. Mrs. Lincoln?

13 The Chairman. Pass, I guess.

14 The Clerk. Mr. Wyden?

15 Senator Wyden. Aye.

16 The Clerk. Mr. Schumer?

17 The Chairman. Pass.

18 The Clerk. Ms. Stabenow?

19 Senator Stabenow. Aye.

20 The Clerk. Ms. Cantwell?

21 Senator Cantwell. Aye.

22 The Clerk. Mr. Nelson?

23 Senator Nelson. Aye.

24 The Clerk. Mr. Menendez?

25 The Chairman. Pass.

1           The Clerk.    Mr. Carper?  
2           The Chairman.   Pass.  
3           The Clerk.    Mr. Grassley?  
4           Senator Grassley.   Aye.  
5           The Clerk.    Mr. Hatch?  
6           Senator Hatch.    Aye.  
7           The Clerk.    Ms. Snowe?  
8           Senator Snowe.    Aye.  
9           The Clerk.    Mr. Kyl?  
10          Senator Kyl.    Aye.  
11          The Clerk.    Mr. Bunning?  
12          Senator Bunning.   Aye.  
13          The Clerk.    Mr. Crapo?  
14          Senator Crapo.    Aye.  
15          The Clerk.    Mr. Roberts?  
16          Senator Roberts.   Aye.  
17          The Clerk.    Mr. Ensign?  
18          Senator Ensign.   Aye.  
19          The Clerk.    Mr. Enzi?  
20          Senator Enzi.    Aye.  
21          The Clerk.    Mr. Cornyn?  
22          Senator Cornyn.   Aye.  
23          The Clerk.    Mr. Chairman?  
24          The Chairman.   Aye.    Senator Bingaman is aye by  
25          proxy.    Senator Lincoln, aye by proxy.    Senator Carper,

1 aye by proxy. Mr. Menendez, aye by proxy. Mr. Schumer,  
2 aye by proxy.

3 The Clerk. Mr. Chairman, the tally is 22 ayes and  
4 one pass.

5 The Chairman. Thank you. The amendment passes.  
6 Senator Cornyn, do you have an amendment?

7 Senator Cornyn. Yes, Mr. Chairman. Thank you very  
8 much. This is Cornyn amendment D-6, which would strike  
9 the Medicare Commission in Title III, Subchapter E of the  
10 Chairman's mark.

11 As you know, the Chairman's mark would establish an  
12 independent Medicare Commission to develop and submit  
13 proposals to Congress, aimed at reducing Medicare  
14 spending. The commission would submit proposals to  
15 Congress starting in 2013.

16 Rather than making tough decisions about how to pay  
17 for new spending now, this proposal would delegate to the  
18 commission broad spending reduction powers beginning in  
19 2013.

20 Mr. Chairman, I think the best example of why this  
21 will not work is the physician payment formula that we  
22 revisit it seems like almost on an annual basis, where  
23 Congress has repeatedly acted to prevent the sustainable  
24 growth rate and preventing reductions from going into  
25 effect.

1           The same mark also includes a new commission,  
2           interestingly enough, to achieve spending reductions. It  
3           also includes the SGR spending reduction target. The CBO  
4           seems to agree with the concerns addressed by my  
5           amendment when it says "These projections assume that  
6           proposals are enacted and remain unchanged throughout the  
7           next two decades, which is often not the case for major  
8           legislation."

9           For example, the sustainable growth rate mechanism  
10          for governing Medicare's payment to physicians has been  
11          frequently modified to avoid reductions in those  
12          payments. In fact, I believe, if my memory serves me  
13          correctly, only on one occasion have we failed to reverse  
14          the cuts in the physician payment under the Balanced  
15          Budget Act.

16          While this commission would be modeled, in many  
17          ways, after the expertise of the Medicare Payment  
18          Advisory Commission, MedPAC does not always get it right  
19          either. As the *Wall Street Journal* reported, the  
20          Medicare Payment Advisory Commission created by Congress  
21          in 1997 has recommended more than \$200 billion in cost  
22          cuts in the last year alone, which lawmakers have  
23          ignored.

24          Some may say we should not have ignored those, but  
25          indeed they are our responsibility and we should be held

1       accountable. The Medicare Commission has also raised  
2       significant concerns among provider groups, like the  
3       American Medical Association, because it would bestow  
4       unprecedented power on an unelected board over health  
5       care financing for the entire country.

6               The Medicare Commission essentially allows Congress  
7       to spend money now, but avoid responsibility of  
8       determining how to pay for that spending. So I would  
9       urge my colleagues to support my amendment to strike the  
10      Medicare Commission.

11             The Chairman.    Senator, are you finished?

12             Senator Cornyn.   Yes, sir.

13             The Chairman.    All right. I understand this  
14      amendment has a \$23 billion effect. Is that correct,  
15      Senator, do you know? \$23 billion, CBO says.

16             Senator Cornyn.   I believe that is correct.

17             The Chairman.    I personally believe that this  
18      commission is very important. There are different  
19      versions of this commission. Different Senators have  
20      different ideas of how it should be constituted, but in  
21      the main, I think it is very, very important, this  
22      commission.

23             Why? Basically, it is one of the two or three or  
24      four ways in this underlying bill that can begin to get  
25      some handle on the rate of growth of health care costs in

1 this country. It also helps us say and CBO to conclude  
2 that this is budget deficit-neutral over 10 years.

3 There has been a lot of talk about bending the cost  
4 curve, bending the growth curve, and, clearly, we have an  
5 obligation here in 2009 to pass legislation that begins  
6 to lower the rate of growth of health care spending in  
7 our country. We have no option but to try to do that in  
8 a fair, firm, common sense way.

9 We know that about every 30 seconds, someone goes  
10 bankrupt in this country due to medical costs. We know  
11 that about 1.5 million homes are lost every year to  
12 foreclosure due to medically-related costs. We know that  
13 health care is becoming an impossible cost of doing  
14 business for most American companies.

15 We know if the Medicare trust fund is going to be  
16 insolvent, everybody says, by 2017 and the same with  
17 states' Medicaid budgets, they are just going through the  
18 roof, we have got to figure out a way to control costs in  
19 a fair, balanced way.

20 I do believe that too often Congress has a hard time  
21 saying no to providers. Providers come in and say,  
22 "Well, gee, we do not agree with this update. We need  
23 more." I could name all kinds of providers who have come  
24 here and any Senator on this committee can name that many  
25 more, and I do think it makes some sense to have some

1 kind of a check here to help members of Congress do the  
2 right thing.

3 By that, I mean, have in law mechanisms that do  
4 fairly and in a balanced way start to reduce the rate of  
5 growth in health care costs in this country, and the  
6 provision in this bill, I think, fairly does that and  
7 there is a balance here.

8 The question is how much do you want another entity  
9 to make these decisions and how much do we want members  
10 of Congress making these decisions. That is a fair  
11 question and one could say only members of Congress and  
12 there should be no outside entity that makes these  
13 decisions or one could go the other direction and say  
14 only an outside entity can make these decisions.

15 As we know, there have been many references to BRAC,  
16 the Base Realignment and Closing Commission, which was  
17 established not too many years ago. Why? Because we,  
18 Congress, just want to protect our own military  
19 installation in our state. We just could not let them  
20 go, even though they are inefficient and, in the interest  
21 of national security, probably should be closed or  
22 relocated or something.

23 So we set up this BRAC Commission where we could  
24 vote yes or no depending upon the BRAC Commission's  
25 recommendations. By and large, that has worked. By and

1 large, that BRAC process has worked. And why has it  
2 worked? It has worked because the commission has done a  
3 really good. They have been all around the country.

4 I have gone to two or three BRAC Commission  
5 meetings. I am, just like everybody else here, trying to  
6 defend the military installations in my state and I go to  
7 them, talk to them, give best case, and, as every member  
8 of the House and the Senate does to protect his or her  
9 military installations in his or her own district or  
10 state.

11 But BRAC has ruled and, frankly, they ruled against  
12 my state in one very significant case and I accepted it,  
13 because I thought that was a very fair process. That is  
14 pretty much what this Medicare Commission is going to be  
15 doing, too, in my judgment.

16 It is going to be very careful. It is going to look  
17 at different providers, look at different efficiencies,  
18 look at different productivity growth in different  
19 provider industries, see kind of what makes sense here  
20 and what is right.

21 To be truthful, I was astounded to learn at one of  
22 our roundtable discussions over in Finance Committee when  
23 I learned that when we do this updates, we do not take  
24 productivity into account. Over the years, we just give  
25 the same increase, basically, a kind of cost of living,



1 but we have not taken productivity in the case.

2 So really updates could be a little bit less than  
3 they otherwise would be, because with productivity,  
4 entities become more efficient, hospitals, et cetera, and  
5 this is the kind of thing that this MedPAC Commission  
6 would do.

7 Well, we have a mechanism in here that gives us a  
8 check, Congress a check. If we think this cost has gone  
9 off the deep end, they have made mistakes, hey, they are  
10 a rogue outfit, a rogue agency, then there are provisions  
11 in here for a congressional vote to check that.

12 Now, you might say the requirement of extraordinary  
13 vote is too tough. That might be. That is debatable.  
14 But I do think that it does make some sense to set up an  
15 institute like this.

16 CBO says this is going to help bend the cost curve.  
17 CBO says if this is out of here, forget it. CBO says if  
18 this is deleted, this provision -- I know I am saying  
19 this, I have not talked to CBO about this, but I will bet  
20 you dollars to donuts that they would say we are not  
21 going to bend the cost curve in 10 years, they will  
22 conclude it is negative, not positive for us, but  
23 negative.

24 This is one of these ways, it is kind of something  
25 new, but I think something in our American system, given

1        what we have in America, it is a wonderful system, it is  
2        partly public, it is partly private, so forth, about half  
3        and half, basically, that keeps pace with that balance by  
4        setting up a public outfit, but with a private check, or  
5        an Executive Branch outfit with a congressional check.  
6        So we would work for our people back home, representing  
7        them, we could check them.

8                So I just really believe very, very strongly that  
9        this provision that we have in the market is basically a  
10       no-brainer. That is my personal belief, that this is  
11       just so important to help set the stage, to help reduce  
12       the rate of growth of spending in this country. Because  
13       do you know, otherwise, what is going to happen?

14               Otherwise, I will you this is what is going to  
15       happen. Spending is going to keep growing so much that  
16       pretty soon, all these calls for entitlement commissions  
17       are going to start to sound a lot more attractive. Then  
18       they are going to be whacking Social Security benefits,  
19       they are going to be whacking Medicare benefits.

20               We are going to be really crude about this stuff  
21       because we have to, because the insolvency is coming so  
22       close. I just think nothing is easy in life and this is  
23       really one of those difficult areas, but you have got to  
24       be smart about it and do what is right, and I think the  
25       right thing to do is to have this kind of a commission to

1 help us get control of our costs.

2 It will not be perfect. Congress will meet next  
3 year. We can make adjustments. We can see how it works  
4 and so forth. But if this is in place, it is going to  
5 send a signal to the country, a signal to all providers  
6 that, hey, we have got to even more get our act together;  
7 we have got to be a little more efficient; it is not  
8 business as usual. I think that has a very salutary  
9 effect on health care reform in this country.

10 So I just do believe that we should not adopt this  
11 amendment.

12 Let me recognize Senator Rockefeller.

13 Senator Rockefeller. I feel that strongly and more  
14 strongly against this amendment, but not so much against  
15 this amendment as I am for the Medicare Advisory  
16 Commission.

17 I think this is probably the most important argument  
18 that we will have, which means it will probably go on for  
19 three hours instead of one. But we have to learn how to  
20 discipline ourselves. I am not going to embarrass  
21 anybody over there or anybody over here by asking how  
22 much time they spend studying the intricacies of Medicare  
23 reimbursement rates to different hospitals, to different  
24 doctors in different parts of the country, rural, urban.

25 I am not going to do that, because I think the

1       answers would be a very high percentage of their time.  
2       It is not very often that a new idea like this comes  
3       along, which is not new, because it was established by  
4       the Republicans in 1997, but was given no authority to do  
5       anything.

6               In other words, the Republicans understood that  
7       Medicare was on a path to get out of control and that you  
8       did not just solve that by figuring out reimbursement  
9       rates, but you had to solve that, which is very, very  
10      complicated, which most of us are not competent to do,  
11      but, nevertheless, be more competent to do and do do and  
12      usually do not do very well, which is why we are where we  
13      are today.

14             But they also look at something which most people do  
15      not want to look at, because it is hard, it is cerebral,  
16      and that is outcomes research. This MedPAC Commission or  
17      whatever you want to call it, and Chairman Baucus and I  
18      disagree a bit on its format, that is not the point. The  
19      point is to defeat your amendment so it remains alive in  
20      some form.

21             We have to look -- and I would appreciate it if my  
22      colleagues would listen. I would appreciate if my  
23      colleagues would listen, particularly on the Democratic  
24      side over here.

25             I think there is a turning point for health care. I

1 think there is the future of health care. This is the  
2 discipline that we are going to have to face up to in  
3 health care in the future, which we do not have today,  
4 and it is not just about reimbursements.

5 Yes, it is about the lobbyist comes in to see you  
6 and brings in a client from your state, knowing that you  
7 are producing a certain amount of durable medical  
8 equipment or your lower back surgeon, the thoracic  
9 surgeons or ophthalmologists want to get more  
10 reimbursement, or your hospitals or whatever, and it is  
11 very hard to say no.

12 I am sure the Senator from Texas is very good at  
13 saying no. I am not going to do that. But they get to  
14 see you. So it is a question of who gets to see you and  
15 that really is the way a lot of these decisions are made,  
16 because they are made collectively by people who were all  
17 going about it in the wrong way.

18 That is not to say that they do it with malice.  
19 That is not to say they do it with greed, although some  
20 do. It is saying that they do it without a disciplined  
21 system, which is both cerebral and far-looking and  
22 accurate in content.

23 So they have to be given the money to look at  
24 outcomes. Who of us are going to be able to sit here and  
25 explain how to really do a good outcomes, research-based

1 reimbursement policy so that a hospital on the lower  
2 western side of West Virginia, which is about the same as  
3 a hospital on the higher western side of West Virginia  
4 which is doing a much better job on outcomes because they  
5 have a tougher administrator and he is making really good  
6 decisions, that that administrator gets rewarded with a  
7 higher reimbursement rate because he is not maybe making  
8 as much money, because he is being very efficient.

9           You have to recognize these things and it is the  
10 future of health care. Analysis, hardcore professional,  
11 non-political, non-monetary-based, I say carefully,  
12 decision-making is the future of a health care system  
13 which works.

14           It is called saving our health care system. It is  
15 not called messing it up. It is called saving it. We  
16 are the ones who are, in large part, as Congressmen and  
17 women, responsible for giving it all of its difficulties,  
18 because we are making ad hoc decisions -- I so firmly  
19 believe this -- we are making ad hoc decisions based on  
20 friendships, based upon counties.

21           I want to say that West Virginia is one of the four  
22 poorest states in the country. Therefore, I have got  
23 this special passion which comes when it comes to  
24 reimbursement of our pediatricians or our geriatricians.  
25 I do, also, incidentally, looking out to the future, use

1 geriatricians as a example and I have in the last couple  
2 of days in this setting.

3 People train geriatricians, medical schools train  
4 geriatricians and they get trained, they do their  
5 residencies, they go into practice, they make almost no  
6 money, they make almost no money for two years, and then  
7 go off and get into a specialty and leave geriatrics,  
8 when that is the part of the population which we have got  
9 to pay attention to.

10 So we do not discipline ourselves. We do not  
11 discipline the system. We do not discipline how we do  
12 reimbursements. We are not tough enough on hospitals or  
13 we are not gracious enough toward hospitals that are  
14 really doing it.

15 I had 15 hospital directors, I mean big-time, I felt  
16 like I almost had to stand during the meeting, they were  
17 so big-time. Johns Hopkins was one of them. They were  
18 in to see me, to lobby me on getting rid of this MedPAC  
19 advisory concept so they could go about the good work  
20 they were doing.

21 I had just come back from a very long meeting of  
22 something and I was in the mood to really let them have  
23 it and I let them have it and I was on the side of virtue  
24 of rectitude. You know what? When they left, I had  
25 switched a lot of their minds, and they told me that,

1       because they know what they are about. They know how to  
2       come to Congress with it. They know how to put pressure  
3       on us.

4               I will tell you, when some of these hospitals and  
5       some of these physicians' group come into your office  
6       with their lobbyists or your former colleagues who hold  
7       fundraisers for us and all the rest of that kind of stuff  
8       and you say, "I am sorry, I have got other things I have  
9       got, I cannot help you," we do not do that. We  
10      accommodate them, for the most part.

11              Now, you join with me, please, in the discipline of  
12      thinking about what is the worst way to making a decision  
13      about how you shape the future of health care. What we  
14      need to do is to have this commission, whatever you want  
15      to call it, and give them the resources and the  
16      authority, which they do not have now.

17              Of course, they advise what we ought to do, but they  
18      have no authority, so we do not listen them. We do not  
19      listen to them. This was a Republican idea in 1997. It  
20      was good then, it is good now. But they have no  
21      authority. They have no power. They have no resources.  
22      They have no staff.

23              I mentioned to one of these hospital people, "Well,  
24      would Gail Wolensky be a real big threat to you," because  
25      they say, "Oh, you are going to fill it up with



1 ideologues," either to the right or to the left or  
2 whatever, going to fill it up with ideologues.

3 And I say, "Well, what about Gail Wolensky?" Gail  
4 Wolensky is a Republican who has been on MedPAC before,  
5 and I respect her greatly. She is good, she is tough.  
6 She could care less about what lobbyists think. They  
7 will not dare go into her office, because she will pitch  
8 them right out of the second floor. But they probably  
9 will not have a second floor, they will probably just be  
10 on the first floor, because they will not be that big.

11 But the point is she is smart, she is tough, she is  
12 experienced, she is un-ideological, she is a  
13 professional. That is all she thinks about. We might  
14 have to expand them from five to 15. I do not care about  
15 that. That is small money compared to if we can actually  
16 take a whole system and discipline it and really get into  
17 this business of outcomes.

18 That really is, Senator Cornyn, that is the future,  
19 who is performing and who is not, no matter what part of  
20 the reimbursable field you are talking about, hospitals,  
21 doctors, whatever.

22 They have these groups out there now, and Senator  
23 Snowe's colleague, Susan Collins, has a brother-in-law  
24 who has one of the best in the country in Charleston,  
25 West Virginia, lives two blocks from me, and it is sort

1 of a quality assurance. It is a how you get to quality.

2 These thing are all over the place, but they are not  
3 national, they are local. They are specialized. They  
4 are Brookings. People read their papers or do not read  
5 their papers. This is a built-in system which is part of  
6 us, we are part of them.

7 I would not have a congressional vote at all. The  
8 Chairman would have a congressional vote, and I probably  
9 will not fight to the death with him on that issue. I do  
10 not think I will anyway.

11 But I know the idea is right and I know the idea is  
12 the instrument to improve health care delivery in this  
13 country in a fair way by professionals who do it all the  
14 time and who have the knowledge and who are not guessing  
15 and who send people out all over the country to find out  
16 the geographic variations and what about a little bit  
17 more for geriatricians, a little bit more for primary  
18 care physicians.

19 They have that power to do that. So does the CMS  
20 director have the power to do that. But I think if you  
21 are talking about preserving the trust fund in 2017 from  
22 beginning to decline, this is your instrument. This is  
23 your friend, Senator Cornyn.

24 This is what is going to take a huge state like  
25 Texas, which is going to get a tremendous amount of money

1 no matter how you look at it, and divide that money to  
2 reward those who are doing the best, discipline those who  
3 are not, encourage those who are not, but who are on the  
4 cusp of, because they will know. They will know.

5 So I strongly oppose this amendment and I hope that  
6 some of my colleagues will speak.

7 The Chairman. Senator Grassley?

8 Senator Grassley. In the group of six, we were  
9 talking about the commission work and I think we were  
10 looking favorably at it, but it was kind of a question of  
11 just how far you go and what Congress has to do with it.

12 Beyond that, what we were thinking in terms of using  
13 it for a short period of time. Now, I see the Chairman  
14 has modified that or at least -- I guess we did not have  
15 anything to modify, but at least modification from what  
16 we were talking about, that this will not sunset at 2019.

17 I was looking favorably at it from the standpoint of  
18 how would it work and bringing it down to a point of a  
19 future Congress making a judgment whether or not it ought  
20 to be extended when it sunsets.

21 But now I see in the Chairman's mark it does not  
22 sunset at 2010 and then after 2019, we have this very  
23 solid goal of GDP plus 1 percent. Now, I think we were  
24 all hoping to end up at GDP plus 1 percent, but I am not  
25 sure that I want to turn it over to an arbitrary

1 commission to make sure that that is where we come out.

2 Worse yet, if Congress decided, at the year 2019 or  
3 sometime in the future, that it ought to be discontinued,  
4 I assume that CBO is going to have some budget score that  
5 would go with it and if we were going to do away with it,  
6 we would have to have an offset.

7 Maybe staff can correct me on that, but that is the  
8 way I read the way things are going. So I think that  
9 this is one thing to try it in this 10-year budget window  
10 and see how it works and see what it can accomplish and  
11 then have Congress at a future time make a designation  
12 and move it on.

13 So I am reluctant to think in terms of going along  
14 with the Chairman's mark at this point where it does not  
15 sunset in the year 2019. So I am going to support the  
16 amendment by the Senator from Texas.

17 Senator Conrad. Mr. Chairman, in a letter to me  
18 and Senator Gregg, the ranking Republican on the Budget  
19 Committee, on June 16, about ways to bend the curve in  
20 health care spending, the CBO director, who has been much  
21 quoted here today, had this to say: "Another way to  
22 ensure significant savings in Medicare would be to give  
23 the Secretary of Health and Human Services, the  
24 administrator of the Centers for Medicare and Medicaid  
25 Services or some other governmental entity broad

1 discretion to make changes in Medicare to produce  
2 savings, but also to impose an across-the-board reduction  
3 in payments to providers if sufficient savings were not  
4 achieved in other ways.

5 Many experts think that broader discretion for the  
6 administrators of Medicare would help to encourage  
7 innovation and enhance efficiency in any event. However,  
8 the fallback reductions in payments to providers would be  
9 crucial in encouraging providers to accept other changes  
10 in the program instead.

11 Moreover, as noted above, this mechanism and others  
12 in this section would only be effective in the end if the  
13 Congress let the legislated reduction in payments take  
14 effect."

15 Mr. Chairman and colleagues, I think everybody on  
16 this committee know we are headed for a cliff. Medicare  
17 is going broke in eight years. The trust fund has  
18 already gone cash negative.

19 Let me repeat that. The trust fund, the HI, the  
20 trust fund has already gone cash negative. And we are in  
21 the circumstance in which the trustees have told us they  
22 are going to go broke in eight years.

23 The unfunded liability in Medicare alone is \$37.8  
24 trillion. The head of CBO has told us unequivocally that  
25 this mechanism is important to his assessment on whether

1 or not we bend the cost curve in the right way in the  
2 second 10 years.

3 That is the reason the Chairman accepted my  
4 amendment that says we are extended beyond 2019 unless  
5 Congress votes affirmatively to stop it, because that is  
6 critical to the CBO director giving us the scoring in the  
7 second 10 years that we are bending the cost curve in the  
8 right way.

9 For everybody who says they are concerned about our  
10 seniors, and I believe every member of this committee is,  
11 for everybody that says we are on a course that is  
12 unsustainable, and I believe everybody on this committee  
13 knows we are, this is one of the three key elements that  
14 the budget director has told us has got to be part of a  
15 package for him to be able to say to us we are bending  
16 the cost curve in the right way.

17 So I would urge my colleagues to support the  
18 Chairman on this amendment.

19 The Chairman. Senator Cornyn?

20 Senator Cornyn. Mr. Chairman, I appreciate the  
21 passion with which the Senator from West Virginia speaks  
22 about this and others and I think I understand his point.  
23 But my hope is that our future would embrace the courage  
24 to make tough decisions ourselves rather outsource them  
25 to an unelected, unaccountable body.

1           I might add that the record of our having embraced  
2 these kinds of automatic cuts is not good. Six out of  
3 seven times that the Balanced Budget Act imposes a cut in  
4 the sustainable growth rate, we have overridden it and  
5 there is nothing in this legislation that would prevent  
6 Congress from coming back and overriding it again.

7           I agree that we need to find a way to bend the cost  
8 curve and, indeed, this bill does include very salutary  
9 provisions with regard to delivery system reforms,  
10 seeking value rather than volume and realigning  
11 incentives and the like.

12           But we have an experience to demonstrate that this  
13 kind of outsourcing of our responsibilities ultimately is  
14 an undependable way to bend the cost curve, because, of  
15 course, as the CBO said, Congress -- the assumption is  
16 these projections remain unchanged.

17           In other words, the proponents of this legislation  
18 want to spend \$756 billion in new entitlements, create a  
19 new entitlement, and cash that savings now that comes  
20 from this MedPAC on steroids provision, when experience  
21 tells us that this Congress will, in responding to  
22 concerns like our physician providers and draconian  
23 provider cuts, will come back and revisit those, indeed,  
24 and reverse those.

25           I would just suggest that BRAC is not an analogous

1 situation, because it does not have to do with spending  
2 by health care providers. It is not analogous. And I  
3 would just say to my colleague and friend from West  
4 Virginia, when you talk about joining the spending  
5 decisions with decisions about outcomes, it reminds me of  
6 some of the concerns that we have hear about comparative  
7 effectiveness research and how this would be used as a  
8 tool for rationing and how government rather than  
9 physicians, making decisions in the best interest of  
10 their patients, would determine who gets what care,  
11 because it would determine who gets compensated for that  
12 care and who does not.

13 This is really at the heart of some of our concerns  
14 about rationing and the abuse of comparative  
15 effectiveness research, which could be used for a good  
16 purpose, but which, in the hands of unelected,  
17 unaccountable bureaucrats, could also be abused.

18 So I agree with the Chairman that our entitlement  
19 spending is out of control. I agree with the  
20 distinguished Chairman of the Budget Committee. This  
21 bill does nothing to fix that. Indeed, it makes it  
22 worse, and this provision, which provides a fig leaf,  
23 with all due respect, which is also subject to being  
24 abolished at a later time, so the budgetary assumptions  
25 upon which we are acting may prove, as the CBO has



1 indicated, not sustainable, because Congress can always  
2 come back and change it later on.

3 The Chairman. I see a vote has begun, two votes.

4 Senator Enzi. Mr. Chairman, could I ask just one  
5 quick question to staff based on what Senator Grassley  
6 said that I want to clear up?

7 The Chairman. Sure.

8 Senator Enzi. He talked about the requirement in  
9 there, the GDP plus 1 percent. What would have happened  
10 if this would have been in effect, say, 18 months ago and  
11 then we had the downturn in the economy? Would there  
12 have to be even more drastic cuts in order to meet that  
13 requirement?

14 Mr. Dawe. I think the intent of the provision is  
15 to have GDP be modeled out over a number of years to  
16 smooth out ups and downs in the economy, so perhaps a  
17 five-year rolling average of GDP.

18 Senator Enzi. So you are saying it would have no  
19 effect.

20 The Chairman. It deletes the provision of the  
21 bill.

22 Senator Kyl. I had the same question. Sorry, Mr.  
23 Chairman. I had the same question. It was unclear when  
24 Senator Grassley mentioned that. I am not sure how that  
25 formula works and it is not clear from the language.

1           The Chairman.   Mr. Dawe, could you please explain  
2           that 1 percent provision in the mark?

3           Mr. Dawe.    The Conrad amendment that modified the  
4           mark called for the growth rate to be GDP plus one over  
5           the long term.  It was written broadly.  So the thought  
6           would be that it would be defined by half GDP plus one  
7           over a number of years to stabilize ups and downs.

8           Senator Kyl.   If I could, excuse me.  It just says  
9           eliminates the sunset on the Medicare Commission and sets  
10          the growth target beyond 2010 at GDP per capita plus 1  
11          percent, period, nothing else said in there.

12          This may be an illustration of why legislative  
13          language is important.

14          The Chairman.   That is what the legislative  
15          language would say.

16          Senator Kyl.    So there is no long term, there is no  
17          five-year averaging.  It just says at GDP per capita plus  
18          1 percent.

19          The Chairman.   That is something that can be  
20          addressed either later on today, tomorrow or the next day  
21          or so forth.  The vote is on.  There is a vote on the  
22          floor.  I suggest we have a vote here.

23          Senator Carper.   Mr. Chairman, could I just have  
24          one minute?

25          The Chairman.    Senator Carper, very briefly,

1 because we have got to vote.

2 Senator Carper. Just one minute. A thought for my  
3 colleagues. If we had not just come through eight years  
4 in which we actually doubled our nation's debt, if we had  
5 not just rolled up as much new debt in eight years as we  
6 had in the previous 208 years of our nation's history, I  
7 might be inclined to vote for Senator Cornyn's amendment.

8 If we are on track this year to run up the biggest  
9 deficit we have ever run up in one year of our nation's  
10 history, I might be inclined to vote for Senator Cornyn's  
11 amendment.

12 If Medicare were not scheduled to go broke in 2017,  
13 I might be inclined to vote for Senator Cornyn's  
14 amendment. If there were no provision in the Chairman's  
15 revised mark to allow a congressional override, an  
16 override which I think might even be described as too  
17 easy, if that opportunity for an override were not there,  
18 I would be more inclined to vote for Senator Cornyn's  
19 amendment.

20 As it turns out, I am not going to vote for Senator  
21 Cornyn's amendment, because we have run up a huge deficit  
22 in the last eight years, matching the first 208 years of  
23 our nation's history, because we are on track to run up  
24 the biggest deficit in any one year this year, and  
25 because Medicare is going to go broke unless we do

1 something.

2 I have said before I am not going to vote for a bill  
3 that does not bend the cost curve. This is one of the  
4 biggest ways to bend the cost curve and we need to defeat  
5 this amendment.

6 The Chairman. The clerk will call the roll.

7 The Clerk. Mr. Rockefeller?

8 Senator Rockefeller. No.

9 The Clerk. Mr. Conrad?

10 Senator Conrad. No.

11 The Clerk. Mr. Bingaman?

12 The Chairman. No by proxy.

13 The Clerk. Mr. Kerry?

14 The Chairman. No by proxy.

15 The Clerk. Mrs. Lincoln?

16 The Chairman. No by proxy.

17 The Clerk. Mr. Wyden?

18 The Chairman. Pass.

19 The Clerk. Mr. Schumer?

20 Senator Schumer. No.

21 The Clerk. Ms. Stabenow?

22 Senator Stabenow. No.

23 The Clerk. Ms. Cantwell?

24 Senator Cantwell. No.

25 The Clerk. Mr. Nelson?

1           The Chairman.    No by proxy.  
2           The Clerk.     Mr. Menendez?  
3           Senator Menendez.   No by proxy.  
4           The Clerk.     Mr. Carper?  
5           Senator Carper.    No.  
6           The Clerk.     Mr. Grassley?  
7           Senator Grassley.   Aye.  
8           The Clerk.     Mr. Hatch?  
9           Senator Grassley.   Aye by proxy.  
10          The Clerk.     Ms. Snowe?  
11          Senator Snowe.    No.  
12          The Clerk.     Mr. Kyl?  
13          Senator Kyl.     Aye.  
14          The Clerk.     Mr. Bunning?  
15          Senator Bunning.   Aye.  
16          The Clerk.     Mr. Crapo?  
17          Senator Grassley.   Aye by proxy.  
18          The Clerk.     Mr. Roberts?  
19          Senator Grassley.   Aye by proxy.  
20          The Clerk.     Mr. Ensign?  
21          Senator Grassley.   I do not have a vote for Senator  
22          Ensign.  
23          The Clerk.     Mr. Enzi?  
24          Senator Enzi.     Aye.  
25          The Clerk.     Mr. Cornyn?

1 Senator Cornyn. Aye.

2 The Clerk. Mr. Chairman?

3 The Chairman. No. Senator Wyden?

4 Senator Wyden. No.

5 The Chairman. Senator Crapo?

6 Senator Crapo. Aye.

7 The Chairman. The clerk will tally the vote.

8 The Clerk. Mr. Chairman, the final tally is eight  
9 ayes, 14 nays.

10 The Chairman. The amendment fails. Just an  
11 announcement here. We will stand in recess until 5:00.  
12 We are now surveying Senators to figure out evening  
13 plans. I tentatively would like to schedule dinner, our  
14 side. We have got a conflict tonight on the floor. So I  
15 will try to get word out as quickly as possible.

16 We will reconvene at 5:00.

17 [Whereupon, at 4:35 p.m., the hearing was recessed.]

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## 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

1 colleagues.

2 The Chairman. Okay. Senator Kyl.

3 Senator Kyl. Thank you, Mr. Chairman.

4 This amendment is similar to the Cornyn amendment  
5 which was just defeated, but much narrower in scope. It  
6 preserves the Medicare Commission in subtitle (e) of  
7 Title III, but it eliminates the three paragraphs that  
8 specifically provide automatic authority to the  
9 Commission in the event that Congress does not act. I  
10 will just read the three paragraphs. It is very short,  
11 and it gives you a good idea of what would be eliminated  
12 from the bill.

13 "By April 1st of 2014, the Senate Finance Committee,  
14 along with the relevant House committees, would be  
15 required to report out either the Commission or the  
16 Secretary's proposal or an amended proposal that achieves  
17 the same level of reductions in excess cost growth."

18 So there is the first requirement that we would have  
19 to meet a level established by this Commission, which I  
20 think may raise constitutional questions, but we can talk  
21 about that later.

22 "Second, if the Committee fails to report a  
23 legislative package achieving the targeted level of  
24 Medicare savings by April 1st, the Commission's or  
25 Secretary's package would be automatically discharged



1 from the Committee." In other words, our failure to act  
2 results in an automatic discharge to the floor of these  
3 proposals.

4 And, finally, "If a package that meets the level of  
5 savings described above is not enacted into law by August  
6 15, 2014, the Chairman's mark would require the  
7 Commission or Secretary's original proposal to go into  
8 effect automatically."

9 That obviously seems very strange. The idea, of  
10 course, is that we are just not able to do this on our  
11 own, frequently, and, therefore, we will let this  
12 Commission do it for us. And our procedures will reflect  
13 that fact. That is the language that would be stricken  
14 from the bill--or from the mark, rather.

15 The Chairman. Any discussion on the amendment?

16 Senator Kyl. Well--

17 The Chairman. Sorry.

18 Senator Kyl. Could I make the strong and compelling  
19 case for it, Mr. Chairman?

20 The Chairman. Certainly.

21 Senator Kyl. It does not take too long. It is  
22 actually that compelling.

23 The first point I would make is this: This  
24 Commission will clearly--by virtue of the fact that it is  
25 given the obligation to target sources of excess cost

1 growth--be looking at ways, probably primarily reducing  
2 payments to providers, to reduce costs. This could  
3 easily have and I believe will have an effect on the care  
4 that seniors are expecting to receive under Medicare,  
5 primarily from hospitals, doctors, nursing homes, just to  
6 name a few.

7 Now, recognizing that this potential rationing is a  
8 problem, the mark contains the language that the  
9 Commission would be prohibited from recognizing proposals  
10 that ration care. That is a very important  
11 acknowledgment. It could have that result. I think about  
12 Great Britain's entity--I forgot what we call ours, the  
13 Medicare Commission. They call theirs NIHC, the  
14 National Institute for Health and Clinical Excellence.  
15 NIHC has gotten to be not so nice in Great Britain. It  
16 does ration care. It bothers people that it does that.  
17 And so learning that lesson, we have said that the  
18 Commission is prohibited from presenting proposals that  
19 ration care.

20 I like that. The problem is I do not think that  
21 that goes far enough, because here is what we are doing.

22 Like some other provisions of the mark, the  
23 recommendations end up making the providers do the dirty  
24 work. In other words, the Federal bureaucrats would, in  
25 effect, reduce the payment to providers, forcing them to

1       reduce the care, forcing them to delay the treatment or  
2       the scheduling of the American people or whatever it  
3       might be. So it is not the Government directly that is  
4       actually rationing care. No, we would not want to do  
5       that. We cut the providers to the point that they have  
6       to do it instead, and that result is still rationing.  
7       And as far as the patients are concerned, it is still the  
8       same result, but they just blame the providers, I guess,  
9       rather than Congress.

10               And then the final insult here to our authority, I  
11       think, is that if we do not do--if we do not cut to the  
12       level that this Commission says we have to cut to, not  
13       even a level that we say we have to cut to, then the  
14       Secretary or the Commission recommendations bypass the  
15       Congress. We have to act by a certain date and to a  
16       certain amount. Our authority is to do it in a different  
17       way.

18               We know that the issues are very complex, and what I  
19       do not want to get into is handing off to this group of  
20       people who are not elected the same authority that NIHCE  
21       has in Great Britain where they have created something  
22       called the QALI, or the determination that that if you do  
23       not have that much longer to live, then certain  
24       treatments that cost a lot of money are going to be  
25       denied to you. That is the kind of thing we want to

1       avoid. And what I submit here is that we have a  
2       responsibility to our constituents not to pass the buck  
3       to people over whom we have no control.

4               Now, I understand--and I will cut my statement.  
5       There are a lot of examples that I was going to point to  
6       where we do not do that, and there are certain reasons  
7       why we do not do it.

8               Here is what can happen if we do it. You go to a  
9       meeting and constituents come up to you and they say, you  
10      know, I am denied this thing that is going to save my  
11      life. How did you let that happen? Well, I did not have  
12      anything to do with it. Well, who did? Well, it is this  
13      Commission. Well, how did you give them the authority?  
14      Well, we gave them the authority and they are doing it,  
15      so don't blame me.

16              I mean, that cannot work in our society. We  
17      represent these folks. They are our bosses, and we have  
18      to be accountable to them.

19              Now, I am very cognizant of the argument that many  
20      have made--and there is a lot of truth to it--that we do  
21      not always cover ourselves in glory when it comes to  
22      responding to recommendations on how we can cut money.  
23      There are some that--I will not name names here, but some  
24      of my best friends argue against it. I am for it. We  
25      have differences of opinion.

1           We are all responding to constituents, and the  
2 argument is that makes our job tougher, we will not do  
3 it, and, therefore, we need to turn it over to somebody  
4 else. And even worse than that, we might be responding  
5 to certain special interests. And it is true--Senator  
6 Rockefeller made the point--that special interests come  
7 in and see us all the time, and they are arguing that  
8 this medical device not be cut or that drug not be cut  
9 and so on. And sometimes we respond to that.

10           I think the answer to this is that is our democratic  
11 republic at work. And if intelligent and courageous  
12 people are elected to office, they will make decisions  
13 that reflect their constituents' desires, which, after  
14 all, is what we are supposed to be doing.

15           Now, we are also, in the Edmund Burke tradition,  
16 supposed to give our constituents our best judgment,  
17 which may not always agree totally with what they all  
18 think. And then we have to go home and explain it. But  
19 that is the challenge that we have.

20           To turn it over to unelected people is contrary to  
21 our way of doing things. Folks say, well, but look at  
22 the BRAC commission. There is a big difference,  
23 colleague. The BRAC commission gives us cover on a  
24 political decision relative to closing a base or reducing  
25 the number of employees at a base in our State or, in the

1 case of a Congressman, a congressional district. And we  
2 can avoid direct responsibility and pass the buck onto  
3 somebody else for that unpopular political decision.

4 When it comes to the rationing or potential  
5 rationing of health care, you have got something totally  
6 different. We are talking about people's lives, our  
7 families' lives, our constituents' lives. And in that,  
8 we have an obligation to take charge and to make the best  
9 judgments. And I do not think it is an answer to say,  
10 well, we have not done a very good job in the past of  
11 making sure that costs do not get out of control, so  
12 let's just turn this over to somebody else. That is, at  
13 the end of the day, not a responsible course of action.

14 And so I urge my colleagues to just think about this  
15 one point. We are going to retain the Commission. We  
16 are going to give them this mandate to make  
17 recommendations that help us identify ways to cut costs,  
18 and there is going to be a lot of pressure for us to do  
19 that. But the one thing that my amendment says we will  
20 not do is let the Commission tell us how much we have to  
21 cut and to say that if we do not do it by a certain date  
22 the way they want us to do it, we either have to do it a  
23 different way, or else their recommendations go into  
24 effect.

25 That is turning it over to unelected bureaucrats,

1 the last thing that our constituents want us to do, and  
2 the first step toward the British kind of system of  
3 turning it over to a group like NIHCE, which will then  
4 ration care.

5 The Chairman. Senator Kyl, first question. Is it  
6 true that this amendment loses about \$23 billion in  
7 savings?

8 Senator Kyl. Yes.

9 The Chairman. It does. Is it also true that the  
10 amendment has no offset?

11 Senator Kyl. That is correct, Mr. Chairman.  
12 Again, I would argue that since we are preserving the  
13 status quo, we are preserving Congress' authority,  
14 preserving the Commission in terms of the requests that  
15 we have made of it to make recommendations to us, there  
16 is no offset because--

17 The Chairman. Since there is no offset--

18 Senator Kyl. It preserves the status quo.

19 The Chairman. --at the appropriate point, I will  
20 rule it out of order. In fact, I do rule it out of  
21 order. But before we--does the Senator wish to have a  
22 vote to override the ruling of the Chair?

23 Senator Kyl. Yes, I would move at the appropriate  
24 time to--

25 The Chairman. Okay. Before we have that vote, I

1 will let the Senator say a word or two.

2 First of all, this is essentially the same amendment  
3 as the Cornyn amendment. The only difference is the  
4 Cornyn amendment did have an offset. This one does not.

5 I think it was Cornyn. It might have been Ensign. I  
6 have forgotten who it was.

7 Senator Kyl. Cornyn struck the full--

8 The Chairman. It is essentially the same as the  
9 Cornyn amendment, which we struck down.

10 Point two, I hope people are not confused by what  
11 this commission is. This is not anything resembling  
12 NIHCE in Britain. We are not talking about what  
13 procedures are allowed or disallowed. That is totally  
14 irrelevant to this provision. This provision basically  
15 just addresses the rate of growth of provider payments  
16 and setting--giving the Commission the authority to look  
17 at the appropriate provider payments. It has nothing to  
18 do with procedures for patients, as is the case with the  
19 NIHCE in Great Britain. These are totally different, and  
20 I do not think it is really fair to try to lump the two  
21 together.

22 And for a lot of reasons, I think this amendment  
23 should be defeated, but I ruled it not germane and out of  
24 order. So after a little bit of discussion, then we will  
25 have a vote to appeal the ruling of the Chair.



1           Senator Conrad.    Mr. Chairman?

2           The Chairman.    Senator Conrad.

3           Senator Conrad.    Mr. Chairman, I think it is very  
4 important to try to put this in context.

5           First of all, this is not at all anything close to  
6 the British system. I would strongly oppose anything  
7 approaching the British system. The provision explicitly  
8 protects beneficiaries from benefit cuts and increased  
9 cost sharing.

10          Furthermore, the provision explicitly forbids the  
11 Commission from making recommendations that would ration  
12 care. It also protects beneficiaries' access to care,  
13 and it protects providers with negative margins.

14          If, as I believe will happen, the delivery system  
15 reforms elsewhere in this bill are successful in slowing  
16 the growth of medical expenses--and that is the object of  
17 this exercise. If the delivery system reforms and the  
18 insurance reforms are successful, this Commission will  
19 never have to act.

20          But if the reforms are not fully successful, then  
21 the Commission functions in effect as a fail-safe  
22 mechanism. And Congress has every opportunity--if they  
23 do not like what the Commission comes up with, the  
24 Congress has every opportunity to meet the equivalent  
25 savings so that health care expenses in these accounts

1 are not growing faster than the gross domestic product  
2 plus 1 percent. That is the goal.

3 If we do not do it, if the other provisions of the  
4 bill do not do it, the Commission makes a proposal. If  
5 we do not like it, as Congress we have every opportunity  
6 to offer an alternative that achieves the same result.

7 So, to me, this is very responsible, and I will not  
8 repeat the letter from the Congressional Budget Office  
9 and Mr. Elmendorf, who tells us that he thinks this kind  
10 of provision is important to making progress at dealing  
11 with what is a crisis. Medicare is going to go broke in  
12 8 years. The trust fund has already gone cash negative.

13 So we have got to step up here, and--

14 Senator Kyl. Could I interrupt you for a question?

15 Senator Conrad. Yes.

16 Senator Kyl. You have accurately characterized the  
17 essence of the amendment in terms of what it would  
18 provide. But I am very unclear as to what the  
19 permissible funding level or mandated or targeted funding  
20 level here is. When you say gross domestic product plus  
21 1 percent--I have read the language. It is actually per  
22 capita gross domestic product plus 1 percent. What does  
23 that mean? Does that mean that you take a trillion  
24 dollar GDP, divide it by 300 million people, that gives  
25 you a certain number. You add 1 percent of something to

1 that. I am not sure what it is. And then that is the  
2 amount of money per Medicare beneficiary that we are  
3 going to spend a year or what? I do not understand how  
4 this target is supposed to work.

5 Senator Conrad. Maybe we could ask one of the  
6 technical staff for an explanation on how GDP plus 1  
7 percent works. But my understanding is you look at GDP  
8 plus 1 percent, you compare that to health care costs.  
9 If health care costs are rising faster than GDP plus 1  
10 percent, then the Commission has an obligation to come up  
11 with a plan to get back down to the level. And if we do  
12 not like what they come up with, we come up with an  
13 alternative plan.

14 Senator Kyl. Do you mean Medicare--you said health  
15 care costs. The Medicare health care costs.

16 Senator Conrad. Yes.

17 Senator Kyl. Could staff clarify that?

18 The Chairman. Mr. Dawe, do you want to add to  
19 that?

20 Mr. Dawe. Yes, GDP refers to the rate of growth of  
21 gross domestic product plus one percentage point. It is  
22 not the level of GDP but the rate of growth.

23 Senator Kyl. But doesn't the language say per  
24 capita so, therefore, it is not a rate of growth? It is  
25 a dollar figure.

1 Mr. Dawe. I will have to get the language.

2 The Chairman. I believe it is per capita rate of  
3 growth. I think that is what the standard is.

4 Mr. Dawe. I believe that is correct.

5 Senator Kyl. So you take the per--well, what is a  
6 per capita rate of growth for GDP? There is no such  
7 thing.

8 The Chairman. Yes, there is. That is used all the  
9 time.

10 Senator Kyl. But that is not what this says, Mr.  
11 Chairman, with all respect. It says the growth target at  
12 GDP per capita plus 1 percent. GDP per capita is a  
13 dollar amount of money. But it does not even say plus 1  
14 percent of what.

15 The Chairman. Of that.

16 Senator Kyl. So it is a dollar amount.

17 The Chairman. One percent--

18 Senator Conrad. It is the rate of growth of GDP  
19 per capita plus 1 percent. That is a percentage. It is  
20 the rate of GDP growth--

21 Senator Kyl. Well, first of all--

22 Senator Conrad. --per capita, which is a  
23 percentage, plus 1 percent.

24 Senator Kyl. The mark does not say rate of growth.

25 Senator Conrad. Well, maybe we should just clarify

1 that.

2 Senator Kyl. So we would have to clarify that. So  
3 let us assume that it is different than what the mark  
4 says. It is the rate of growth of per capita GDP. So  
5 maybe the staff could give us an example, like what is  
6 the per capita GDP today rate of growth? I gather that  
7 is compared with the previous year?

8 The Chairman. It is.

9 Senator Kyl. It does not say that either. Is that  
10 what we intend?

11 Ms. Bishop. Senator, I think that the intent there  
12 is to signal that the rate of growth is not going to  
13 account for growth in population because that would be--  
14 we do not want to limit spending that is attributable to  
15 growth in Medicare population or population at large. So  
16 just the intent is to signal that it is growth in  
17 spending on a per person basis not including--you know,  
18 so we want to remove the effects of the population growth  
19 on the estimate of the rate of growth in spending. Does  
20 that make sense?

21 Senator Kyl. No, it--

22 The Chairman. Let us proceed. This amendment is  
23 out of order in the first place.

24 Senator Kyl. Well, but Mr.--

25 The Chairman. And I do not want a budget seminar

1 on GDP.

2 Senator Kyl. Mr. Chairman--

3 The Chairman. Let us vote on the motion to--

4 Senator Kyl. Mr. Chairman--

5 The Chairman. --uphold the ruling of the Chair.

6 Senator Kyl. Maybe let me just make this point.

7 The Chairman. Very briefly, because this is out of  
8 order, so--

9 Senator Kyl. That is true but--

10 The Chairman. --the discussion is moot. It is out  
11 of order.

12 Senator Kyl. I understand that, but it is  
13 debatable. The motion to override--

14 The Chairman. No, it is not.

15 Senator Kyl. Yes, it is. Mr. Chairman, I beg to  
16 differ.

17 The Chairman. No, it is not. No, it is not. It  
18 is not--

19 Senator Kyl. The rules of the Senate provide that  
20 a motion to table or to suspend the ruling of the Chair  
21 on an issue of germaneness are debatable. This Committee  
22 has no rule--traditionally we refer to the rules of the  
23 Senate in that event. The point here that I am trying to  
24 make is that the Commission is going to set a target. We  
25 do not set that--

1           The Chairman.   Let me just cite the rule, Senator,  
2   so you know what the rule is--

3           Senator Kyl.    I have read the rule, Mr. Chairman.

4           The Chairman.   Well, wait.  Let me read it to you  
5   just so you are more familiar with it.  The rule says  
6   that if the Chairman determines that a motion has been  
7   adequately debated, he may call for a vote on such  
8   motion, and the vote shall be taken unless the Committee  
9   votes to continue debate on such motion.  The vote on a  
10   motion to continue debate on any motion shall be taken  
11   without debate.

12          Senator Kyl.    That is continuing.

13          The Chairman.   That is correct.

14          Senator Kyl.    But that is not what we are talking  
15   about here.

16          The Chairman.   Well--

17          Senator Kyl.    What you first--

18          The Chairman.   I am starting to reach the judgment  
19   that this has been adequately debated because it is not  
20   germane.

21          Senator Kyl.    Mr. Chairman, we can argue about--you  
22   can check with the parliamentarian.  Under the rules of  
23   the Senate--

24          The Chairman.   This is a Senate rule--

25          Senator Kyl.    An appeal of the ruling--

1           The Chairman.    The matter is a Committee rule.

2           Senator Kyl.     And the Committee rule is--

3           The Chairman.    That is what the Committee rule--

4           Senator Kyl.     Mr. Chairman, the Committee rule is  
5           silent on the question of whether an appeal by a ruling  
6           by the Chair is debatable.

7           The Chairman.    Let us not waste time here.

8           Senator Kyl.     Good. My point is simply this--

9           The Chairman.    I will give you a few minutes. Then  
10          we are going to--

11          Senator Kyl.     Good. It will just take a second  
12          here.

13          The Chairman.    Okay.

14          Senator Kyl.     The mark is, first of all, not only  
15          not clear, it is not susceptible of an interpretation  
16          right now as to what target we are talking about. This  
17          Commission is required to come up with a recommendation  
18          to meet a target, but we do not know what that target is.

19          And the Congress is compelled under the language of this  
20          mark to abide by that level of spending. We do not set  
21          the level. The Commission sets that level. And we  
22          either adopt their way of achieving that degree of  
23          saving, or we come up with an alternative way. If we do  
24          not come up with an alternative way, their way  
25          automatically becomes the law.



1           So it is highly relevant what target we are setting  
2 here, and what I am saying is you cannot give that to an  
3 unelected body. We cannot even agree here today what  
4 that target is based upon what has been written here.

5           Let me just make one final point. There is a recent  
6 survey I read that shows if you are a 65-year-old male  
7 and you have a heart attack in 1980, you get to the  
8 hospital, you have got a 60-percent chance of living.  
9 Today you have got over a 90-percent chance of living  
10 because there are a lot of new medical procedures. It  
11 costs more money. And the question we have got to answer  
12 is: Would you rather have 1980's health care at 1980's  
13 prices or today's health care at whatever price that may  
14 be?

15           I, therefore, do not think you can just set an  
16 arbitrary limit today and say we are never going to spend  
17 more than that on our Nation's seniors. It depends on  
18 what new devices and treatments and medications and so on  
19 cost. And, sure, we try to the care the most efficient  
20 way we can. But you cannot set an arbitrary limit,  
21 especially not one that is so ill-defined as is the case  
22 with respect to the mark today.

23           The Chairman. The question is on the motion to  
24 overrule the ruling of the Chair. All those in favor of  
25 overruling the Chair, vote aye--

1           Senator Kyl.    Roll call, please.  
2           The Chairman.   --those opposed, vote no.  
3           The Clerk.   Mr. Rockefeller?  
4           Senator Rockefeller.   No.  
5           The Clerk.   Mr. Conrad?  
6           Senator Conrad.   No.  
7           The Clerk.   Mr. Bingaman?  
8           Senator Bingaman.   No.  
9           The Clerk.   Mr. Wyden?  
10          Senator Wyden.   No.  
11          The Clerk.   Mr. Schumer?  
12          Senator Schumer.   No.  
13          The Clerk.   Ms. Cantwell?  
14          Senator Cantwell.   No.  
15          The Clerk.   Mr. Carper?  
16          Senator Carper.   No.  
17          The Clerk.   Mr. Grassley?  
18          Senator Grassley.   Aye.  
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?

1 Senator Bunning. Aye.

2 The Clerk. Mr. Crapo?

3 Senator Crapo. Aye.

4 The Clerk. Mr. Chairman?

5 The Chairman. No.

6 The Chairman. The clerk will tally the result.

7 The Clerk. Mr. Chairman, the final tally is six  
8 ayes and 8 nays.

9 The Chairman. Two-third of the Committee not  
10 having voted in the affirmative, the motion fails.

11 The next amendment.

12 Senator Grassley. Is it going to be mine?

13 The Chairman. If you want to. Are you ready? Any  
14 Senator who wants to offer an amendment.

15 Senator Grassley. And it is not modified.

16 The Chairman. Okay. Do you want to call up the  
17 amendment?

18 Senator Grassley. Yes, D-4.

19 The Chairman. D-4, okay. Senator Grassley, D-4.

20 Senator Grassley. I think, Mr. Chairman, because  
21 of my oversight work over the years that I have been in  
22 the Senate, and particularly in the last 6 years, some of  
23 my oversight work not just of nonprofits but--well,  
24 mostly nonprofits, I think I bring some expertise to this  
25 subject and offer to my colleagues some experience I have

1 had with governance of some organizations.

2 The Chairman's mark creates a new patient-centered  
3 outcome research institute to conduct comparative  
4 effectiveness research, and, no, I am not going to raise  
5 Cain about comparative effectiveness research. There are  
6 some aspects of it that are very good.

7 You know, we have heard a lot of concern about this  
8 type of research maybe resulting in rationing or  
9 Government bureaucrats getting between you and your  
10 doctor. Even though I share those concerns, that is not  
11 my interest in this amendment.

12 But I also think that comparative effectiveness  
13 research, if done properly, can be a very valuable tool  
14 in helping promote higher-quality care. I think the  
15 concerns about comparative effectiveness exist because  
16 the Government is too involved in the research. So this  
17 has benefits beyond just what I am trying to do here with  
18 the governance of the project.

19 What this kind of research should be about is about  
20 patients, doctors, academics, and researchers, not people  
21 in Government. So I want to create a clear line between  
22 the Federal Government and this research. So my  
23 amendment would prohibit any Cabinet Secretaries or other  
24 Government officials from serving on the board of the  
25 patient-center outcome research institute.

1           As many of my colleagues know I have done extensive  
2 oversight of charitable organizations over the last 8  
3 years, and that has included reviewing governance of  
4 these organizations. I will just cite a couple of  
5 examples where Government officials were very much  
6 involved.

7           My oversight of the American Red Cross and the  
8 Smithsonian Institution in particular has shown that  
9 Cabinet Secretaries and other high-ranking Government  
10 officials frequently are not able to properly fulfill  
11 their roles and responsibilities as board members.

12           I know that there are still a lot of other changes  
13 that need to be made to deal with concerns about  
14 rationing and Government taking over medical care. But  
15 adopting this amendment would not have anything to do  
16 with that issue--except maybe quiet some of the concerns  
17 that people have.

18           I would just suggest to you in one particular  
19 instance, without naming Government officials, but when I  
20 got involved with one of these organizations, one of our  
21 friends in Congress said to me, "Well, I am glad you  
22 brought that up. I didn't know things were so bad in  
23 that organization." So I think that it is necessary that  
24 we have people in place.

25           Now, just to show that I am not in any way crippling

1       this organization at all, the Secretary of HHS would be  
2       on it, the director of the quality organization, AHRO,  
3       and the director of the National Institute of Health.  
4       Now, we would have--effectively these would be the ones--  
5       I better ask my staff. Those would be the ones that we  
6       would be eliminating, right?

7               Yes, those--otherwise, Mr. Chairman, the way you  
8       have set this up, it seemed to me that you got good  
9       people from outside of Government that are very much  
10      involved in this process. And that is where it ought to  
11      be, in my judgment, and I think it would relieve some of  
12      the concerns that people have about--you know, some  
13      people consider this whole project a scary project. I  
14      just told you I do not, because I think it can serve a  
15      very, very good purpose in bringing evidence-based--or  
16      bringing about evidence-based medicine, the practice of  
17      medicine.

18             The Chairman. Okay, Senator, I think you make a  
19      very good point, frankly. When I looked at this earlier,  
20      that question came to mind. Why are we requiring all  
21      these elected officials to be part of this? I had some  
22      of the same, frankly, private concerns that you are now  
23      addressing. I think it is a good idea. The amendment is  
24      a good idea. It will make it more clear that this is not  
25      some government-run outfit; rather, these decisions are

1 made by--they are clinical decisions made by clinicians  
2 and by experts in the field, and I suggest that we accept  
3 your amendment.

4 Senator Grassley. We will accept it without a vote  
5 if it is okay with everybody else.

6 The Chairman. That is fine with me. Are there any  
7 objections to accepting this without a vote?

8 Senator Grassley. And I thank you very much.

9 Senator Rockefeller. Can I raise just a question?

10 Senator Grassley. Yes, please do.

11 Senator Rockefeller. To the good Senator from  
12 Iowa, my friend.

13 Senator Grassley. Please do.

14 Senator Rockefeller. If you have Cabinet  
15 Secretaries, people who are designated into heavy work  
16 situations by the nature of their full-time work, my hope  
17 was that this would be their full-time work and,  
18 therefore, I raise the question: Would they have the  
19 time to devote to what is an incredibly complex--

20 Senator Grassley. I think you are raising--I hope  
21 I expressed that. If I am wrong in interpreting your  
22 question to me, I think you are raising the same question  
23 I raised, whether or not they would have time to devote  
24 to it to get the job done right.

25 As I said, people, you and I know, on one of my

1 investigations said, "Well, I am glad you brought that  
2 up. I didn't know that it existed." And the person had  
3 been involved with the organization for a long period of  
4 time. I think we--you know, I can tell you in two  
5 instances where I have been appointed by leaders--maybe I  
6 ought to not name them, but I just did not find the time  
7 to serve.

8 The Chairman. Okay. Without objection, the  
9 amendment is agreed to.

10 Further amendments? How are we doing? Who is next?

11 I would like, just for the information of Senators,  
12 to say that we will continue meeting tonight. I will  
13 break at 7 o'clock for one hour, reconvene at 8 o'clock,  
14 and we will plow ahead after 8 o'clock. There will be no  
15 votes after 6:30. But I do intend to vote beginning at 8  
16 o'clock. We can debate 6:30 to whenever we recess at 7  
17 o'clock, but no votes after 6:30, but votes will occur  
18 after 8 o'clock.

19 Senator Grassley. Does this break that we have  
20 take into consideration the Senate program that they  
21 have?

22 The Chairman. I understand that starts at 6:30.

23 Senator Grassley. Okay.

24 The Chairman. That Senate program. But I am going  
25 to recess at 7:00, 7:00 to 8:00.



1 Senator Stabenow. Mr. Chairman?

2 The Chairman. Senator Stabenow.

3 Senator Stabenow. Thank you, Mr. Chairman. I have  
4 an amendment that I would hope that would be able to be  
5 accepted. It is something that has passed the Senate--

6 The Chairman. Sure. Which one is it?

7 Senator Stabenow. --Finance Committee before. It  
8 is D-19.

9 The Chairman. D-19?

10 Senator Stabenow. Yes, to the Chairman's mark.  
11 The amendment is the same at the Patient Safety Abuse  
12 Prevention Act that was passed by the Senate last  
13 Congress. It requires the Secretary of HHS to--

14 The Chairman. Can you help me, Senator? Is it on  
15 this list by chance, do you know? Or is it on another  
16 list?

17 Senator Stabenow. It should be.

18 The Chairman. We have a different list. Okay. It  
19 is on the second list, and it is D-19. It is nursing  
20 home abuse.

21 Senator Stabenow. Yes.

22 The Chairman. Thank you.

23 Senator Stabenow. This actually is patterned after  
24 an act that Senator Kohl is the prime sponsor of, and he  
25 had asked me to bring it forward, which I am happy to do

1 as a strong supporter of this. But it requires the  
2 Secretary of HHS to establish a program to identify  
3 procedures to conduct background checks for folks that  
4 are in nursing--prospective employees that work in  
5 nursing homes and other providers that provide direct  
6 care to patients.

7 We have had a pilot project in Michigan that has  
8 been extremely successful in doing background checks,  
9 and, in fact, in the time that it has been set up under  
10 one of these pilots for then 9,987 prospective direct  
11 care workers that have actually been excluded from being  
12 hired based on findings of abuse and neglect or criminal  
13 convictions for fraud, theft, and controlled substances.

14 And so this would simply allow the Secretary to take  
15 what has been a pilot project and be able to expand that  
16 to be able to make sure we are supporting every effort to  
17 make sure people who are working with seniors, working  
18 with people in long-term care facilities are the right  
19 folks, that they do not have--that they are not people  
20 who have committed crimes or have been convicted of abuse  
21 and neglect.

22 The Chairman. Senator, I am inclined to want to  
23 accept this. Is this the same amendment that Senator  
24 Kohl has been pursuing?

25 Senator Stabenow. Yes.

1           The Chairman.    Is there a cost to this?

2           Senator Stabenow.    I understand it is fully offset  
3 by requiring national correct coding.

4           The Chairman.    Okay.    I am inclined to accept it.

5           Senator Stabenow.    Thank you very much.    Thank you,  
6 Mr. Chairman.

7           The Chairman.    Any further debate on this  
8 amendment?

9           [No response.]

10          Senator Stabenow.    Thank you.

11          The Chairman.    If none, without objection, the  
12 amendment is agreed to.

13          Senator Bingaman.    Mr. Chairman, if you have  
14 another new updated list of amendments that we are going  
15 to be considering, that would be great if we could get  
16 copies of that.

17          The Chairman.    I think that would be a good idea.  
18 Can we get copies of that?    I think we have some here.

19          Senator Rockefeller.    Mr. Chairman, can I agree  
20 with that?    We got this evidently 2 minutes before--

21          Senator Bunning.    Mr. Chairman?

22          Senator Rockefeller.    You accepted it, and I have  
23 no idea--

24          The Chairman.    Only one person can talk at a time.  
25 Right now Senator Rockefeller is speaking.

1           Senator Rockefeller.   No.  I finished.  I mean, I  
2 got this 2 minutes before--

3           The Chairman.   Well, you got it about 2 minutes  
4 after I got it, so we are about in the same boat here.  
5 Okay.  We are distributing the second list.  This is  
6 Second Round Amendments, Delivery Reform.  That is the  
7 title of the list that is being distributed.  Down at the  
8 bottom it says 4:45 p.m.  Okay.

9           Senator Bunning.  I just have a question for the  
10 Chairman.

11          The Chairman.   Sure.  Go ahead.

12          Senator Bunning.  In regards to the Henry Clay  
13 portrait, some of us have a problem being here until 6:30  
14 because of commitments over--

15          The Chairman.   Okay, sure.

16          Senator Bunning.  I just want you to understand  
17 that.  Thank you.

18          The Chairman.   Okay.  Well, as I said, there will  
19 be no votes after 6:30, not votes until 8 o'clock.  I  
20 appreciate that.  We will try to work around maybe a  
21 debate or something as it gets close to 6:30 if that is a  
22 problem.  We will work out a solution.

23

24          Okay.  Other amendments?  I will go down the list  
25 here.  We have done number 1.  That has been agreed to.

1 Senator Hatch is not here. Senator Lincoln is not  
2 present. Senator Kyl, do you want to--he is not here  
3 now. Senator Roberts, not here.

4 Senator Bingaman, do you want to do yours? This is  
5 the low-income Medicare benefits.

6 Senator Bingaman. Mr. Chairman, I am advised that  
7 we are still working with the Committee staff to get  
8 agreement on an offset that is acceptable.

9 The Chairman. Okay.

10 Senator Bingaman. And as soon as we do, I will be  
11 glad to offer that amendment.

12 The Chairman. Okay. Senator Ensign, your D-3, D-  
13 4, are you ready to offer that? Okay. We will now go to  
14 Senator Ensign's D-3, D-4, which is medical malpractice--  
15 which is not within the jurisdiction of this Committee.  
16 So why don't you describe it briefly so we can rule it  
17 out of order?

18 [Laughter.]

19 Senator Ensign. Well, Mr. Chairman, let me talk a  
20 little bit about medical liability reform that is  
21 desperately needed. We know we have junk lawsuits across  
22 the country in so many aspects of our legal system, none  
23 worse than in our medical health care system.

24 Really great doctors are sued all of the time now.  
25 Patients who actually have true medical malpractice

1 performed on them have years and years and years of delay  
2 of actually getting the kind of compensation that they  
3 deserve simply because our courts are clogged up with  
4 frivolous lawsuits.

5 We all understand and we hear about it all the time.

6 The President mentioned it in his speech. The practice  
7 of defensive medicine, all kinds of tests, unnecessary  
8 tests, are run just to cover the potential for a lawsuit,  
9 because what happens today is we have a whole team of  
10 "experts" that go around testifying in medical  
11 malpractice cases. And most of these are not even  
12 experts. Most of these--a lot of them--are not even  
13 board-certified in the field in which they are  
14 testifying.

15 So we know in State after State after State there is  
16 a problem in the United States, and the reason that I  
17 believe that it is critical as a national priority is  
18 because the Federal Government pays, depending on the  
19 statistics that you look at, 40 to 60 percent of all  
20 medical bills day, between Medicare, Medicaid, the VA,  
21 and SCHIP and the like that we pay; and the taxpayer,  
22 obviously, is the one who holds the bill for this, pays a  
23 tremendous amount in excess cost due to all of these junk  
24 frivolous lawsuits that occur in the United States.

25 There have been many States over the years that have

1 passed really good medical liability reforms. Back in  
2 the early 1970s, California was the first State to really  
3 embark on this. I doubt if California could pass the  
4 same law today, but it passed back in the early 1970s.  
5 It is known as MICRA. It has done a good job in holding  
6 down a lot of the costs in California, especially the  
7 cost of medical liability insurance. Colorado has passed  
8 reform, done similar things.

9 The most recent example, I think, that has had  
10 dramatic effects is Texas. As a matter of fact, the  
11 amendment that I have before us reflects the Texas model.

12 Since Texas passed their medical liability reform,  
13 and not only passed their medical liability reform, but  
14 had it tested in the courts to make sure that it was  
15 upheld in the courts, they have had dramatic results, to  
16 say the least.

17 Under Texas law, there is a cap of \$250,000 for a  
18 judgment against a physician or a health care provider.  
19 But, in addition, a patient can be awarded up to \$250,000  
20 for a judgment against a health care institution. Now,  
21 these caps are on non-economic damages. The total of  
22 non-economic damages cannot exceed \$750,000, but economic  
23 awards can be whatever the economic damage that has been  
24 done to the person turns out to be.

25 What we have seen in Texas is the arrival of

1 thousands of new physicians--physicians who fled other  
2 States and said, "I can't practice here anymore. My  
3 medical liability insurance is too expensive, and I do  
4 not want to get sued every time I turn around."

5 We hear about the shortage of doctors--specialists,  
6 primary care doctors--in many of our States. Texas now  
7 has more primary care doctors and specialists because of  
8 medical liability reform. For example, since 2003, Texas  
9 has added 655 emergency room doctors alone; 358 heart  
10 doctors, 212 OB/GYNs, and the statistics go on and on.

11 Not only that, we hear about the shortage of doctors  
12 in rural areas. The Chairman obviously has a very rural  
13 State. Well, the ranks of rural obstetricians have grown  
14 in Texas by 27 percent. So when we talk about  
15 incentives, you know, for doctors, first of all, a lot of  
16 doctors are leaving practice today, the really good ones,  
17 they are tired of it. They are tired of being sued.  
18 They cannot afford the medical liability insurance  
19 anymore, and they are just tired of it. That is why you  
20 are seeing so much call for medical liability reform  
21 across the United States.

22 The interesting thing also is charity care has been  
23 expanded in Texas. Today Texas hospitals are rendering  
24 almost \$600 million more in charity care than they did  
25 just 6 years ago. That is \$600 million per year than



1 they did just 6 years ago. That is almost a 24-percent  
2 increase in charity care, which is largely funded by  
3 liability savings.

4 Liability savings have also allowed hospitals to  
5 upgrade medical equipment, expand emergency room services  
6 and outpatient services, staff ER rooms 24/7 with high-  
7 risk specialists, improve salaries for nurses, and launch  
8 patient safety programs. Without the reforms and the  
9 attendant savings, these healthy developments would not  
10 have been possible.

11 So we desperately need medical liability reform.  
12 Most Texas doctors today are paying lower liability  
13 premiums than they were in 2001, and all major physician  
14 liability carriers in Texas have cut the rates since the  
15 passage of the reforms, most by double digits.

16 The Chairman. Senator, may I ask you a question?

17 Senator Ensign. Yes.

18 The Chairman. There are Senators who are getting a  
19 little antsy, a little nervous. They would like to--

20 Senator Ensign. I am just about finished.

21 The Chairman. I just wondered if perhaps we could  
22 have the vote soon, then you could talk later if you--but  
23 in the interest of other Senators--

24 Senator Ensign. Sure, and I will wrap up. I am  
25 just about to wrap up.

1           The President talked about the need for medical  
2           liability reform. I believe that this bill addresses  
3           those concerns, and the reason that I brought it forward  
4           in this Committee is because the Judiciary Committee,  
5           which would have jurisdiction, is not marking this up.  
6           There are no plans, from what I understand, to have  
7           serious medical liability reform included in the final  
8           package. And so if this Committee is not going to do it,  
9           if this Committee does not take the jurisdiction, what  
10          Committee would? And that is why we are asking for this  
11          amendment to be considered today. If we want to get  
12          serious about medical liability--and we are going to take  
13          this, by the way, to the floor. We are going to take  
14          this amendment to the floor and offer it there. But I  
15          realize that you are going to rule this as not germane,  
16          so I have a follow-up amendment that hopefully will be  
17          ruled as germane.

18          The Chairman. Okay. Senator, I appreciate your  
19          remarks very much. In fact, the Group of Six discussed  
20          tort reform and medical malpractice quite seriously for 3  
21          or 4 days, what to do. There is a recognition and  
22          realization that this is a subject that must be  
23          addressed, and it is true this Committee does not have  
24          jurisdiction. I suspect that other committees of  
25          jurisdiction are probably not going to report so-called

1 tort reform legislation to the floor. And as you have  
2 indicated, this is most likely going to be a floor  
3 amendment, and that is, I believe, the proper venue to  
4 take up essentially medical malpractice amendments.

5 There is a provision in the mark, as you all know,  
6 that encourages States to develop and test alternatives  
7 to the current civil litigation system as a way of  
8 improving patient safety and reducing medical errors, et  
9 cetera, and that is a recognition of the need to address  
10 the subject, even though the Committee does not have  
11 jurisdiction over the subject.

12 So I appreciate the Senator for raising the subject,  
13 and because this is clearly not the Committee's  
14 jurisdiction, I will have to rule that his amendment is  
15 not germane and is out of order. If the Senate wishes to  
16 have a vote overriding the ruling of the Chair, that is  
17 his prerogative.

18 Senator Ensign. There are not enough people here.

19 [Laughter.]

20 The Chairman. Okay. Yes, Senator Carper?

21 Senator Carper. Just a quick comment, if I could.

22 We have heard a lot in the past several months about  
23 fee-for-service driving costs, and one of the reasons why  
24 we see incidents of more tests, more procedures, more  
25 visits, more imaging, more MRIs, more this, more that, is

1 in some cases to try to help people get better, provide  
2 better health care. In some cases, we are finding that  
3 it is a way to generate income. And in some cases, folks  
4 do it in order to reduce their exposure to litigation  
5 costs, and it is a form of defense medicine to do that.

6 I am very much interested--and I know a number of  
7 Republicans and Director colleagues are interested--in  
8 reducing three things: reducing the incidence of  
9 litigation in this regard, reducing the incidence of  
10 defense medicine, and also to improve health care  
11 outcomes.

12 We are going to have an opportunity--I hope to offer  
13 a bipartisan approach on the floor--not in Committee but  
14 on the floor--that says less robustly test, a variety  
15 approaches that are being used in the States, including  
16 my State and other States. One, we have a number of  
17 States that use certificate of merit. Let's test that.  
18 Let's just test it and evaluate it does it really do  
19 those three things: reduce the incidence of litigation,  
20 reduce the incidence of defensive medicine, and improve  
21 outcomes.

22 Secondly, I want us to test the safe harbor to see  
23 how it is working in at least one State with respect to  
24 those three goals; test the approach of health courts,  
25 which we discussed here previously; test the approach

1 that works fairly well at the University of Michigan,  
2 "Sorry Works," to see how is that really working. And,  
3 finally, we have a number of States with different  
4 approaches in caps on medical malpractice. When I was at  
5 the Cleveland Clinic, they talked to me about the  
6 approach in Ohio which is a cap of \$250,000, but it is a  
7 sliding-scale cap that goes up to \$1 million.

8 What I would like to see us do is test a number of  
9 those approaches, use the States as laboratories for  
10 democracy, see if they are working, any of those  
11 approaches are working well in those States to help  
12 better inform the other States as to what maybe they  
13 should be doing.

14 The States, as you know, basically control tort law,  
15 not us, and so I think we have an opportunity to do  
16 something real, not illusory, and get started literally  
17 on the adoption of this legislation.

18 So I would welcome the partnership with our friend  
19 from Nevada.

20 Senator Ensign. Thank you. Mr. Chairman, if I  
21 could just make 15 seconds more comment.

22 The Chairman. Sure.

23 Senator Ensign. The one thing I also wanted to  
24 mention that I am going to be trying on the floor that I  
25 think just makes a heck of a lot of sense as far as

1 medical liability reform, we want to encourage more  
2 doctors to do pro bono work and donate their services.  
3 We ought to at least, kind of like a Good Samaritan law,  
4 we ought to protect--unless there is gross negligence, if  
5 somebody--any health care provider, whether he or she is  
6 a nurse, physical therapist, doctor, whatever, donates  
7 their services, unless there is gross negligence, they  
8 should be able to be protected from medical liability  
9 lawsuits. And so I will be offering that amendment as  
10 well on the floor of the Senate when this bill gets to  
11 the floor.

12 Thank you, Mr. Chairman.

13 The Chairman. Senator Menendez.

14 Senator Menendez. Mr. Chairman, I know you have  
15 ruled this out of order, and I just want to make an  
16 overarching point because I know that there are other  
17 amendments that may be pending in this regard. And I  
18 appreciate the Chair's position, and I understand those  
19 who want to offer this on the floor.

20 Let me just say that certainly most of these  
21 amendments that I have seen filed, at least unless they  
22 are amended again, are hooked onto Medicaid. The problem  
23 is that Medicaid should not be conditioned on whether a  
24 State has passed a specific tort reform provision, such  
25 as caps on non-economic damages. And there really is not

1 a rational relationship or link between States receiving  
2 Federal Medicaid dollars and so-called tort reform.

3 Secondly, all of these amendments require--or many  
4 of these amendments require non-economic damage caps in  
5 all--in all--medical malpractice cases, not just those  
6 involving Medicaid patients. So this supersedes far  
7 beyond the question of Medicaid and linking it, which I  
8 think is a tenuous link in any event. This is about  
9 telling States what, in fact, they should and should not  
10 do as it relates to the tort law.

11 And while I do not want to get into the specifics,  
12 all of the arguments that might be had in this regard, I  
13 do want to just point out one thing. You know, there is  
14 a study by the University of Alabama by Professor  
15 Morrissey in which they examined 27 States--27 States  
16 that have already decided on their own, on their own, to  
17 cap damages, including Texas. And that study concluded  
18 that tort reforms have not led to health care cost  
19 savings for consumers, that it really had a small effect,  
20 or else it does not seem to change what some call  
21 "defensive medicine" and that it is not a panaceas for  
22 health care costs.

23 So I know particularly hope that we are not going to  
24 use Medicaid and denying Medicaid dollars to States that  
25 are critical, particularly in this economy as we are

1 moving forward, based upon imposing upon that State what  
2 some would want them to be their tort law. And so I hope  
3 that that will be the generic view of the Chair as we  
4 move forward in terms of those that are trying to link  
5 this issue outside of the jurisdiction of the Committee  
6 on the back of Medicaid.

7 The Chairman. Thank you, Senator.

8 Okay. Are there other Senators who wish to offer  
9 amendments?

10 Senator Bingaman. Senator Ensign had a second  
11 amendment on this.

12 The Chairman. Let me ask. Senator Ensign, did you  
13 have a second amendment?

14 Senator Ensign. I do. We are just trying to do  
15 some research on it, and I think it may be better, if  
16 that is okay, if we do after we come back at 8 o'clock,  
17 if that is okay.

18 The Chairman. I am just trying to get amendments  
19 offered now if we can.

20 Senator Bingaman, I do not mean to rush you. Are  
21 you ready?

22 Senator Bingaman. Mr. Chairman, I am still advised  
23 that we--my staff is trying to get an offset agreed to  
24 with the Committee staff that is acceptable.

25 The Chairman. Okay. I am going down the list



1 here. Senator Grassley is not here, Senator Kyl--Senator  
2 Stabenow, we did yours? Okay. Senator Roberts is not  
3 here. Senator Cornyn, not here.

4 Senator Schumer. Mr. Chairman?

5 The Chairman. Yes, Senator Schumer.

6 Senator Schumer. Yes, on my amendment on the  
7 biogenerics and the exchangeability, we are very close to  
8 an agreement

9 The Chairman. Okay.

10 Senator Schumer. So I would like to come to that  
11 at 8:30, because it looks like we will have an agreement  
12 by then. Is that okay?

13 The Chairman. How about 8:25?

14 [Laughter.]

15 Senator Schumer. Anytime. I thought we were--  
16 sure, 8:25 is great. How about 8:24?

17 The Chairman. Whatever. I am easy.

18 Senator Schumer. I thought we were coming back at  
19 8:30.

20 The Chairman. 8:00.

21 Senator Schumer. When we come back.

22 The Chairman. Okay. Are there any other Senators--

23 -

24 Senator Bingaman. Mr. Chairman, I am advised that  
25 I will not be offering this amendment D-4.

1           The Chairman.    You will not be offering.

2           Senator Bingaman.   I will not be.  We believe a  
3 significant part of it will be included in another  
4 amendment that Senator Lincoln--

5           The Chairman.    Okay.  We will strike that one from  
6 the list.

7           Senator Bingaman.   That I am working on with  
8 Senator Lincoln.  It will be a Lincoln-Bingaman  
9 amendment, which will be offered a little later.

10          The Chairman.    Okay.  Are there any other  
11 amendments?  We have got some time here.

12          Senator Schumer.   Let's break until next Tuesday.

13          The Chairman.    If not now, then 8 o'clock.  If not  
14 now, we will move to as many amendments as we possibly  
15 can at 8 o'clock and just clear plowing through.  Just  
16 keep moving, keep going.

17          Senator Schumer.   Mr. Chairman?

18          Senator Lincoln.   Mr. Chairman?

19          The Chairman.    Yes, ma'am.

20          Senator Lincoln.   I would like to call up the  
21 Lincoln amendment, it is D-7 in this grouping.

22          The Chairman.    Okay.  Good for you.

23          [Laughter.]

24          Senator Schumer.   You automatically get--

25          Senator Lincoln.   Just for being brave enough to

1 bring it up.

2 Well, Mr. Chairman, this addresses the need of home  
3 infusion therapy for Medicare beneficiaries. I think  
4 this amendment is a really great example of a solution to  
5 the current problems we face in our health care delivery  
6 system.

7 Infusion therapy involves the administration of  
8 medication directly into the bloodstream using a needle  
9 or a catheter, and right now Medicare pays for the cost  
10 of infusion drugs. However, the equipment, supplies, and  
11 the professional services to ensure safe and effective  
12 home infusion are not covered.

13 My home State of Arkansas is extremely rural and has  
14 one of the highest rates of seniors living in poverty,  
15 and, therefore, many of my constituents who really need  
16 home infusion therapy, they just simply cannot afford it.

17 They then have to enter a hospital or a nursing home for  
18 infusion treatment to be fully covered by Medicare, and  
19 not only is this a hardship for patients and families, it  
20 adds substantially to Medicare costs. It does not make  
21 sense. Certainly given that right now private insurance  
22 companies, including many Medicare Advantage plans--  
23 TRICARE, the Veterans Administration, many Medicaid  
24 programs--pay for home infusion.

25 Basically, Mr. Chairman, everybody reimburses for

1 home infusion except Medicare.

2 So I am pleased to be joined in this bipartisan  
3 effort by Senator Snowe. She and I have worked on many  
4 things together, and this is yet one more of them. But  
5 when it comes down to it, offering people a choice in  
6 infusion treatment at home for a lower cost will be a  
7 win-win for patients, families, and the Medicare program.

8 We have been working diligently, Mr. Chairman, with  
9 CBO and CMS on this issue, and I would certainly like to  
10 continue working with you and your staff so that we can  
11 make home infusion therapy a cost-effective reality for  
12 Medicare beneficiaries. But we have not gotten the full  
13 scoring of that, and I am hoping that as we move forward  
14 we can.

15 But I just want to point out to my colleagues that  
16 this is a really cost-effective thing that absolutely  
17 everybody else is doing except for Medicare. And it  
18 certainly makes sense. I know having visited our  
19 Veterans Administration twice during the August break and  
20 actually having one of my former staffers who needed home  
21 infusion, being able to get their antibiotics at home as  
22 opposed to going back into the hospital where they are  
23 subjected to the possibilities of becoming more ill or  
24 catching something else, it certainly makes sense.

25 So I hope that the Committee would consider it, and

1 I am glad to work with the Chairman.

2 The Chairman. Senator, you make a very good point.

3 There is certainly a gap in benefits here for not  
4 covering home infusion. It is really true, and we have  
5 got to figure out a way to solve it.

6 This amendment, I am advised, costs about \$20  
7 billion as it is currently drafted, but I would very much  
8 like to try to figure out some way to get at this  
9 problem, because it is not fair the way the law today  
10 does not allow home infusion benefits. I clearly want to  
11 work with you to try to find a solution.

12 Senator Lincoln. Well, I appreciate it. I  
13 certainly will withdraw the amendment with the idea that  
14 we could work together. But I just really will remind my  
15 colleagues, almost all private insurance companies,  
16 including Medicare Advantage plans, TRICARE, the Veterans  
17 Administration, and many Medicaid programs, do pay for  
18 and reimburse for home infusion. So I hope that we will  
19 take a look at this really cost-effective way that has  
20 been proven. Again, many of these entities have been  
21 covering home infusion for more than 20 years, so it is  
22 not a new thing either.

23 So it is a great cost-effective way for us to not  
24 only create savings, but provide the kind of quality of  
25 care that people want in the setting that they want it

1 in. So I appreciate that, Mr. Chairman, and I will  
2 withdraw my amendment with the idea that we can work as  
3 we move forward on this one.

4 I would also like to mention, Mr. Chairman, briefly  
5 that I filed several other amendments that are long-time  
6 priorities of mine that I do not plan to offer today  
7 since we are still working on refining Budget Office  
8 scores and some of the offsets, including the amendments  
9 to increase access to Medicare Part B providers, physical  
10 therapists, respiratory therapists, and others, as well  
11 as one that would help our critical hospitals serving  
12 rural and underserved parts of the country, to continue  
13 to serve low-income and uninsured individuals until we  
14 are able to get them covered. We all know that we are  
15 not going to be able to take a pill when we pass this  
16 health care reform bill and wake up the next day and  
17 everything is going to be great. And it is going to be  
18 very difficult in rural areas for the transition that is  
19 going to need to happen. So being able to take care of  
20 particularly the low-income and the uninsured in those  
21 areas is going to be an important part.

22 So I look forward to working with you, Mr. Chairman.

23 I have got several other of those amendments, and I  
24 would like to continue to work with you and your staff on  
25 those issues.

1           The Chairman.    You bet.

2           Senator Lincoln.   Thank you.

3           The Chairman.    Absolutely.  Those are good ideas,  
4           and we will do our best to address them.

5           I see Senator Cornyn has just arrived, so if the  
6           amendment is withdrawn--that is, the amendment by the  
7           Senator from Arkansas--Senator Cornyn, did you want to  
8           offer an amendment?  I am told that you had--you have two  
9           on the list here.  Either one of these you want to offer?

10          Senator Cornyn.    Mr. Chairman, excuse me.  Would  
11          you give me a minute to get my--

12          The Chairman.    Okay.  You got it.

13          Senator Cornyn.    Thank you.

14          The Chairman.    You bet.  Okay, Cornyn, Roberts,  
15          Kyl, Grassley.  Otherwise, we will have to offer these  
16          amendments at 8 o'clock and afterwards.

17          If there are no amendments, we can start the  
18          coverage amendments right now.

19          Senator Bingaman.   Do we have a list?

20          The Chairman.    Do we have a list of coverage  
21          amendments?  Well, let's begin to work it out.  Let's  
22          start--why doesn't staff start working out a list of  
23          coverage amendments right now so we have that ready and  
24          available?

25          Senator Cornyn.    Mr. Chairman, I am ready whenever

1 you are.

2 The Chairman. Thank you, Senator. Senator Cornyn  
3 is recognized.

4 Senator Cornyn. Thank you very much, Mr. Chairman.  
5 Mr. Chairman, I would like to call up Cornyn  
6 amendment D-13.

7 The Chairman. D-13, okay.

8 Senator Cornyn. I ask that its modified version be  
9 distributed, which I understand it has at this time.

10 The Chairman. I am sorry. You say it is modified?

11 Senator Cornyn. Yes.

12 The Chairman. Okay. I understand it is a very  
13 simple modification, is that correct, to D-13? I do not  
14 have the modification--oh, here it is. Now I have it.  
15 Thank you.

16 Senator Cornyn. Mr. Chairman, the modification  
17 just makes it clear that this does not preempt State tort  
18 law.

19 The Chairman. Okay.

20 Senator Cornyn. Mr. Chairman, as many of us have  
21 discussed, including the President of the United States,  
22 when you talk about reforming our health care system, it  
23 has to include a component of medical liability reform.  
24 We know that the practice of defensive adds, by some  
25 estimates, up to 9 percent to our health care bills as a



1 country. And at the same time we recognize the  
2 importance of maintaining an open door at the courthouse  
3 so that people who are legitimately victimized by the  
4 negligence of a health care provider can be compensated.

5 But we also know that frivolous litigation, abusive  
6 litigation, can cause physicians to practice defense  
7 medicine. These excesses increase insurance premiums for  
8 physicians and, as I said, encourage the practice of  
9 defensive medicine.

10 To ward against these excesses, 27 States have  
11 followed the lead of my State, Texas, in capping  
12 allowable total non-economic malpractice damages. And,  
13 of course, among these States there is no red or blue  
14 divide. Texas, Florida, Mississippi--all sensibly cap  
15 non-economic malpractice damages at \$750,000.  
16 California, Michigan, and Massachusetts each cap such  
17 damages at \$500,000 or less.

18 Recognizing the need to reform our medical  
19 malpractice laws nationwide and to follow the lead of a  
20 majority of the States, I propose to amend the  
21 Chairman's mark to encourage all States to adopt a total  
22 non-economic damage cap in medical malpractice of \$1  
23 million or less. You will note that is higher than the  
24 States I just mentioned. Because the \$1 million cap is  
25 higher than almost any States' current cap, it allows

1 States to craft their own damage limits while restraining  
2 the most excessive damage awards.

3 Nothing, as I indicated earlier, in this amendment  
4 would preempt any State law that already provides for a  
5 total cap of less than \$1 million. I believe that total  
6 caps of less than \$1 million, such as the \$750,000 cap in  
7 Texas, are effective and fair. But at minimum, States  
8 should limit total non-economic malpractice damages at \$1  
9 million.

10 When wrongs are committed, compensation should be  
11 paid to those who are harmed. But we need to rein in the  
12 runaway jury awards and opportunistic litigants who  
13 currently are abusing our judicial system at the cost of  
14 all of us.

15 Mr. Chairman, as we all know, the Federal Government  
16 in one form or another pays, the American taxpayer pays  
17 about half of our health care in this country directly,  
18 and so many Senators may wonder why are we making a  
19 Federal case out of what has heretofore been dealt with  
20 at the statewide level. I believe this kind of  
21 amendment, which, again, does not preempt State law but  
22 certainly provides incentives to States to adopt sensible  
23 caps, will have the impact of bringing down medical  
24 liability premiums. In my State, it has been somewhere  
25 on the order of 30 percent.

1           It has also had the beneficial outcome of actually  
2 encouraging more physicians to move to our State since  
3 they feel like they have more predictability, more  
4 certainty, and certainly the cost of their medical  
5 liability insurance is lower. So that has had the  
6 beneficial impact of increasing access to health care  
7 because, as we know, having coverage is one thing, but  
8 having access to a physician who will actually see you  
9 and treat you is something altogether different.

10           So for all those reasons, I would ask my colleagues  
11 to support the amendment, which I believe will have a  
12 number of beneficial effects. Thank you.

13           The Chairman. You bet.

14           Senator Bingaman, do you wish to be recognized?

15           Senator Bingaman. Yes, Mr. Chairman. I just had a  
16 question. I guess the Senator has described his  
17 amendment as privilege incentives to States to enact  
18 these laws. The way I read what has been passed out, it  
19 says that if you get Medicaid, you shall enact this  
20 limitation. So I assume that the inverse of that is that  
21 if you do not enact this limitation, you no longer get  
22 Medicaid. Is that what the Senator intends?

23           Senator Cornyn. Maybe I should rephrase it. It  
24 does place a \$1 million cap on non-economic damages, and  
25 it provides an incentive for the States to adopt those

1 kinds of caps. It is similar to other ways the Federal  
2 Government provides an inducement. For example, I am  
3 thinking of adopting a driving age at 21 or the like in--

4 Senator Bingaman. Well, the way we did that is  
5 withhold highway funds.

6 Senator Cornyn. Right.

7 Senator Bingaman. But here you are saying that the  
8 States' ability to obtain Federal Medicaid funds would be  
9 terminated if the State did not enact this law?

10 Senator Cornyn. Well, my expectation is that they  
11 would, the Federal Government would enact the \$1 million  
12 cap. The States are free to adopt a cap lower than that  
13 if they wish.

14 Senator Bingaman. Well, I did not read it that  
15 way. It says, "Any State that receives funding under  
16 Medicaid shall enact a limit against doctors"--a limit  
17 against on total economic--non-economic damages against  
18 all doctors and health care facilities of \$1 million or  
19 less. We are telling the States each State has to enact  
20 a law of this type, and if they do not, then they no  
21 longer receive Medicaid. Is that the gist of the  
22 amendment?

23 Senator Cornyn. My expectation, Senator Bingaman,  
24 is that all of them will once they see this--

25 Senator Bingaman. When they see that kind of

1 hammer. That is a pretty good hammer, I would say.

2 Senator Cornyn. We want it to be effective.

3 Senator Bingaman. Well, Mr. Chairman, I could not  
4 support cutting of Medicaid to my State. Federal funding  
5 for Medicaid is pretty important to a lot of people in  
6 New Mexico, and I would not want to say to our State  
7 legislature, "You do what Senator Cornyn says or you get  
8 no Medicaid money." That would be a difficult vote for  
9 me to explain back in New Mexico.

10 Senator Cornyn. Well, Mr. Chairman, if I could  
11 respond, I certainly would not presume that Senator  
12 Bingaman's constituents would do anything because of what  
13 I said. I am asking for the support of the majority of  
14 the Committee and the majority of the Senate to do what I  
15 think will help increase access to quality health care,  
16 will help health care providers manage what are  
17 frequently medical malpractice liability costs, and I  
18 think bring a little bit of sense to what is the practice  
19 of defensive medicine, one that has increased health care  
20 costs, by some estimates, as much as 9 percent. So to  
21 me, that is why I think it makes good sense and why I  
22 would encourage all of our colleagues to support it.

23 The Chairman. Let me say I am somewhat sympathetic  
24 to legislate in this area, but I do believe, as Senator  
25 Bingaman has pointed out, that the hammer here is a

1 little bit too heavy. It is too much of a bludgeon. And  
2 I do wonder what the enforcement mechanism would be here  
3 if States were to fail to enact these measures that the  
4 Senator is suggesting in his amendment.

5 I think having these actions contingent on Medicaid  
6 is too heavy a price to pay for not enacting them; that  
7 is, it is not appropriate that the penalty is  
8 disproportionate to what is intended here. But that is  
9 on the substance. Frankly--

10 Senator Cornyn. Mr. Chairman, I--

11 The Chairman. Frankly, even though in this  
12 amendment you tried to base this provision on Medicaid,  
13 the basic gravamen, that is, essentially this is a tort  
14 reform amendment. It is essentially a medical  
15 malpractice amendment, just looking at it in its totality  
16 and its whole, and this Committee clearly does not have  
17 jurisdiction over tort reform, and I would have to rule  
18 this amendment out of order, consequently. And if the  
19 Senator wants a vote on overriding, that certainly is his  
20 prerogative, but this essentially is a tort reform that  
21 the Committee does not have jurisdiction over tort  
22 reform; therefore, it is not germane; therefore, it is  
23 out of order.

24 Senator Cornyn. Mr. Chairman, I would ask to  
25 appeal the ruling of the Chair and have a roll call vote

1 on that. But may I say that we have tried to figure  
2 through the Medicaid angle or hook some way to address  
3 this in a perhaps less direct way than just the Federal  
4 Government passing a law preempting State tort laws. We  
5 could do that and remove the Medicaid hook and just say  
6 impose as a matter of Federal law, which, of course,  
7 preempts State law, that the cap shall be thus-and-so.  
8 But I would also be willing to modify it if it helps to  
9 see if there is some other incentives we can get to deal  
10 with this practice of defensive medicine and frivolous  
11 litigation which has a health care cost, I would be glad  
12 to do that.

13 The Chairman. Sure. Let's revisit this issue  
14 during the next hour, hour and a half. A quorum is not  
15 present, so we cannot do business anyway, and I cannot  
16 rule it out of order because that would be doing  
17 business. Right now we could not have an override vote  
18 because that would be doing business.

19 If Senators wish to make more statements and  
20 persuade us when we come back to take a certain action,  
21 that is certainly permissible. But we cannot do  
22 business, that is, take action at this time.

23 Senator Cornyn. I will try to think of persuasive  
24 arguments, Mr. Chairman.

25 The Chairman. All right. You are free to continue

1 if you wish.

2 Senator Cornyn. I would be glad to try when we  
3 have a quorum, and so hopefully I can convince some  
4 members of the Committee. Thank you.

5 The Chairman. Do other Senators wish to speak to  
6 the amendments that they will be offering later? All  
7 right. A quorum--the presence is dwindling.

8 Senator Bingaman. Since we cannot do business, I  
9 suggest we eat supper.

10 The Chairman. All right. Is there a motion to eat  
11 supper?

12 [Laughter.]

13 Senator Bingaman. I so move.

14 The Chairman. Okay. The Committee stands in  
15 recess until 8 o'clock.

16 [Whereupon, at 6:30 p.m. the meeting was recessed.]

17

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1 AFTER RECESS

2 [8:15]

3 The Chairman. Committee will come to order. When  
4 we recessed, Senator Cornyn's amendment was pending.  
5 Senator Ensign has a similar amendment which he would  
6 like to offer. I just discussed the issue with Senator  
7 Cornyn and Ensign. They both agreed that Senator Ensign  
8 should go first and that is what we will do. Senator  
9 Ensign?

10 Senator Ensign. Thank you and I want to thank my  
11 good friend from Texas for the consideration as well. We  
12 have similar amendments in that they do address medical  
13 liability reform, actually paying honor to your state  
14 because the State of Texas has done such a great job with  
15 medical liability reform.

16 Just for colleagues who were not around earlier, I  
17 will just summarize very briefly because there are  
18 similar issues as my previous amendment that was ruled  
19 non germane. I fully believe that this one should be  
20 ruled germane, and I will make a defense of germaneness  
21 in just a moment.

22 I am sorry. Do you have your amendments in front of  
23 us, Senator? It was passed out previously, D4 as  
24 modified.

25 The Chairman. D4 as modified.

1           Senator Ensign.    D4 as modified.  This is the one  
2           with the medical liability with the FMAP tie in.

3           Senator Bingaman.   Mr. Chairman, I do not have it  
4           here.

5           The Chairman.    I do not either.

6           Senator Bingaman.   If someone has got a copy that I  
7           could get, that would be great.

8           The Chairman.    Can we get copies.  Senator?  Do you  
9           have more copies of the amendment?

10          Senator Ensign.   While they are passing that out, I  
11          will just describe the amendment very briefly.  It models  
12          medical liability reform after the Texas law.  Earlier  
13          this evening, I talked about how Texas has had a very  
14          successful medical liability reform law.

15          It has gotten rid of a lot of the junk lawsuits in  
16          Texas.  It has freed up the court systems and it has also  
17          held state constitutional muster in Texas.  They have  
18          attracted a lot of doctors to Texas.  Medical liability  
19          insurance rates have gone down dramatically in Texas.  A  
20          lot of doctors want to go in practice there and leave  
21          states that have a lot of frivolous lawsuits.

22          The impact has been fairly dramatic.  Texas is just  
23          one of the examples.  I think it is one of the better  
24          examples out there and the reason that we modeled our  
25          legislation after Texas.

1           Now, our tie in and why we believe this is germane  
2           is we said in order to encourage the states to enact  
3           comprehensive medical liability reform, that we provide  
4           the states with generous financial incentives. Under my  
5           amendment, any state that enacts the medical liability  
6           reform provisions I previously described will be eligible  
7           for a federal medical assistance percentage for two years  
8           for children.

9           The FMAP increase would be paid for by reducing the  
10          federal poverty level thresholds for tax credits in the  
11          bill by the amount necessary if needed.

12          Now, I believe that first of all that medical  
13          liability reform will save money for the federal  
14          government and it shouldn't be needed in the first place,  
15          but in case it is needed, that is our offset.

16          Why do I say that this should be germane after my  
17          last amendment was ruled not germane? I have several  
18          points to make. One is in the Deficit Reduction Act of  
19          2005, Section 6031 provides states with a Medicaid FMAP  
20          incentive to pay the False Claims Act legislation. This  
21          provision gave states an extra 10 percent in FMAP funds  
22          for any claims recovered through qualified state false  
23          claims acts.

24          Let me be clear. The state False Claims Act is not  
25          limited to health care issues and the False Claims Act is

1 not in the jurisdiction of the Finance Committee. It is  
2 in the jurisdiction of the Judiciary Committee just like  
3 normally the medical liability would be in the  
4 jurisdiction of the Judiciary Committee as well.

5 The state False Claims Act could be applied to any  
6 matter of fraud that occurred in a state. So in that  
7 sense, the Deficit Reduction Act used the state Medicaid  
8 program as an incentive to create far broader change than  
9 is in the amendments on the medical liability being  
10 considered tonight.

11 I would also direct the committee's attention to  
12 Section 6035 of the same Act. The provision is related  
13 to enhancing third party identification and payment in  
14 Medicaid. This provision requires states to pass laws to  
15 require insurers and other third party payers to turn  
16 data over to the state so that the state can check to see  
17 if other parties should pay claims before the state  
18 Medicaid program.

19 This is a very important provision that enhanced  
20 states' ability to protect Medicaid programs from  
21 wasteful spending. That provision is also consistent  
22 with the amendment being offered tonight.

23 I would also point out that the provision in DRA  
24 Section 1902A25I is based on Section 1902A258 of the  
25 statute. That provision of the law also requires the

1 state Medicaid program to pass certain laws related to  
2 subrogation.

3 That provision of law was enacted in 1993 Public Law  
4 103-66. As I recall in 1993, the Democrats held the  
5 White House, the Senate and the House. So this mechanism  
6 has been used when Republicans and Democrats were in  
7 charge. While I appreciate the Chairman's concern, I  
8 think he needs to be careful with the precedent that he  
9 may be setting tonight.

10 I came up with these examples in the statute in  
11 about an hour's research and I am fairly certain that in  
12 the hundreds of pages in the Medicaid statute there are  
13 many more examples of states being required or  
14 incentivized to take certain actions through Medicaid. I  
15 imagine others were also done under Democrat control of  
16 the Congress and were considered good policy at the time.

17 So I think the Chairman should move cautiously as  
18 this ruling may come back to haunt the committee.

19 Given the two percents I was able to dig up quickly  
20 for you, Mr. Chairman, using Medicaid as an incentive or  
21 as a condition of medical liability reform, a subject  
22 which undeniably has an impact on health care costs in  
23 the state, our amendments are in the jurisdiction of this  
24 committee and consistent with recent precedent of the  
25 committee.

1           Defeat them if you feel you must, but do not weaken  
2 the precedent of the committee by ruling them non  
3 germane. Then I also think that we should adopt the  
4 amendment.

5           The Chairman. Good try. I might say -- go ahead.

6           Senator Bingaman. If you want to go ahead, Mr.  
7 Chairman, I had some points I wanted to clarify.

8           The Chairman. Okay. I will let you do so, but  
9 first I appreciate your efforts, Senator. I commend you  
10 for your efforts to find other matters tied to Medicaid  
11 that is not precisely the jurisdiction of this committee,  
12 but as I look at your amendment, still taken as a whole.

13           The gravamen of your amendment is still med mal. It  
14 is not in this committee's jurisdiction and I feel  
15 constrained. Therefore --

16           Senator Ensign. Mr. Chairman, as far as the rule -  
17 --

18           The Chairman. Therefore, it is out of order.

19           Senator Ensign. As far as the ruling is concerned,  
20 the two issues that I pointed out, the basis, the  
21 majority of those two provisions were not in the  
22 jurisdiction of this committee.

23           The Chairman. I have not seen those. I am only  
24 basing my decision upon what I see, the amendment that I  
25 see. Just looking at this amendment, the amendment

1 clearly is med mal. It is tort reform. We do not have  
2 jurisdiction, so I have reached my conclusion.  
3 Senator Bingaman sought recognition.

4 Senator Bingaman. Mr. Chairman, let me just ask  
5 something here. Maybe I could ask Mr. Barthold with  
6 joint tax if he could clarify this. The offset that you  
7 identified, Senator Ensign, you say the F map increase  
8 would be paid for by reducing the federal poverty level  
9 threshold for tax credits in the bill by the amount  
10 necessary.

11 I must be confused. I thought if you reduced the  
12 federal poverty level threshold for tax credits, you lost  
13 money instead of raising money.

14 Mr. Barthold. Senator Ensign may want to clarify,  
15 but I think his intent was to have the --

16 Senator Bingaman. I think you are correct.

17 Mr. Barthold. -- a lower level.

18 Senator Ensign. I think you are correct and it  
19 needed to be stated the other way around.

20 Senator Bingaman. So you would raise the federal  
21 poverty level?

22 Senator Ensign. It does not matter. He already  
23 ruled it out of order.

24 Mr. Barthold. Instead of phasing out at 300  
25 percent of poverty level or 400 percent of poverty level,

1 he would carve it back so that it was fully phased out by  
2 250 or 275 or whatever the necessary amount was.

3 So by phasing it out sooner, there would be fewer  
4 people who would qualify for at least a partial subsidy  
5 and that would provide an offset. I believe that was  
6 Senator Ensign's intention.

7 The Chairman. Okay. Does the Senator seek a vote  
8 to overrule? I assume that everyone wants a roll call  
9 vote. Okay. The clerk will call the roll. To appeal  
10 the ruling of the Chair, those that vote no will stand.  
11 Those that vote aye will be overruled -- Chair. The  
12 clerk will call the roll.

13 The Clerk. Mr. Rockefeller?

14 Senator Rockefeller. No.

15 The Clerk. Mr. Conrad?

16 Senator Conrad. No.

17 The Clerk. Mr. Bingaman?

18 Senator Bingaman. No.

19 The Clerk. Mrs. Lincoln?

20 Senator Lincoln. No.

21 The Clerk. Mr. Wyden?

22 Senator Wyden. No.

23 The Clerk. Mr. Schumer?

24 Senator Schumer. No.

25 The Clerk. Ms. Stabenow?



1           Senator Stabenow.   No.

2           The Clerk.    Mr. Nelson?

3           Senator Nelson.    No.

4           The Clerk.    Mr. Menendez?

5           Senator Menendez.   No.

6           The Clerk.    Mr. Grassley?

7           Senator Grassley.   Aye.

8           The Clerk.    Ms. Snowe?

9           Senator Snowe.    Aye.

10          The Clerk.    Mr. Kyl?

11          Senator Kyl.    Aye.

12          The Clerk.    Mr. Bunning?

13          Senator Bunning.   Aye.

14          The Clerk.    Mr. Ensign?

15          Senator Ensign.   Aye.

16          The Clerk.    Mr. Cornyn?

17          Senator Cornyn.   Aye.

18          The Clerk.    Mr. Chairman?

19          The Chairman.   No.

20          The Clerk.    Mr. Chairman, the final tally is six

21          ayes, ten nays.

22          The Chairman.   Two-thirds of members present not

23          having voted affirmative, the motion to overrule the

24          Chair fails.   Any further amendments?  Oh, that's right.

25          Senator Cornyn.   I'm sorry.

1           Senator Cornyn.    Thank you, Mr. Chairman.  Let me  
2           just briefly reintroduce the Cornyn Amendment D13.  This  
3           amendment would mandate that any state receiving funds  
4           under Medicaid must limit total economic damages in a  
5           medical malpractice case to \$1 million or less.

6           Mandating such a nationwide cap on non-economic  
7           damages would reduce health care costs and improve  
8           patient access to medicine by discouraging the practice  
9           or de-incentivizing the practice of defensive medicine.

10          A majority of state including my state already have  
11          adopted such caps and their success has proved that a  
12          federally mandated cap is necessary.

13          Excesses of \$750,000 cap on economic damages has  
14          resulted in dramatic benefits.  As the New York Times  
15          reported, new doctors swelled the ranks of specialists of  
16          Texas hospitals and brought professional health care to  
17          some long under served rural areas.

18          Overall, Texas has experienced a 31 percent  
19          physician growth rate in under served areas like El Paso.  
20          The growth rate has been as high as 76 percent.  The cap  
21          has also helped lower malpractice insurance premiums by  
22          an average of 27 percent.

23          This amendment would extend to all states the  
24          benefits gained in Texas an 27 other states from non-  
25          economic damage caps.

1           For those states like Texas with caps lower than a  
2 million, it would have no effect. Those existing caps  
3 would remain. For states without caps, it would mandate  
4 the adoption of a non-economic malpractice damage cap of  
5 a million dollars or less.

6           As I said, in my state we have seen the benefits of  
7 this. Physician malpractice premiums before that had  
8 doubled the number of physician liability. Insurers had  
9 dropped from 17 to 4. Many doctors had left the state or  
10 limited the procedures they were willing to perform.

11           These increases in costs and reductions in service  
12 left many Texans, especially those in rural areas in need  
13 of specialist care without affordable access to health  
14 providers.

15           So responding to the problem, the Texas legislature  
16 has stepped up with the kind of non-economic caps that I  
17 am talking about. In addition, it required that juries  
18 unanimously approve punitive damage claims, imposed a  
19 stricter statute of limitations and set higher standards  
20 for expert witnesses. So it has had a dramatic impact.

21           Earlier I would like to clarify one of my exchanges  
22 with Senator Bingaman earlier. Senator Bingaman asked  
23 about an incentive payment in my amendment and argued  
24 that the amendment would affect his states or a state  
25 non-compliant state's Medicaid funding. I want to make

1 clear that my language in the amendment does not actually  
2 speak to an incentive payment and would never result in  
3 cutting Medicaid.

4 The enforcement mechanism is simple. It makes a  
5 federal law that states receiving Medicaid funds shall  
6 enact a liability cap. If the state receives Medicaid  
7 funds but refuses to enact such a cap, the cap would  
8 thereby be imposed by the federal government by this  
9 Congress at a million dollars.

10 So to clarify, and I apologize for any lack of  
11 clarity in my earlier response, this would not in any  
12 circumstance result in a Medicaid cut or an incentive  
13 payment to the states. It would, as I say, if the state  
14 declined to act, it would, the cap would be imposed by  
15 Congress.

16 I would just incorporate by reference Senator  
17 Ensign's comments about how this committee in the past,  
18 there is well established precedent both under Democrats  
19 and Republicans to use Medicaid as a jurisdictional hook  
20 for the Finance Committee to act in this area.

21 The Chairman. Thank you, Senator. This is a  
22 worthy discussion, medical malpractice. Seriously, I  
23 think I probably speak for many members of this  
24 committee. I heard a lot of people over the break raise  
25 this with me, a lot. More than I would have expected

1 frankly. Frankly from my perspective, the more one looks  
2 at it, analyzes it, the more one realizes we need to act  
3 in this area.

4 I do not know exactly what to do, but we need to  
5 act. I have seen all kinds of studies to which doctors  
6 practice defensive medicine. It is hard to know exactly  
7 how much defensive medicine is practiced because all of  
8 the surveys are based, they are self-reporting docs and  
9 what might be defensive medicine for one doctor might be  
10 just more caution by another.

11 I have seen studies as high as 20 percent of health  
12 care costs because of defensive medicine in this country  
13 because we do not have tort reform. On the other hand,  
14 and I may be wrong in this, the last CBO report I saw on  
15 this, as I recall, was about 2/10 of a percent of health  
16 care costs according to CBO is due to defensive medicine.

17 Now, that is a very good debate and we need to have  
18 some place to discuss it to try to find the correct  
19 answer to it. But unfortunately this committee does not  
20 have jurisdiction to address that. We discussed this  
21 many times tonight. I think the proper place is on the  
22 floor of the Senate. I am sure there will be many  
23 amendments on the floor and they will deal with this  
24 issue. It will be a good debate.

25 Senator Ensign. Mr. Chairman, can I ask you a

1 question?

2 The Chairman. Sure.

3 Senator Ensign. If the argument that you are  
4 making that basically we do not have the jurisdiction  
5 over the committee because we are trying to change laws,  
6 you know, state laws basically that would be more the  
7 jurisdiction of the Judiciary Committee and we are using  
8 Medicaid.

9 Is this bill, the underlying premise in this bill  
10 that for Medicaid laws, we are making states change their  
11 laws, their coverage laws? Aren't we doing that? And so  
12 why would not most of the coverage rules in this bill,  
13 underlying bill, be out of the jurisdiction and only in  
14 the jurisdiction of the Help Committee and not in the  
15 jurisdiction of this committee?

16 The Chairman. Well, Medicaid is exclusively the  
17 jurisdiction of the Finance Committee. The HELP  
18 Committee does not have jurisdiction over Medicaid, for  
19 example, even though they legislate in the area to some  
20 degree. And frankly --

21 Senator Ensign. No, but I am talking about  
22 changing the rules requiring state laws on coverage.

23 The Chairman. We are. But that is under Medicaid.

24 Senator Ensign. No, not just Medicaid. Requiring  
25 state laws change laws on a lot of things on coverage.

1 On certain minimum plans, exchanges. All those coverage  
2 things are state laws.

3 The Chairman. That is true, but the main point is,  
4 the main point is that the thrust of your amendment is  
5 med mal. This committee does not have jurisdiction on  
6 medical malpractice. That is the trust. That is the  
7 totality. If you look at the --

8 Senator Ensign. How do we have jurisdiction over  
9 changing state laws on coverage? Outside of Medicare or  
10 Medicaid. Outside of Medicaid, how do we have --

11 The Chairman. There are conditions to participate  
12 in the exchange.

13 Senator Ensign. That is right.

14 The Chairman. For setting up an exchange.

15 Senator Ensign. These would be conditions to  
16 participate.

17 The Chairman. And exchange is essentially tax  
18 credits. Taxes aren't the jurisdiction of this  
19 committee.

20 Senator Ensign. Medicaid is the jurisdiction of  
21 this committee. We gave the hook.

22 The Chairman. Anyway, I have ruled. I looked at  
23 this totally honestly as a whole and we do not have  
24 jurisdiction.

25 Senator Cornyn. Mr. Chairman, may I ask a

1 question?

2 The Chairman. Certainly.

3 Senator Cornyn. I understand the ruling of the  
4 Chair, but I am feeling a little bit like Lucy and the  
5 football here when it comes to the President teeing this  
6 issue up before the American Medical Association in its  
7 joint sessions speech to Congress, if this is  
8 comprehensive health care reform and if this committee  
9 does not have jurisdiction of it, why cannot this bill or  
10 at least that portion of the bill be referred to the  
11 Judiciary Committee to report out that provision of it so  
12 that we can consider it on the floor?

13 The Chairman. Senator, with all due respect, I  
14 think you will find a much more receptive audience on the  
15 floor than you will in the Judiciary Committee. I  
16 suggest that your best shot is on the floor.

17 Senator Cornyn. Well, Mr. Chairman, serving on the  
18 Judiciary Committee, I think the Chairman is right.

19 The Chairman. All right. Does the Senator wish to  
20 -- we have done this a couple of times already.

21 Senator Cornyn. I would ask for a vote on  
22 overruling.

23 The Chairman. The clerk will call the roll.

24 The Clerk. Mr. Rockefeller?

25 Senator Rockefeller. No.



1           The Clerk.    Mr. Conrad?  
2           Senator Conrad.   No.  
3           The Clerk.    Mr. Bingaman?  
4           Senator Bingaman.   No.  
5           The Clerk.    Mrs. Lincoln?  
6           Senator Lincoln.   No.  
7           The Clerk.    Mr. Wyden?  
8           Senator Wyden.    No.  
9           The Clerk.    Mr. Schumer?  
10          Senator Schumer.    No.  
11          The Clerk.    Ms. Stabenow?  
12          Senator Stabenow.   No.  
13          The Clerk.    Mr. Nelson?  
14          Senator Nelson.    No.  
15          The Clerk.    Mr. Menendez?  
16          Senator Menendez.   No.  
17          The Clerk.    Mr. Carper?  
18          Senator Carper.    No.  
19          The Clerk.    Mr. Grassley?  
20          Senator Grassley.   Aye.  
21          The Clerk.    Ms. Snowe?  
22          Senator Snowe.    Aye.  
23          The Clerk.    Mr. Kyl?  
24          Senator Kyl.     Aye.  
25          The Clerk.    Mr. Bunning?

1 Senator Bunning. Aye.

2 The Clerk. Mr. Ensign?

3 Senator Ensign. Aye.

4 The Clerk. Mr. Cornyn?

5 Senator Cornyn. Aye.

6 The Clerk. Mr. Chairman?

7 The Chairman. No.

8 The Clerk. Mr. Chairman, the final tally is six  
9 ayes, 11 nays.

10 The Chairman. Two-thirds of the members present  
11 not having voted in the affirmative, the ruling of the  
12 Chair is sustained.

13 I now recognize the Senator from New York for  
14 purposes of offering an amendment. Oh, he is not ready.

15 Senator Kyl. In order to keep the process moving  
16 along and anticipating that you would rule an amendment  
17 Number C25 that I have not germane and since it deals  
18 with the same subject matter, would it be a capricious  
19 time for me to go ahead and bring this up now? I think  
20 we could save time.

21 The Chairman. Why cannot we just incorporate the  
22 last discussion by reference and just rule out of order  
23 and proceed?

24 Senator Kyl. That is a good question and let me  
25 provide an answer to it.

1           The Chairman.    Okay.

2           Senator Kyl.    I think you, I understand the ruling  
3 of the Chair. I think the American people might view it  
4 as formal resubstance, but the Senate has rules. One can  
5 disagree, but we all on this side I think appreciate the  
6 basis for your rule.

7           I think the point you made about action on the  
8 Senate floor is a worthy point. The Senator from Texas  
9 noted that the President had talked about this. My  
10 purpose for bringing the amendment that I have up right  
11 now for brief discussion here before the Chair rules is  
12 to make a couple of points about what we all ought to be  
13 considering about med mal reform in preparation for floor  
14 action.

15          It is in that spirit in trying to recognize what you  
16 have said and to move on that I would like to very  
17 briefly discuss this amendment.

18          The Chairman.    Senator, I appreciate it but I will  
19 rule out of order. In the interest of time, other  
20 Senators have amendments. I just urge you to be quite  
21 brief and quite short.

22          Senator Kyl.    I appreciate that. Thank you very  
23 much. And I just ask my colleagues to consider this  
24 because when we start talking about medical malpractice  
25 reform on the floor of the Senate, if in fact we do, I

1 think this is one of the best ideas. It is an idea that  
2 combines the reforms that Texas has done and the reforms  
3 that the state of Arizona has done.

4 I will not repeat what Senator Cornyn has said  
5 though I have some statistics. For example, the Texas  
6 Medical Board says that more than 10,000 doctors have  
7 either returned to the state or decided to move to Texas  
8 as a direct result of tort reform, and there are a lot of  
9 other --

10 Senator Rockefeller. But you are not going to  
11 repeat them.

12 Senator Kyl. Information, factual information that  
13 I am not going to repeat. Senator Cornyn did not make  
14 that particular point.

15 The point is that the Texas experiment has worked.  
16 They have had over five years now and the data are in.  
17 In the state of Arizona, we do not have as much data  
18 because the changes were made I believe in the year 2006.

19 But the essence of what Arizona did in 2006 is to  
20 make two changes that do not affect damages at all, but  
21 rather just the procedure that you follow when you file a  
22 malpractice claim and pursue it.

23 To summarize it very briefly, when you file your  
24 claim, you have got to have an expert witness whose  
25 credentials meet the statutory requirements. For

1 example, practicing in the very area of the alleged  
2 malpractice.

3 An expert that files an affidavit with the court  
4 confirming that in his expert opinion, malpractice was  
5 committed under the facts of this case in laying out some  
6 other details that then apprized the defense of what the  
7 suit is all about. It enables the court to better make  
8 an initial determination of the validity of the case, and  
9 frankly it has resulted in better settlements because  
10 plaintiffs in many cases have found that it isn't  
11 worthwhile to pursue the case.

12 Senator Conrad. Will the Senator yield just on  
13 that point?

14 Senator Cornyn. Yes. Sure.

15 Senator Conrad. I would just say in the group of  
16 six that I raise and that others did, I think the Senator  
17 from Maine did. I respect the state's experience. In my  
18 state we have a certificate of merit. It sounds like  
19 very much along the lines of what you described.

20 People back home tell me they think it has been  
21 quite effective in weeding out frivolous suits that do  
22 not have merit. The Senator from Maine said in our group  
23 that a similar program in her state has been extremely  
24 effective at weeding out frivolous suits, ones that have  
25 less merit.

1           So there is an area I think where there could be  
2 support on the floor.

3           Senator Kyl. I appreciate that comment and perhaps  
4 this is one area where a group of us might even sit down  
5 before the bill comes to the floor and see if we could  
6 work something out.

7           The other half of the Arizona provision says that  
8 when you have expert testimony to establish the standard  
9 of care in the case that was allegedly briefed, again,  
10 the expert witness has to be licensed in some state, it  
11 has to have specific specialty experience in the area of  
12 the alleged malpractice. You cannot have a pediatrician  
13 testifying about an oncologist's malpractice, for  
14 example, and a couple of other items that demonstrate to  
15 the court that this isn't just a person that has been  
16 hired by the plaintiff's lawyer in case after case after  
17 case, but a real expert in the area of the alleged  
18 malpractice.

19           According to James Carlin, who is the President and  
20 CEO of MIAC which is the Medical Associations Insurance  
21 Company, it is a self-insurance company in Arizona, that  
22 the enactment of these Arizona statutes have reduced  
23 meritless medical malpractice suits in Arizona. He notes  
24 that just in the first year they had a drop of about 30  
25 percent just in filings.

1           The premiums that were returned to MIAC participants  
2 were \$90 million in the first year in the form of  
3 dividends which mean that they got money back because  
4 there were not as many claims to file.

5           So Mr. Chairman, considering your admonition to try  
6 to be brief, the point here is that there are good ideas  
7 in the states and I believe it is important for the  
8 American people who view this who as you said believe  
9 medical malpractice must be a part of what we do to  
10 understand that we are going to tackle this problem even  
11 though we cannot do it here.

12           My last point is this. From a Price Waterhouse  
13 Cooper study a couple of years ago, \$.10 of every health  
14 care dollar spent is on malpractice premiums. From Mark  
15 McClellan who is a former Director of CMS, he had a  
16 partner whose name I do not recall. \$100 billion at  
17 least every year of defensive medicine practiced could be  
18 saved with good medical malpractice reform.

19           So when we talk about A, wanting to reduce the cost  
20 of health care and B, therefore making it more accessible  
21 to people, you can do this without costing a dime of the  
22 federal government or the state. In fact, you could buy  
23 insurance for the 12 million people who do not have it  
24 just with the money that may be able to be saved from  
25 this.

1           So Mr. Chairman, I would ask simply so that my  
2 colleagues will have this before them that I do offer the  
3 amendment and I would appeal to the Chair to get a vote  
4 on this. I will not ask that for three other variations  
5 of this that I was going to present.

6           The Chairman. Okay. Right. This amendment is  
7 primarily medical malpractice, not the jurisdiction of  
8 this committee. It is not germane. Therefore it is out  
9 of order. I believe the Senator said he wanted a vote.

10          Senator Kyl. Yes. And Mr. Chairman, can I just  
11 ask one other thing?

12          This is not a commitment that I know you can make  
13 tonight. But I would ask that the members of this  
14 committee appreciate the spirit in which this is done and  
15 agree to do their very best to ensure that votes on  
16 medical malpractice amendments will be permitted if and  
17 when a bill gets to the floor of the Senate and that  
18 members of either side of the aisle will support having  
19 votes on some of the proposals that we have discussed  
20 here this evening.

21          The Chairman. This is going to come up on the  
22 floor I am quite certain. Okay. The clerk will call the  
23 roll.

24          The Clerk. Mr. Rockefeller?

25          Senator Rockefeller. No.



1           The Clerk.    Mr. Conrad?  
2           Senator Conrad.   No.  
3           The Clerk.    Mr. Bingaman?  
4           Senator Bingaman.   No.  
5           The Clerk.    Mr. Wyden?  
6           Senator Wyden.    No.  
7           The Clerk.    Mr. Schumer?  
8           Senator Schumer.   No.  
9           The Clerk.    Ms. Stabenow?  
10          Senator Stabenow.   No.  
11          The Clerk.    Mr. Nelson?  
12          Senator Nelson.   No.  
13          The Clerk.    Mr. Menendez?  
14          Senator Menendez.   No.  
15          The Clerk.    Mr. Carper?  
16          Senator Carper.   No.  
17          The Clerk.    Mr. Grassley?  
18          Senator Grassley.   Aye.  
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?

1 Senator Bunning. Aye.

2 The Clerk. Mr. Ensign?

3 Senator Ensign. Aye.

4 The Clerk. Mr. Cornyn?

5 Senator Cornyn. Aye.

6 The Clerk. Mr. Chairman?

7 The Chairman. No.

8 The clerk will tally the vote.

9 The Clerk. Mr. Chairman, the final tally is seven  
10 ayes, ten nays.

11 The Chairman. Two-thirds members present not  
12 having voted in the affirmative, the ruling of the Chair  
13 is sustained. Now other amendments.

14 The only ones I am aware of at this point unless  
15 somebody -- offer an amendment is I have been advised --  
16 Senator Carper, do you have an amendment? Okay. Senator  
17 Carper, you are recognized.

18 Senator Carper. Medicaid D3s and on the first  
19 round of amendments near the bottom.

20 The Chairman. Okay. Just for the information of  
21 the Senators, Senator Carper's amendment is D3. It is  
22 near the bottom of the first round of amendment list.  
23 D3, Medicaid overpayments. First list.

24 Senator Carper. Mr. Chairman, colleagues, I chair  
25 a subcommittee on homeland security and government

1       affairs. It is a subcommittee that Tom Coburn and I have  
2       taken turns at chairing over the last several years.

3               One of the issues that he and I have focused on is  
4       improper payments. As you may know, under federal law,  
5       federal agencies are required to report to OMB each year  
6       their improper payments. This has been a requirement  
7       since the earlier part of this decade.

8               As it turns out, some of the agencies report the  
9       improper payments and some do not. Over the course of  
10      the last half dozen or so years, more federal agencies  
11      are beginning to report improper payments.

12              For the most part, over payments, some under  
13      payments, but for the most part, over payments. As of  
14      last year, improper payments reported collectively by  
15      agencies totaled \$72 billion. \$72 billion. That does  
16      not include Department of Defense, that does not include  
17      homeland security, that does not include the Medicare  
18      part D program. I do not believe it includes Medicaid.  
19      It does not include as I understand it, Medicare Part C.

20              Still it is \$72 billion. What we have found in the  
21      course of our hearings and investigation is that over the  
22      course of this decade, one, federal agencies are  
23      beginning to comply with the law, they are reporting  
24      their improper payments. Two, they are identifying their  
25      improper payments. Two, they are starting to report

1 their improper payments and three, a couple of them are  
2 actually starting to go out and recover over payments.

3 Those of you who serve on this committee that have  
4 been here for awhile may recall that a couple of years  
5 ago an effort was begun to begin recovering overpayment  
6 or improper payments in the Medicare program. I think  
7 Part A and Part B.

8 The first year or two they recovered almost nothing.

9 Last year they recovered about \$700 million from three  
10 states. Three states, \$700 million. Last year. We want  
11 to go forward and recover over payments, improper  
12 payments in some cases from five, other cases -- we want  
13 to do that in all 50 states, not just three, but all 50  
14 states. That is recognized in the Chairman's -- Medicaid  
15 part A and B, but also in C and D.

16 If we can recover \$700 million last year in just one  
17 portion of Medicare, we can do a whole lot better than  
18 that if you add in Part D and Part C. I believe we need  
19 to turn our attention to Medicaid and the improper  
20 payments that occur in Medicaid. Frankly, we just  
21 haven't addressed that yet.

22 The amendment they are offering here grows out of a  
23 hearing that we held earlier this year. One of our  
24 witnesses and the issue before us at the hearing was  
25 improper payments. The question is now that we have

1 identified improper payments, what are we doing to  
2 recover them?

3 We had the Medicaid director from the state of New  
4 York before us and the Medicaid director from the state  
5 of New York shared with us that they hadn't done a very  
6 good job of recovering improper payments there until  
7 fairly recently and he felt they were doing a much better  
8 job.

9 But he shared with us what I thought was an  
10 invaluable point, very valuable point. He said under  
11 current law if we, once we identify fraud in an over  
12 payment, if we identified fraud, we have to turn over  
13 whatever portion of federal dollars is involved within 60  
14 days. He says as it turns out in these fraud cases, a  
15 lot of them are fairly complex and we do not have the  
16 money to turn over within 60 days. We will not have the  
17 money within 160 days or 260 days. Some of these fraud  
18 cases take a fair time to flesh out, to identify and to  
19 be able to go out and get the money.

20 As a result, states turn a blind eye when they  
21 identify fraud in a lot of cases when they are going to  
22 have to fork out the money to the feds that they don't  
23 even have, they just turn a blind eye. They do not  
24 recover the money and frankly we do not recover the  
25 federal share either.

1           What this amendment does is a couple of fairly  
2 simple things. I think they are common sense. One is to  
3 say in response to that testimony, why do not we say that  
4 the states, and that is where fraud is involved. When  
5 fraud is involved, you have to turn the federal money  
6 over to us, the federal share over within 360 days. They  
7 basically have a year to do it.

8           We want the money but we want them to stop turning a  
9 blind eye to these investigations. We want them to get  
10 their money for themselves and we want to get our money,  
11 too.

12           The idea is does it make much sense to get 50  
13 percent of nothing or does it make sense to get 50  
14 percent of a whole lot more than nothing if they have the  
15 360 days or 365 days? I think it makes a whole lot more  
16 sense to wait the extra 300 days and get our share and  
17 for them to get their share.

18           It is a great incentive, Senator Rockefeller as a  
19 former Governor knows and we all know what states are  
20 going through with the Medicaid programs. If there is  
21 fraud, they need money to help support their programs.  
22 If they can recover more of the improper payments, that  
23 is a break for them, and frankly it is good for us, too.

24           It is good for us, too.

25           The Chairman.    Senator Conrad?

1           Senator Conrad.   Mr. Chairman, I think this is  
2 really an excellent amendment. I believe it because  
3 Secretary Levitt when he was the head of Health and Human  
4 Services came to see me about fraud and Medicare and told  
5 me about a number of undercover operations they had  
6 underway at the time and it really is shocking what they  
7 were finding.

8           I would support this amendment if it was nothing  
9 more than the second half. The offset, the expansion of  
10 recovery audit contracting because I believe there is a  
11 gold mine to be found there in going after fraudulent,  
12 incorrect and other forms of payments which the taxpayer  
13 of the United States is getting cheated. I believe it  
14 constitutes billions of dollars.

15           The Secretary came to me and asked for me to put in  
16 several hundreds of millions of dollars in the budget to  
17 go after these wrongdoers. We did. It paid enormous  
18 dividends, but there is much more to be found. Frankly,  
19 we are limited in what we can do in the budget and these  
20 recovery audit contracts have proved to be very, very  
21 productive.

22           So if the Senator's amendment was nothing more than  
23 the second half, I would support it. But he has put on  
24 the front end an inducement to the states to be  
25 interested in going after fraud as well because he is

1 exactly right. The states, I have had states tell me  
2 they were afraid to go after fraud because they would  
3 have to produce money before they received it. What a  
4 backward system that is. So I think the Senator has got  
5 a great amendment.

6 The Chairman. I would like to ask Mr. Schwartz to  
7 give us a summary of provisions in the market, help our  
8 fraud and abuse recovery systems. There is a lot in here  
9 that we are trying to do to help stop -- get some money  
10 out of these bad actors who are ripping off American  
11 taxpayers. What is in the bill?

12 Mr. Schwartz. The Chairman's mark contains a whole  
13 series of provisions related to improving program  
14 integrity.

15 To sort of just summarize, the first thing that the  
16 Chairman's mark does is recognize that programs, the  
17 Medicare and Medicaid programs today do not do a very  
18 good job of screening people when they come into the  
19 program. By people, I mean doctors, hospitals, ambulance  
20 providers, DME suppliers, anyone who can incur billing  
21 for either program. So the first step is to try to do a  
22 better job of checking out who is coming in.

23 The Chairman. Do we have some kind of estimate how  
24 much we could pick up? A savings with greater program  
25 integrity.



1           Mr. Schwarz. Well, I can tell you this. It was a  
2 lower number than we were hoping for, but it is broken  
3 out into a couple of categories by CBO. The first is  
4 increased revenue that is derived from a new provider  
5 application fee which would be charged to people,  
6 providers looking to join Medicare or Medicaid and I  
7 believe that is about \$2 billion of new revenue.

8           Then the savings that CBO scores us as achieving for  
9 the prevention and elimination of fraud compared to what  
10 they assume is in the baseline is about \$1.1 billion. So  
11 now we are at \$3.1. Then there is an additional what  
12 they call memorandum on the CBO table of what they call  
13 non scorable savings.

14           Years ago there was something called the health care  
15 abuse control account or HCFAC as we call it. HCFAC  
16 funding goes to CMS, the HHSOIG, the Department of  
17 Justice and the FBI under sort of a convoluted formula,  
18 but it is dedicated money to prevent health care fraud.

19           It is non-scorable savings of \$400 million. We give  
20 HCFAC in the mark \$100 million and just parenthetically I  
21 would reference that the OMB website actually credits  
22 HCFAC as having a 17:1 return on investment which is a  
23 number I think the members are very familiar with. So we  
24 are hoping that that .4 of non-scorable savings is  
25 actually significantly higher in real life.

1           The Chairman.   Okay.  Thank you very much.  I think  
2           frankly, Senator, you have a good amendment.  I am sure  
3           it must be very difficult for states.  They know they have  
4           overpaid, to try to cover from providers so they can make  
5           the overpayment back to the states.  I think your  
6           extension is appropriate.  It is not too long, 180 days  
7           makes sense to me.

8           Second, as the Senator from North Dakota has pointed  
9           out, we found some additional savings here to beef it up  
10          through the so-called recovery audit.  That is very good.  
11          I suggest that we take a voice vote in this amendment.  I  
12          support the amendment and I encourage all my colleagues  
13          to vote for it.  All those in favor, say aye.  Those  
14          opposed, no.  The ayes have it, the amendment is agreed  
15          to.  Thank you, Senator, very much.  Senator Grassley?

16          Senator Grassley.  This is amendment C9.  It says  
17          so right here.  I do not think it had to be modified.

18          The Chairman.  Good for you.

19          Senator Grassley.  The Chairman's mark requires  
20          states to expand coverage to cover all populations up to  
21          one hundred thirty three percent of federal poverty by  
22          the year 2014.  A very laudable goal.  But providing  
23          coverage in Medicaid as we all know doesn't automatically  
24          mean that people are going to get the care that the  
25          coverage would allow them.

1 Medicaid reimbursement rates and provider  
2 participation rates are very, very low compared to either  
3 private insurance or Medicaid. No, that is Medicare.  
4 Access to serious challenge. Access is a very serious  
5 challenge to Medicaid programs.

6 In 2014, states will be mandated to expand to cover  
7 adults that have never been covered under Medicaid  
8 before. States will get additional assistance for  
9 covering these adults. State will get on average a 90  
10 percent match from the federal government. Of course we  
11 know states are going to be thankful for that.

12 States are already at a breaking point, and so they  
13 should be thankful that this bill is only going to cost  
14 them an additional \$30 billion.

15 We are deluding ourselves though if we think that we  
16 are going to do anything in this bill to make Medicaid a  
17 better program for the people it serves. We are throwing  
18 just enough resources at state Medicaid programs to  
19 achieve certain coverage targets. But I ask you, are we  
20 guaranteeing Medicaid recipients access to providers? I  
21 think even during our talks on group of six, that was  
22 recognized as a very serious shortcoming.

23 The bill will likely make it worse on kids then.  
24 This bill provides a clear, undeniable financial  
25 incentive for states to cover adults. What does the bill

1 do to cover access for kids? What does the bill do to  
2 guarantee that providers will participate and treat kids?  
3 Nothing.

4 So, Mr. Chairman, my amendment requires states to  
5 raise reimbursement rates for Medicaid providers. This  
6 would include pediatricians, children's hospitals and  
7 dentists, providing care for an eligible child to 100  
8 percent of Medicare levels starting in 2014.

9 Let us be clear. Doctors are not going to get rich  
10 on Medicare rates. But at least they are more likely to  
11 participate because this low participation rate in the  
12 Medicaid program is a very serious social problem we  
13 have. It goes beyond a health problem to be a social  
14 problem.

15 We need to pay pediatricians to participate in  
16 Medicaid. We need to pay children's hospitals to  
17 participate in Medicaid. We need to pay dentists to  
18 participate in Medicaid. We are fortunate that so many  
19 providers feel a duty to provide services in Medicaid,  
20 but the dollars do matter.

21 So my amendment states we'll get a 100 percent match  
22 for the additional cost of reimbursing providers for two  
23 years, phasing back the regular matching rate by 2019.  
24 The additional cost of this provision is paid for by  
25 eliminating subsidy provided in the bill for people over

1 300 percent of poverty and lowering the overall subsidy  
2 amount to a sufficient amount to make up the difference.  
3 So the money then goes for the subsidy instead.

4 The choice of this amendment is really very simple.  
5 You can use this as an opportunity to guarantee access to  
6 the poorest kids in the country and all of you have to be  
7 willing to do so to reduce subsidies to people who make  
8 more money than the national median income.

9 Bottom line. Coverage without access is not an  
10 improvement on what we have today. I yield the floor.

11 The Chairman. Is there discussion on this  
12 amendment? Senator Stabenow?

13 Senator Stabenow. Mr. Chairman, I have a question  
14 I guess for the sponsor. Do I understand that you are  
15 lowering the subsidies for families, for individuals in  
16 the exchange?

17 Senator Grassley. Yes, from 400, whatever it is,  
18 down to 300.

19 Senator Stabenow. I would, Mr. Chairman, have a  
20 concern with that, but at the same time I am very  
21 sympathetic. In Michigan we have extremely low Medicaid  
22 rates for providers. It is very, very hard to find  
23 providers in the midst of an extremely challenging  
24 economy.

25 The state has had to cut Medicaid. So I certainly

1 am very supportive of raising the rates for providers.  
2 We have a difficult time of finding doctors that will  
3 serve people, but at the same time doing that in the  
4 context of lowering the tax credits for people that we  
5 are now saying would need to participate in the exchange  
6 and get insurance I think is the wrong tradeoff.

7 I am extremely sympathetic to what my friend is  
8 saying. I would be concerned about the way this is paid  
9 for.

10 Senator Grassley. Well, thank you for being  
11 sympathetic and it is a trade off. It would be 1/10<sup>th</sup> or  
12 \$40 billion of the subsidy for the exchange, and what you  
13 would be basically saying is people at higher income that  
14 have more ability to provide for their insurance anyway  
15 would be helping provide health care for kids that we  
16 have promised over a long period of time and we haven't  
17 delivered on that promise.

18 The Chairman. Senator Menendez?

19 Senator Menendez. Mr. Chairman, I appreciate what  
20 Senator Grassley is going to do, wants to do in ensuring  
21 that children have good access to health care is a worthy  
22 policy. It should not, however, come at the cost of  
23 eliminating premium credits to help moderate income  
24 people afford health insurance.

25 Now, the premium credits are important, especially

1 when we are creating a mandate here. The premium credits  
2 are important to ensuring that a requirement for people  
3 to have coverage does not place a harsh burden on  
4 moderate income people who otherwise could not afford to  
5 pay for health insurance.

6 If the amendment would be accepted, many people with  
7 incomes just above 300 percent of the poverty line would  
8 face difficulty paying the full price for coverage. The  
9 average job based insurance policy today would cost a  
10 family of three just above 300 percent of the poverty  
11 level, nearly one quarter of its pre-tax income. One  
12 quarter of its pre-tax income.

13 So many people who fall in that category, they also  
14 need help in achieving, affording health care.  
15 Otherwise, they could be faced with a difficult choice of  
16 having no health care and paying some of the basic  
17 necessities like housing and food.

18 So when we continue to go below, there is universe  
19 in this country, a very significant universe that find it  
20 equally as difficult because of the areas of the country  
21 in which they live to be able to afford that health  
22 insurance, and this is one of those.

23 Senator Rockefeller. Mr. Chairman?

24 The Chairman. Senator Rockefeller?

25 Senator Rockefeller. I share sort of a foreboding

1 about this amendment. I think what Senator Grassley has  
2 done is to pick out a particular section and we  
3 understand what he is saying, but for this reason that we  
4 created a Medicaid and CHIP payment and access commission  
5 last year which, or maybe this year which looks at the  
6 whole problem.

7 I am sort of like Senator Menendez, you know, it is  
8 very vague. When amendments are very vague, I get very  
9 nervous. I am not sure that we have to rob Peter here in  
10 order to pay Paul and I have a very uncomfortable feeling  
11 about it which I cannot substantiate enough except that I  
12 have enough worry that I am going to vote against it and  
13 hope that my colleagues will, too, even without the  
14 specificity of information other than what Senator  
15 Stabenow has told us as well as Senator Menendez.

16 We are dealing with a very big subject here.  
17 Senator Grassley is dealing with a small part of that  
18 subject and I think it is premature and it is the kind of  
19 thing I do not think we should be voting on now. That  
20 sounds defensive, but I look at this amendment and I feel  
21 extremely defensive.

22 The Chairman. I might say, Senator, we are being  
23 rushed here to make a judgment that can have I think some  
24 significant consequences. This is the first I have seen  
25 this amendment now. I think I can speak for my



1 colleagues saying it is pretty much the same for them,  
2 too.

3 I am advised that first of all there is a \$41  
4 billion cost to this amendment. I am advised that  
5 actually children that, CHIP children do better in  
6 Medicaid than to other populations in Medicaid.

7 Their benefits are good, they are good visits. I  
8 just do not know what data you have to back up the  
9 reasons for your amendment, but I am advised that  
10 actually kids in CHIP do pretty well -- better in  
11 Medicaid populations than in private health insurance,  
12 for example.

13 I might also say that I am a little concerned with  
14 the point that Senator Rockefeller made. We are robbing  
15 Peter to pay Paul here. Mainly we are taking away tax  
16 subsidies significantly from families -- as for the bulk  
17 of the money is above 3 percent.

18 So those kids in those families will be getting  
19 fewer tax credits while the shift here to, I guess to  
20 Medicaid kids I guess primarily. I think discretion is a  
21 better part of valor here and that we should direct a  
22 commission we set up called MACPAC which is the Medicaid  
23 and CHIP Payment and Access Commission to study -- that  
24 is agree to which low income kids are not getting the  
25 benefits that they should relative to children say in

1 private health plans.

2 My sense is CHIP kids do pretty well relative to  
3 children in private health plans. CHIP and Medicaid kids  
4 both. CHIP and Medicaid kids both do pretty well  
5 relative to children in private health plans. I would  
6 just urge us because we are moving so quickly on  
7 something we do not know a lot about that it is better to  
8 have that commission study this issue and report back to  
9 us within a year.

10 Senator Rockefeller. You know, someone comes up to  
11 me and I walk out of my house and they say be careful,  
12 the wind is blowing. That does not mean very much to me  
13 because it could be blowing a little bit or it could be  
14 blowing loaded with rain or sleet or it could just be  
15 bellowing like a howling tornado.

16 But just saying that the wind is blowing, that is  
17 sort of what I feel this amendment is like and I cannot  
18 support something I do not understand. So I would like  
19 one thing to get Mr. Schwartz to explain what this  
20 commission is set up to do. Go ahead.

21 Mr. Schwartz. Thank you, Senator Rockefeller. So  
22 the Medicaid Payment and CHIP Payment and Access  
23 Commission, or MACPAC as it is called, was created, as  
24 you pointed out, as part of the CHIP Reauthorization Act  
25 that was signed into law in February. As you well know,

1 one of the things it is charged with doing is reviewing  
2 all sorts of Medicaid and CHIP policies that --

3 The Chairman. Could I call to order here? There  
4 is a lot of side conversations going on here and I just  
5 think we would do better if we focus on one issue at a  
6 time. Right now we are discussing the question asked by  
7 the Senator from West Virginia which Mr. Schwartz is now  
8 answering. I just urge all of us to cease our private  
9 conversations so they can get their work done. Thank  
10 you.

11 Mr. Schwartz. Thank you, Mr. Chairman. It was set  
12 up to review all of the policies that exist at the state  
13 level and in the federal law for CHIP and for Medicaid  
14 that effect access to services, access to the programs  
15 and payments under both programs. It is modeled very  
16 loosely off of MedPAC, and I say loosely because the  
17 federal government doesn't set payment levels, so MedPAC  
18 is a payment advisory commission, so the title is  
19 different, the mission is a little different.

20 But it was set up to get at this very issue. I  
21 think Senator Grassley very correctly points out that  
22 payment levels are a big concern in Medicaid. It is  
23 something that has sort of come up periodically  
24 throughout the discussions about an increase in Medicaid  
25 eligibility levels.

1           I think it is important to note that we do not know  
2           how much they are off and which providers are worse off  
3           than others. The general consensus is that hospitals are  
4           paid pretty well in Medicaid and individual providers and  
5           specialty, pediatric specialists are paid less well, and  
6           so access to them is a little bit tougher. But then  
7           again it varies by state.

8           Some states actually exceed 100 percent of Medicaid  
9           rates across the board in their Medicare programs and  
10          some are woefully below. So to pick a target of 100  
11          percent of Medicaid rates sounds good and then it puts it  
12          on par with the other big federal program, but we  
13          actually will not know, until MACPAC gets up and running  
14          and is able to survey all 50 states, really what the  
15          right levels are.

16          I would also just add that under the Chairman's  
17          mark, the Medicaid expansion takes effect January 1<sup>st</sup> of  
18          2014. MACPAC's first report I believe under the  
19          Chairman's mark gets delayed to come out in 2010. So  
20          there is a fair amount of time between the creation and  
21          initial reporting period for MACPAC where they could  
22          weigh in with much more evidence than any of us have  
23          available today about payment levels in Medicaid.

24          Senator Rockefeller. Mr. Chairman, let me just  
25          close by saying that I get extremely sensitive when it

1 comes to how children are handled. This is what I call a  
2 very vague amendment. It may not be to the Senator from  
3 Iowa, but it is to me.

4 We have a problem here where amendments are coming  
5 in, sometimes you have less than 30 seconds to look at  
6 them, much less to try to understand them. I do not want  
7 to vote on something which I do not understand and I have  
8 a feeling a lot of people share that feeling. We have no  
9 business doing that.

10 Yes, we understand this is a rush process, but there  
11 are not so many amendments that we could , that something  
12 comes at us and we have to vote yes or no. On this one,  
13 I want to vote no because I do not know, I think I  
14 probably would vote no if I understood it better, but I  
15 certainly want to find out what the commission has to say  
16 and we have the time to do that. So I cannot possibly  
17 vote for this.

18 The Chairman. I might say too, on the surface I  
19 find it a bit bizarre. Medicaid payments for kids to  
20 Medicare. I do not know very many kids in Medicare. It  
21 just seems a bit bizarre. Maybe there is a good  
22 explanation, but I do not know why we would want to tie  
23 Medicaid rates for kids to Medicare which doesn't have a  
24 lot of kids. Unless they are pretty old kids. I just do  
25 not know. Senator Hatch?

1           Senator Hatch.    Yes.  Let me just ask a question.  
2    Couldn't MACPAC set payment levels for adults?

3           The Chairman.    I'm sorry, Senator.  Use the  
4    microphone, please.

5           Senator Hatch.    I am using it.

6           The Chairman.    Okay.  Thank you.

7           Senator Hatch.    Couldn't MACPAC set payment levels  
8    for adults instead of doing it in this bill?  The kids  
9    need it.

10          Mr. Schwartz.    I'm sorry, Senator Hatch.  Is there a  
11    question, could MACPAC set payment levels for adults in  
12    Medicaid?

13          Senator Hatch.    Right.

14          Mr. Schwartz.    I do not think that MACPAC, it is an  
15    advisory commission, sort of like MedPAC.  It does not  
16    actually have rate setting authority.

17          Senator Hatch.    Well, isn't the idea the same?  I  
18    mean, they could advise.

19          Mr. Schwartz.    I think that part of the concern is  
20    that because states vary so tremendously and the old  
21    saying, if you have seen one Medicaid program, you have  
22    seen one Medicaid program, that includes their provider  
23    payment rates.  States obviously get lobbied by different  
24    provider groups and are subject to different pressures to  
25    pay one provider group X and another Y.

1           So I think that taking averages can sometimes be  
2           deceiving whether they are high or low. But to get back  
3           to your original question, MACPAC's authority does apply  
4           consistent with the Chairman's mark for all Medicaid  
5           eligible beneficiaries, adults and children.

6           Senator Rockefeller. There are a lot of Governors  
7           around this country, and some of them would love to have  
8           this so that they could use the money for something else.  
9           I have seen that. I have seen states that do that. I  
10          know Governors who do that. That is part of my  
11          suspicion. You cannot fool with payment to kids and that  
12          is what I think we are doing here. Let us get the  
13          recommendations and do it right.

14          The Chairman. Senator Snowe?

15          Senator Snowe. Yes. Mr. Chairman, I would like to  
16          ask a question. Does the commission make recommendations  
17          to Congress regarding any policy changes?

18          Mr. Schwartz. MACPAC is authorized to make  
19          recommendations to both Congress and the state  
20          governments since both MACPAC Medicaid and CHIP are joint  
21          programs. So some things are within the federal  
22          government's province, some in the state's, so its  
23          authority goes to both.

24          Ms. Snowe. It reviews all of the provider payments?

25          Mr. Schwartz. Yes, and other policies. But yes,

1 provider payment.

2 Senator Grassley. Mr. Chairman? First of all, I  
3 do not want to think Senator Menendez that I give short  
4 shrift to what he said because I know he does have a high  
5 cost state.

6 But I think in terms of nationally, you know, 50  
7 percent of the families and workers are above 300 percent  
8 of poverty and that is where I have to shoot for  
9 something. When it comes to the comments that you made  
10 and Senator Rockefeller made, I would only say this.

11 I do not know how many times in the group of six we  
12 heard Senator Enzi always bring up, you know, you can do  
13 these things with Medicaid if you want to, but are you  
14 going to be able to deliver health care if you do not  
15 have access to it.

16 I never heard anybody take on Senator Enzi on that  
17 point. He has not said anything tonight, but I hope I am  
18 recollection from the many times that I think I heard you  
19 say that that we had to provide access to health care or  
20 what does all these promises under Medicaid do any good  
21 if we do not have it? That is what I am responding to  
22 here with this amendment, Mr. Chairman.

23 Senator Stabenow. Mr. Chairman?

24 The Chairman. Senator Stabenow?

25 Senator Stabenow. Mr. Chairman, again, I want to



1 just emphasize that certainly for us in Michigan,  
2 Medicaid rates are very serious. Medicaid is at 40  
3 percent of Medicare right now and it is extremely  
4 difficult to find providers. So I hope, Mr. Chairman,  
5 that we can work together with the distinguished ranking  
6 member on this question.

7 The unfortunate part of this amendment is that it  
8 pits providers for children against middle class families  
9 and that is just not a choice that I believe we should be  
10 making because I think we need to support middle class  
11 families who need health insurance and we also need to be  
12 addressing what is a very serious issue in terms of  
13 Medicaid.

14 So I would hope that we might just work together and  
15 see what we might be able to do.

16 The Chairman. Senator Enzi?

17 Senator Enzi. Mr. Chairman, I have been trying to  
18 get recognition here because I was going to make my  
19 statement before Senator Grassley did because the bill  
20 that we are looking at is going to force 11 million more  
21 people onto Medicaid. Right now 40 percent of the  
22 doctors will not see Medicaid patients.

23 If you cannot see a doctor, you do not have  
24 insurance. So we have got to do something and we have  
25 got to do it on the front end to make sure that people

1 can see a doctor. So I appreciate the Senator's  
2 amendment.

3 Senator Conrad. Mr. Chairman?

4 The Chairman. Senator Conrad?

5 Senator Conrad. Mr. Chairman, I remember those  
6 conversations very well as does Senator Grassley and  
7 Senator Enzi made this point repeatedly in our group and  
8 he is right to do it because it is a real issue and  
9 Senator Grassley is attempting in a good faith way to  
10 address it.

11 I do not think we have quite got the right pay for.  
12 I increasingly wonder if something that Senator Cantwell  
13 has been talking about does not need to be more fully  
14 reviewed in light of two things. One, the affordability  
15 issue that Senator Stabenow and others have repeatedly  
16 brought to our attention and this issue that Senator Enzi  
17 and now Senator Grassley have brought to our attention to  
18 find a less expensive way to give people coverage who are  
19 on the edge of Medicaid somewhere in that 100 to 200  
20 percent of poverty range there would be for those from  
21 133 to 200 percent of poverty who are going to the  
22 exchange which is a more expensive way to get them  
23 coverage than we might find in some alternative.

24 I know Senator Cantwell is working very hard on that  
25 and I think that might be a funding source to deal with a

1 couple of things. The affordability issue as well as  
2 this issue. Senator Enzi is right. Forty percent of  
3 doctors are not taking Medicaid patients and if we  
4 increase the number of people, we are going to run into  
5 issues of a lack of capacity, a lack of capacity.

6 We see it in Massachusetts already where they have  
7 expanded their coverage and because they have not had  
8 enough of an increase in primary care doctors, and I  
9 applaud the Chairman because in this mark there is a 10  
10 percent bonus every year for the next five years for  
11 those that go into primary care.

12 So I do think we have got some more work to do to  
13 have a rounded package.

14 The Chairman. I think that is probably true. One  
15 point that has not been brought out here is that states  
16 under the law set provider rates. We give the states  
17 broad authority to set provider rates, reimbursement  
18 rates. It is up to states primarily so long as it is  
19 fair basically and so forth.

20 So if states want to raise provider rates, they are  
21 certainly free to do so and they are able to do so and  
22 get the match, too, the federal match when they do so.  
23 So this 40 percent figure, Senator, I am not sure it is  
24 only 40 percent. My guess is that it is more than 40  
25 percent of doctors take Medicaid kids and CHIP kids. I

1       bet it is 100 percent.

2               But even if it is low, the states could increase the  
3 provider rates if they want to. That is up to states and  
4 they have the federal match when they do so.

5               So I just, this is a big area that needs work, I  
6 grant you. I think it is not right to adopt this at this  
7 time. Senator from Oregon?

8               Senator Wyden. I think Senator Enzi is making a  
9 very good point and I just want him to know that I intend  
10 to follow up with him specifically because we were able  
11 to significantly expand state's waiver authorities  
12 earlier today.

13              I think that the Senator from Wyoming over the years  
14 has made a number of good points with respect to making  
15 sure states had more flexibility. It is one of the  
16 reasons that I and others were involved in the state  
17 waiver provision. I think this is one way to very  
18 directly expand coverage as the Senator from Wyoming  
19 wants to do.

20              So we are going to stay at this and I want them to  
21 know that I think there is an opportunity to get done  
22 what he is interested in pursuing.

23              The Chairman. I just want to ask you, Senator  
24 Grassley, is there another way to get at this? It sounds  
25 like there is cohesion here. I just do not know if this

1 is the precise way to do it and I am afraid that --

2 Senator Grassley. Do you want to opt it off until  
3 tomorrow afternoon or something?

4 The Chairman. Let us try that. Let us see if  
5 there is another way to do it because I think you are  
6 raising a good issue.

7 Senator Grassley. Okay. But I think one thing I  
8 want to say in addition to what you said previously to  
9 recognizing Senator Wyden, you have got to remember  
10 everything you said is accurate, but we are loading the  
11 states down with \$33 billion additional mandate as a  
12 result of this legislation with what we are doing with  
13 adults.

14 So that is a consideration you have to take into.  
15 But if you think this can be worked out, we will put our  
16 staff on it and see what we can work out. I do not want  
17 to, I want to make sure we have plenty of time between  
18 now and the time you pass this bill out to get fair  
19 consideration of it.

20 The Chairman. And your goal is to make sure the  
21 kids get treatment under Medicaid. That is more than --  
22 is that the basic goal?

23 Senator Grassley. And I do not understand why  
24 Senator Rockefeller does not understand what I am trying  
25 to do here. It is pretty darn clear.

1           Senator Rockefeller. I am pretty nervous about it.  
2           When the wind blows, I do not know which direction it  
3           blows and how strong it blows.

4           Senator Grassley. And I would hope Senator Conrad  
5           would think in terms of how many people, kids in his  
6           state would benefit from an amendment like this and how  
7           many people between 300 and 400 percent of poverty are  
8           going to benefit from the bill the way it is written.

9           The Chairman. The amendment is withdrawn. We are  
10          going to work on it.

11          Senator Enzi. One quick comment. Incidentally that  
12          40 percent figure comes from MedPAC 2002. So I suspect  
13          it is a lot worse now.

14          The Chairman. Could be. Senator Schumer seeks  
15          recognition to offer an amendment.

16          Senator Schumer. Mr. Chairman, I call up my  
17          amendment D1, the affordable reimbursement equity act.  
18          Let me just explain it briefly.

19          We have broad agreement on this amendment and I want  
20          to thank all my colleagues and staff who helped to work  
21          out an acceptable compromise on the issue. Supporting  
22          this are Senators Enzi, Stabenow, Hatch, Menendez, Carper  
23          and Kerry.

24          Bottom line is biologics are life saving drugs.  
25          They represent the best of American innovation. But

1       there is currently no FDA approval pathway for the  
2       generic version of the biologics, but it is coming very  
3       soon.

4             Senator Bunning.   Excuse me, Senator.   Could we get  
5       a copy of the amendment?

6             Senator Schumer.   It is filed.   It is in the  
7       notebook because it is modified, yes.

8             Senator Bunning.   One of the big fat notebooks.  
9       Thank you.

10            Senator Schumer.   Yes.   It is Amendment D1.  
11       Anyway, so biologics are important.   We are coming up  
12       with generic biologics which obviously could save the  
13       government, private insurance money and there has been in  
14       the past a sort of anomaly of where a doctor prescribes  
15       the brand, the generic they get less money for  
16       prescribing it.

17            Doctors always get a fee, if it is \$10,000 say for  
18       the drug, they get a 4 percent fee for handling it,  
19       prescribing it.   It is the same thing if you prescribe  
20       the original drug or the generic.   But the fee if it is 4  
21       percent of \$20,000 versus 4 percent of \$10,000 say gives  
22       the doc a lean to not prescribe the biologic and cost  
23       money.   Here we allow the Secretary to set a fee that  
24       applies similarly to each.

25            As I said, whatever our views are on biologics and

1 generics, this amendment is supported just about by  
2 everyone because it saves money at no cost to the  
3 government. So I would ask that it be accepted.

4 The Chairman. Any discussion to the amendment? As  
5 I understand, Senator, you have talked to various groups  
6 about this amendment.

7 Senator Schumer. Various groups. Pharma supports  
8 it and the biogeneric people support it. Both sides.

9 The Chairman. All right. I think we can either  
10 accept it or voice it. It is your preference.

11 Senator Schumer. Let us voice it.

12 The Chairman. Okay. The amendment before us is  
13 offered by Senator from New York. All those in favor say  
14 aye. Those opposed, no. The ayes have it, the amendment  
15 is passed.

16 The next amendment on the list is by Senator Kyl but  
17 I see Senator Bingaman.

18 Senator Bingaman. Go ahead. I had one that  
19 related to coverage, but whenever you get to that point,  
20 Mr. Chairman.

21 The Chairman. Well, I just think if you are ready,  
22 let us go.

23 Senator Bingaman. Mr. Chairman, this is the  
24 amendment C7 that is also in the booklets here, in the  
25 notebooks.



1           This a very simple, straightforward amendment. It  
2 makes a relatively modest change in the Chairman's market  
3 to ensure that working Americans will have access to  
4 health insurance tax credits.

5           In the mark as it was modified by change, Senator  
6 Snowe urged employees who receive an offer of employer  
7 sponsored insurance will be eligible to come to the  
8 exchange to receive a health insurance tax credit if one  
9 of two things exists.

10           The offer does not meet a minimum creditable  
11 coverage standard or second, the offer is unaffordable.  
12 That is the premiums cost more than 10 percent of income.

13           That employee's income.

14           In such circumstances the employee is required to  
15 seek an affordability waiver from the state exchange and  
16 then is required to present the waiver to --

17           The Chairman. Could we quiet down a little bit? Go  
18 ahead, Senator Bingaman.

19           Senator Bingaman. Okay.

20           The Chairman. Thank you very much. We are going  
21 to coverage now. There may be a couple of delivery  
22 system amendments yet to be offered. That is fine. When  
23 the Senator has a way to offer them, that's better. But  
24 at this point -- go ahead with Senator Bingaman with  
25 coverage, so we are going ahead. Go ahead, Senator.

1           Senator Bingaman.    Okay.  In these circumstances,  
2           the employee is required to seek an affordability waiver  
3           from the state exchange and then that same employee is  
4           required to present that waiver to his or her employer.  
5           In turn, the employer is required to reimburse the  
6           federal government for the cost of any tax credit  
7           received by the employee up to a cap.

8           I am concerned that requiring an employee to submit  
9           a waiver directly to his or her employer may deter  
10          employees from seeking an affordability exception.  This  
11          amendment would strike the requirement that the employee  
12          submit the waiver to the employer and require instead  
13          that the exchange provide the waiver directly to the  
14          employer.

15          The Congressional Budget Office has provided a  
16          preliminary estimate that this amendment would have a  
17          negligible impact on the score of the bill.  I hope my  
18          colleagues will support this change.

19          The Chairman.    Senator, so I can get it straight  
20          here, who would present the --

21          Senator Bingaman.   Under the bill the way it now  
22          stands, the employee, if the employee wants to claim that  
23          coverage is unaffordable, the employee has to seek an  
24          affordability waiver from the state exchange and then  
25          present that waiver to the employer and the employer then

1 has to reimburse the federal government for the cost of  
2 any tax credits that were received by the employee up to  
3 a certain cap.

4 This change would say that the employee instead of  
5 submitting the waiver directly to the employer, we would  
6 say that the exchange would do that.

7 The Chairman. They would submit the information?

8 Senator Bingaman. Would go ahead and provide that  
9 to the employer and then the employer would have to  
10 reimburse the federal government.

11 The Chairman. All right. And your reason for that  
12 change?

13 Senator Bingaman. The reason is I think that  
14 requiring employees to go ahead and present this to their  
15 employers would likely cause, deter employees from  
16 actually going ahead and seeking this affordability  
17 exception which I think would be unfortunate.

18 The Chairman. Ms. Fontenot, do you see any  
19 technical problems with this? On the face of it I think  
20 it is probably a pretty good idea.

21 Ms. Fontenot. Yes. We were waiting to hear from  
22 CBO and they assure us that it is a negligible cost.

23 Senator Enzi. Mr. Chairman?

24 The Chairman. Yes, Senator Enzi?

25 Senator Enzi. I do not know how much it affects it

1 by having the waiver presented or not presented, but one  
2 of the problems with this kind of a situation is that the  
3 younger, healthier people are going to be the ones that  
4 are going to cash out of this and the sicker ones are  
5 going to be left with the employer which is going to  
6 drive up their affordability dramatically and would be  
7 the cause of it.

8 There has to be somewhere to make sure that there is  
9 an insurance adjustment or something because the  
10 employers are not going to be able to afford who is left  
11 and we are going to have a whole bunch more people  
12 dropped from the insurance.

13 The Chairman. I hear you, but that is a separate  
14 issue. That does not go to the amendment offered by the  
15 Senator from Mexico.

16 Senator Enzi. And whether you have to provide a  
17 waiver or not?

18 The Chairman. When a waiver is sought, the  
19 question, I will let the Senator explain his amendment,  
20 but that is, he is talking about a different issue.

21 Senator Bingaman. I think the employer still  
22 receives notice that the employee has dropped out of the  
23 program and sought this waiver and obtained this waiver.  
24 It is just that the employee would not have the  
25 responsibility of presenting this waiver to the employer.

1 The exchange would send it to the employer. That is the  
2 only change that my amendment would accomplish.

3 The problem that you identified exists today and  
4 still would even after this amendment.

5 The Chairman. Right. Any further

6 Senator Snowe. Mr. Chairman? I just would like to  
7 inquire of Senator Bingaman. Is there any estimate of  
8 the employer's assessment?

9 I understand the value of redistributing the burden  
10 in terms of demonstration of an individual being exempted  
11 under the waiver. But I am concerned about imposing any  
12 additional costs on the employer.

13 Senator Bingaman. I do not think this would, I  
14 mean, the way as I understand the way the bill now  
15 stands, the employer does have to reimburse the federal  
16 government for the cost of any tax credits received by an  
17 employee if the employee seeks and obtains one of these  
18 affordability waivers. We have already made that  
19 decision.

20 Senator Snowe. We already made that decision, but  
21 they do not have to pay the cost?

22 Senator Bingaman. The payer --

23 Senator Snowe. I understand that on the exemption.

24 But also in the fact of the individual having to  
25 present, to demonstrate its waiver to the employer.

1 Additional cost beyond the assessment.

2 Senator Bingaman. There is no additional cost.  
3 Now, the exchange just provides the waiver instead of the  
4 employee having to provide the waiver.

5 The Chairman. Is there any further discussion? If  
6 not, we will vote on the amendment. All those in favor  
7 signify by saying aye. Those opposed, no. The ayes have  
8 it, the amendment is passed. Moving onto the next  
9 amendment.

10 Senator Hatch. Mr. Chairman?

11 The Chairman. I am trying to go back and forth  
12 here. Senator Hatch, I understand you have an amendment  
13 on the first list, is that correct? Could you identify  
14 it, please?

15 Senator Hatch. It is Amendment Number D3, the  
16 American's Future Healthy Act of 2009.

17 The Chairman. D3.

18 Senator Hatch. D3. Let me just take a minute to  
19 explain the Hatch Kyl amendment. This amendment would  
20 replace the Medicare disproportionate share reductions  
21 contained in this bill with the Government Accountability  
22 office report to Congress on the insurance coverage  
23 levels in each state including the projected impact of  
24 the coverage provisions included in the Chairman's mark  
25 at the end of fiscal year 2018.

1           First, since I represent a state that depends  
2 heavily on both Medicare and Medicaid disproportionate  
3 share payment funding, and if we lose that funding it  
4 will affect both patients and providers, especially those  
5 living in rural areas.

6           Providers will no longer be able to care for the  
7 uninsured.

8           The Chairman. I am sorry, Senator. Is this a  
9 modified D3? Just so we have the same paper here.

10          Senator Hatch. Not that I know of.

11          The Chairman. Mine says modified. Hatch Amendment  
12 D3. I want to make sure we have the same amendment. Mine  
13 says modified at the top.

14          Senator Hatch. Well then we have the same  
15 amendment.

16          The Chairman. Okay.

17          Senator Hatch. Okay. As committee members know,  
18 Medicare disproportionate share payments are necessary to  
19 offset costs hospitals incur when providing care to low  
20 income individuals. The rationale of the policy  
21 contained in the Chairman's mark seems to be that if the  
22 expected coverage expansions in the bill come to  
23 fruition, disproportionate share payments become  
24 redundant expenditures.

25          Now, I understand the logic of the Chairman's mark

1       once it is fully implemented it will provide coverage to  
2       individuals who are currently uninsured. I still believe  
3       that it is going to be extremely difficult to achieve  
4       that goal and therefore reducing the state  
5       disproportionate share payment dollars is a big mistake.

6             It will have a tremendous impact on my home state of  
7       Utah and I think others as well. CBO estimates that the  
8       Medicare disproportionate share payments would be cut by  
9       \$23 billion over 10 years. With the exception of  
10      Wyoming, a state that receives no disproportionate share  
11      payment money, Utah is the lowest disproportionate share  
12      payment state in the country. In fact, my state receives  
13      so little disproportionate share payment funding that  
14      Utah has never had enough funding to offset the cost of  
15      providing care to the uninsured.

16            Caring for the uninsured creates a heavier burden on  
17      Utah hospitals because the state's disproportionate share  
18      payment is so low. If Utah disproportionate share  
19      payments are reduced, the impact would be serious if  
20      hospital margins, particularly in rural areas, are  
21      particularly thin. I suspect that Utah is not the only  
22      state that will be affected this way.

23            With respect to the Medicare disproportionate share  
24      payment cuts beginning no later than 2015 and continuing  
25      annually, the Secretary will make disproportionate share



1 payments equal to only 25 percent of the disproportionate  
2 share payments that would otherwise be made. An  
3 additional payment would be made to reflect continued  
4 uncompensated care costs.

5 Again, the Chairman's solution is a creative effort  
6 to tie disproportionate share payment cuts to reductions  
7 of the number of uninsured. For every one point  
8 reduction in the uninsured population, the percentage of  
9 funding available for the continuing cost of  
10 uncompensated care will be reduced by a proportionate  
11 amount.

12 One of my biggest concerns is how do we know that  
13 the data that we are using to determine the number of  
14 uninsured individuals is completely reliable? We need to  
15 confirm that the data is completely reliable since  
16 disproportionate share payment cuts will be tied to  
17 statewide reductions in the number of insured. That is  
18 only right.

19 As someone who represents the rural state, I am  
20 deeply concerned about the impact that this policy will  
21 have on those individuals living in rural America.  
22 Individuals in rural areas are more likely to be  
23 uninsured than those in urban areas.

24 Rural communities contain high percentages of some  
25 of the most vulnerable segments in the population,

1 including self-employed individuals with no access to  
2 insurance, company insurance. Those self-employed and  
3 part time workers are more likely to be uninsured than  
4 are their counter parts in urban areas or areas adjacent  
5 to non-rural population centers.

6 In short, America is both poorer than urban America.  
7 Rural America is both poorer than urban America and more  
8 likely due to unemployment circumstances to lack health  
9 coverage. They are in the whole older and uninsured or  
10 under insured.

11 Meanwhile, the rural hospitals that serve these  
12 communities are already struggling to survive and the  
13 provisions in the Chairman's mark did not help them. I  
14 am not satisfied that statewide statistics on reduction  
15 of the number of uninsured will accurately reflect the  
16 situation on the disproportionate share payment  
17 communities which have greater levels of poverty and  
18 uninsured than their urban counterparts. Therefore, I  
19 believe that it makes sense that before the Medicare  
20 disproportionate share payment cuts go into effect, we  
21 need to conduct a GAO study to report to Congress on the  
22 insurance coverage levels in each state to determine  
23 whether or not we are headed in the right direction with  
24 this policy.

25 So I would urge my colleagues to support the Hatch

1       Kyl amendment.

2             Senator Kyl.     Mr. Chairman?

3             The Chairman.   Okay.   Thank you, Senator.   Any  
4       comments?

5             Senator Kyl.     Mr. Chairman?

6             The Chairman.   I'm sorry.   Senator Conrad?

7             Senator Conrad.   Mr. Chairman, the disproportionate  
8       share payments help to give assistance to hospitals that  
9       provide uncompensated care and are distributed through a  
10      percentage increase to a hospital's perspective payment  
11      rate.

12            In 2007, MedPAC sent us a very clear message and  
13      their message was that disproportionate share payments  
14      are very poorly targeted to hospital's share of  
15      uncompensated care.

16            In the Chairman's mark, it is seeking to reduce  
17      disproportionate share payments in light of the fact with  
18      more people being covered there would be less  
19      uncompensated care.   So, you know, it makes perfect logic  
20      when you expand coverage to reduce disproportionate share  
21      payments because disproportionate share payments are for  
22      uncompensated care.

23            The mark also assures that hospitals will receive  
24      Medicare payments, although at reduced levels for this  
25      uncompensated care because less money will be needed.

1           The amendment by the Senator from Utah would  
2           continue these poorly targeted payments, and that is not  
3           my assessment, that is the assessment of MedPAC. They  
4           told us in 2007 there is a big mismatch and then they  
5           just conclude anybody who has looked into  
6           disproportionate share payments knows this is a system  
7           that cannot bear much scrutiny. That is what MedPAC told  
8           us and anybody, any objective observer who has looked  
9           into disproportionate share payments has come back with  
10          the same conclusion MedPAC did.

11          So I would hope that we not accept the amendment.

12          Senator Hatch. Let me just say, we are not  
13          continuing the payments. We are saying we want general  
14          accountability office to do a report to Congress on the  
15          insurance coverage levels in each state including the  
16          projected impact of the coverage provisions in the Act by  
17          the end of fiscal year 2018.

18          We want it studied so that these people are not left  
19          high and dry, which is why we did disproportionate share  
20          payments to begin with.

21          The Chairman. Can I ask, Ms. Eisinger. Give us a  
22          sense of provisions in the mark. First of all, these  
23          reductions do not start until 2015 as I recall, and that  
24          is designed to make sure that we do not incorrectly cut  
25          disproportionate share payments.

1           As I understand for the hospitals they generally  
2 agree to the Chairman's mark. That is including these  
3 disproportionate share payment reductions that take  
4 effect in 2015. But more importantly to me, we want to  
5 make sure we get this right. That is not overpaid, not  
6 underpaid. So if you could give us a sense of what the  
7 census provisions are and the recording provisions are so  
8 that Medicare knows what payments to make to  
9 disproportionate share hospitals. If you could, please.

10           Ms. Eisinger. Sure. Thank you, Senator. So the  
11 Chairman's mark requires in this area in 2015 the Census  
12 to report on what the change in insurance coverage levels  
13 are relative to 2012 and 2013 and to look back at what  
14 the uninsured rates were in those years relative to 2015  
15 and only if there has been, as we hope and project, a  
16 reduction in the level of uninsured would there then be a  
17 commensurate reduction in disproportionate share  
18 payments.

19           There may be a way to marry your amendment with our  
20 provision and add an extra layer of protection so to  
21 speak and in that interim between 2012 and 2013 or  
22 between then and 2015 have the GAO also do an additional  
23 report to verify what the Census is looking at.

24           But the bottom line is, as the Chairman suggested,  
25 the reason the hospitals have been able to support this

1 is we build in time up front to make sure that we have  
2 all of the data in and that no reduction would be made  
3 until we were ensured that the insurance coverage levels  
4 had gone down.

5 Senator Hatch. Mr. Chairman, can I ask, who makes  
6 the determination and what data will be used?

7 Ms. Eisinger. The data source would be the Census  
8 through the American Community Survey and then it would  
9 be used by the Department of Health and Human Services.

10 Senator Conrad. Mr. Chairman, might I inquire of  
11 the gentleman. Is your amendment, is this the amendment  
12 that was filed? Because the amendment that is filed,  
13 Hatch D3, strikes the provisions of the mark that modify  
14 Medicare disproportionate share payments. Now you are  
15 saying that this just has a GAO study.

16 The Chairman asked you if you had modified and you  
17 said there as no modified.

18 Senator Hatch. It is modified.

19 The Chairman. Whether it is modified or not, it  
20 still strikes. It strikes the provisions --

21 Senator Conrad. Then it is exactly as I described  
22 it. All I am going by is the amendment that you filed.  
23 It says very clearly that the amendment would strike the  
24 provisions of the mark that modified Medicare  
25 disproportionate share payments.

1           You responded to the Chairman that you did not  
2 modify it. That is the amendment that is filed here.

3           Senator Hatch. This is the amendment. That is  
4 right.

5           Senator Kyl. Mr. Chairman, this is an amendment we  
6 both had and that is correct. But we have also said that  
7 a GAO study, and this is what Senator Hatch I think has  
8 pointed out, could help us to understand that. Can I  
9 make a couple of comments here?

10           I share the same concerns that Senator Hatch does.  
11 It is true Senator Baucus said that the hospitals  
12 generally agree because the problem is the Hospital  
13 Association doesn't represent all the hospitals. After  
14 this agreement was announced, I wrote to a whole group of  
15 Arizona hospitals and asked them for their reaction to  
16 this.

17           Now, a lot of the hospitals serve communities near  
18 the border with Mexico and this is one of the areas where  
19 you have got a real problem because you have got a lot of  
20 uncompensated care. Part of that goes up and down  
21 depending upon whether you are in a recession or not.

22           Now, when the statistics were at least the last  
23 statistics were taken, those hospitals were getting  
24 killed because we had a very high level of uncompensated  
25 care to illegal immigrants. Now the number of illegal

1 immigrants has gone down because we are in the recession,  
2 but it will go back again when times get good.

3 But these hospitals wrote back to me and let me just  
4 note a couple of, what a couple of them said in response  
5 to my letter.

6 Here is one. "I am just as concerned as you are  
7 over the position taken by the American Hospital  
8 Association as we have analyzed each set of proposals it  
9 becomes readily apparent that they could have extensive  
10 adverse impact on the Arizona health care system,  
11 especially in rural areas." I had talked about  
12 disproportionate share payments. "There are too many  
13 variables and unrelated factors to accurately forecast  
14 and determine whether we would reduce or eliminate  
15 services in the communities we serve as a result of the  
16 agreement."

17 By the way, this particular letter also added,  
18 "addressing the practice of defensive medicine would  
19 perhaps have the most meaningful impact on health care  
20 costs,' getting back to the malpractice debate that we  
21 are going to have to have again.

22 There are some of course that say well, hospitals  
23 make up for the loss of disproportionate share payment  
24 cuts because we are going to have an expansion of private  
25 insured patients. But I wanted to insert into the record



1 a story and I would ask unanimous consent, Mr. Chairman,  
2 to insert into the record at this point a story by Carla  
3 Cage of Associated Press dated September 7<sup>th</sup> of this  
4 year. Thank you.

5 It is entitled Safety net Hospitals, Last Resort for  
6 the Poor may suffer under health care overhaul. A quick  
7 read of the story underscores how the mark in this  
8 respect is wrong and I am quoting that from the story.

9 To all the -- issues involved in the health care, I  
10 add one more. The proposals of Congress may threaten the  
11 funding and future of the nation's already struggling  
12 safety net hospitals.

13 They point to Massachusetts. The laboratory for  
14 health care overhaul. But one safety net hospital, Boston  
15 Medical Center, is suing the state, claiming it is  
16 covering too much of the cost for expanding coverage.

17 Another safety net standby. Cambridge health  
18 alliance has closed health centers and cut services. Its  
19 Somerville Hospital no longer keeps patients overnight.  
20 "It looks like a national plan will be modeled after  
21 Massachusetts and it is a disaster for poor people" said  
22 Stephanie Wilahnger, Harvard Medical School professor and  
23 a doctor at Cambridge Hospital.

24 The point that Senator Hatch I think was making is  
25 that we shouldn't touch these disproportionate share

1 payments until we know that the reform that we have  
2 implemented here is covering the uninsured.

3 Getting back to the problem of the state like mine,  
4 and I can, if my colleagues would like, add additional  
5 letters and I would want to put them in the record  
6 because they will identify the names, but I can certainly  
7 quote from them.

8 Many of which make the same point that was made in  
9 the one that I quoted here. But the point is that it is  
10 correct that this is supposed to result in less  
11 uncompensated care. For those of us that represent  
12 states like the state of Arizona, that is not necessarily  
13 going to be the case simply because there are more  
14 insureds.

15 We still have the problem of illegal immigration and  
16 people have to be covered by that. I think the  
17 suggestion that we get more data before this is  
18 implemented that Senator Hatch has made is a good  
19 suggestion.

20 The Chairman. Just for a second because I do not  
21 want to go back and forth here.

22 Senator Bingaman. I just wanted to clarify  
23 something. Senator Hatch's amendment relates to Medicare  
24 disproportionate share payment provisions related to  
25 Medicare.

1           The federal government will not reimburse the  
2 hospital under Medicare disproportionate share payments  
3 unless the person is a Medicare beneficiary. Am I right  
4 about that?

5           I mean, the Medicare, the disproportionate share  
6 payments reimbursements by the federal government relate  
7 to Medicare beneficiaries and by definition undocumented  
8 immigrants are not Medicare beneficiaries.

9           So I just do not understand the relevance of all  
10 this discussion about undocumented immigrants and Senator  
11 Hatch's amendment.

12           Senator Kyl. Mr. Chairman, that is a good point  
13 and let me clarify it for you. The point here is that we  
14 are supposed to have less uncompensated care. And  
15 therefore we can reduce these payments. That will not be  
16 the case in the case of an undocumented immigrant for  
17 exactly the reason that my colleague points out.

18           They are not covered anyway. These hospitals must  
19 provide care to them under Mtala. For a period of 4.5  
20 years we actually had a modest compensation for their  
21 emergency room treatment at least to the point that they  
22 were stabilized. That has now gone away.

23           Senator Bingaman. But there is no change being  
24 made in the law with regard to federal government  
25 compensation or reimbursement for Medicare dis.

1           Senator Kyl.    Mr. Chairman and Senator Bingaman,  
2           that is correct.   But the rationale for the marks  
3           provisions is that there is going to be less  
4           uncompensated care, therefore we can reduce dis.   I am  
5           saying that isn't necessarily true in some states.

6           The Chairman.   Sometime facts help.   Let me ask the  
7           staff to shed some light on this.

8           Senator Kyl.    Yes.   Let us ask council how  
9           disproportionate share payments are made.

10          The Chairman.   Ms. Eisinger, can you?

11          Ms. Eisinger.   In one sense both Senator Bingaman  
12          and Senator Kyl were right.   This is very much about  
13          Medicare and add on payment for Medicare relative to  
14          Medicare patients.

15          However, in the Chairman's mark recognizing the  
16          uncompensated care case load, and this was very much a  
17          priority of particularly the public and safety net  
18          hospitals that you speak of, Senator Kyl, we suggest that  
19          on hospital's cost reports, they should begin more  
20          robustly reporting on an individual hospital basis what  
21          their uncompensated care loads are.

22          That means any type of patient.   And so the way that  
23          this is developed, we would say again going back to the  
24          Census survey that I referenced, there would be a  
25          national look at what the changing insurance levels were

1 nationally. That would relate to how much the broad pool  
2 of disproportionate share payment funding would be  
3 reduced.

4 However, then the money that is left in this  
5 disproportionate share payment pot would then be  
6 distributed on a hospital by hospital basis based on  
7 their actual specific uncompensated care loads.

8 So in other words if in Arizona there are certain  
9 hospitals in certain areas that still have high  
10 uncompensated care for whatever reason because people  
11 choose not to get insurance or other reasons, it would be  
12 targeted in a way that it hasn't been in the past. So  
13 that is the distinction.

14 The Chairman. Okay. Senator Stabenow?

15 Senator Stabenow. Thank you, Mr. Chairman. I am  
16 supportive of what we are doing in terms of uncompensated  
17 care and addressing disproportionate share payments, in  
18 making those adjustments.

19 I just wanted to add for the record that there is  
20 another piece of this in states that have very difficult  
21 economic situations and that is the interplay between  
22 disproportionate share payments and Medicaid.

23 As Medicaid has gone down because states have cut  
24 Medicaid so drastically, disproportionate share payments  
25 have filled in for that. I say that only at this point

1 that it is something that we need to be evaluating as we  
2 go along. It goes back to Senator Grassley's comment  
3 about providers, but there really is an interplay for  
4 safety net hospitals between disproportionate share  
5 payments and Medicaid and I think as we go forward, we  
6 just need to be aware and be sensitive to that.

7 The Chairman. The only question here is whether  
8 the reductions in disproportionate share payments that  
9 begin in 2015 should be retained or not. That is really  
10 the only question here. I suggest that we keep them  
11 because of several reasons.

12 One, it is many years off. It is five, six years  
13 away. Second, that is a little incentive for hospitals  
14 to be more efficient and increase their productivity. It  
15 is an incentive, it helps us find solutions here. In the  
16 meantime, we are doing these studies. In the meantime we  
17 are getting the Census data.

18 If we are correct in the amount of payments here  
19 that do not take effect until 2015, then we will have  
20 made the right decision. If we are not correct, the  
21 Census data will show that and we will make appropriate  
22 adjustments.

23 In the whole scheme of health care reform and  
24 because generally the hospitals support this and I  
25 understand Senator -- that some hospitals may not, but

1 all in all I think the better decision is to keep the  
2 provisions in the mark -- not in effect until 2015 and  
3 with the -- little incentive to kind of help us find the  
4 right solution here.

5 I just urge us therefore I have the highest regard  
6 to Utah, I do not know if this is the right amendment.

7 Senator Kyl. Let me add Senator Cornyn is a  
8 cosponsor of this amendment. I am very grateful that he  
9 is willing to do it.

10 All we did, the original amendment basically said  
11 this amendment will strike the provisions on page 149  
12 making changes to Medicare disproportionate share  
13 payments. We modified it with this. This amendment would  
14 strike the provisions on page 149 making changes to  
15 Medicare disproportionate share payments and would  
16 replace it with the following language.

17 The Government Accountability Office shall submit a  
18 report to Congress on the insurance coverage levels in  
19 which state including the projected impact of the  
20 coverage provisions in this Act by the end of fiscal year  
21 2018.

22 Now, we have been getting the information from the  
23 American Community Survey, okay?

24 The Chairman. And you have it right there with  
25 you?

1           Senator Kyl.    I have it right here.  It says the  
2 results of -- the first time the ACS has had health  
3 insurance estimates.  It may become a new standard since  
4 it will be able to provide uninsured estimates by state  
5 and even congressional districts with much smaller  
6 margins of error than the current population survey.

7           In the past, CRS has published state level uninsured  
8 estimates using the CPS.  They probably will rely on the  
9 ACS henceforth.  Now probably the only down side to the  
10 ACS is that it is a mail back survey.  So people just  
11 check boxes among 11 different types of insurance, not  
12 the same as having a person interviewing either by phone  
13 or in person, but with the additional state district  
14 estimates for reliability it might be worth the trade.

15           You do not get any more info on the health insurance  
16 except simply whether it was ESI, Medicare, Medicaid, et  
17 cetera.

18           The Chairman.  You understand?

19           Senator Kyl.  No.

20           The Chairman.  Neither do I.

21           Senator Kyl.  What else is new?  It just makes my  
22 point, this is a very complex bill.  We basically strike  
23 in the Chairman's mark this language, starting no later  
24 than 2015, and it certainly isn't striking all  
25 disproportionate share payments.



1           The Chairman.   Well, it is, isn't it?

2           Senator Kyl.   No.   Starting no later than 2015 and  
3 continuing on an annual basis, the Secretary would make  
4 the share payments equal to 25 percent of the  
5 disproportionate share payments that would otherwise be  
6 made.

7           The payment that represent the imperially justified  
8 amount as determined by the Medicare Payment Advisory  
9 Committee in its March, 2007 report to Congress.

10          The empirically justified funding amount is intended  
11 to reimburse hospitals for the additional cost of  
12 treating glow income beneficiaries.  It goes on for two  
13 more paragraphs.  Basically all we are saying is that we  
14 would get the real facts with this amendment by having  
15 the Government Accountability Office submit this report  
16 so that we know what the insurance coverage levels in  
17 each state really are, including the projected impact of  
18 the coverage provisions in this Act by the end of the  
19 fiscal year 2018.

20          It is just an intelligent way it seems to me to try  
21 and get to the bottom of it of whether we are moving in  
22 the right direction.

23          The Chairman.   I have a suggestion.  When you are  
24 reading your Blackberry comments, it struck me that the  
25 major issue here is whether we are getting the right

1 data. That is a question here, whether we are getting  
2 the proper or right data.

3 So my suggestion is that, if you are willing, to  
4 modify your amendment, if you are willing to do so,  
5 modify your amendment but to delete revision deleting  
6 savings. I mean, I do not think we should cut \$23  
7 billion out right here.

8 So we work overnight, try to find the better GAO,  
9 whatever it is, make sure we have got the better data so  
10 we know what we are doing. I must say that I do not  
11 think it is proper to --

12 Senator Kyl. I will be happy to work with you.

13 The Chairman. Let's find a good way to get the  
14 right data. Okay. Good. So that is also being  
15 deferred.

16 Senator Wyden. D16 relating to the cuts in hospice  
17 in the mark. Are you ready to go to another amendment?

18 The Chairman. Yes.

19 Senator Wyden. D16.

20 The Chairman. D16.

21 Senator Wyden. Yes.

22 The Chairman. I'm sorry, Senator. What number is  
23 yours?

24 Senator Wyden. D16.

25 The Chairman. Not that it matters that much, but

1       which list was that on? It is not in these list, it is  
2       another one. Okay Senator. You are on.

3               Senator Wyden. Mr. Chairman and colleagues, dollar  
4       for dollar there is no better investment in American  
5       health care than hospice. They are constantly developing  
6       new techniques for pain management and I think we all  
7       understand that they are a lifeline for thousands of  
8       American families.

9               In the mark, you would have a significant round of  
10       additional cuts in this program that now operates on an  
11       exceptionally low margin. According to independent  
12       authorities, hospices operate at just over 3 percent over  
13       cost. I think it is fair to say you cannot get any  
14       leaner than that.

15              Now, the additional round of cuts start in the year  
16       2013 and according to the hospice programs that we talked  
17       to, and I think they know what colleagues are going to  
18       hear from around the country, these programs just do not  
19       have the ability to shift costs anywhere else.

20              In other words, when you have cuts in these  
21       programs, they simply have no capacity to shift to others  
22       in the health care system the cuts that they would  
23       endure.

24              I am especially concerned that those who are going  
25       to be hit hardest are going to be seniors and the

1 vulnerable in rural areas. The evidence suggests that  
2 cuts in hospice will also cause a real hardship in a  
3 number of under served urban areas, but my sense is that  
4 in many rural parts of the country --

5 The Chairman. Senator? This is, I must say, we  
6 just got this. This is not your D16. Rather, this is  
7 D16 modified and the modifications are a very different  
8 animal. So it is going to take us a little while to  
9 figure this out. But we just go it, so you are on notice  
10 to know that this is going to be something we have to  
11 look at.

12 Senator Wyden. Mr. Chairman, I would be prepared  
13 to set this aside for now.

14 The Chairman. That is a lot better. I would  
15 prefer that. Are there other amendments that do not  
16 require further study so we can actually take action?  
17 Senator Stabenow?

18 Senator Stabenow. Mr. Chairman, I think this is a  
19 very straight forward amendment and it is budget neutral  
20 according to CBO. This just clarifies that --

21 The Chairman. I'm sorry?

22 Senator Stabenow. I'm sorry. Excuse me. C2.

23 The Chairman. C2. Stabenow C2?

24 Senator Stabenow. Yes. It is, clarifies the  
25 application of mental health requirements by plans

1 offered in the exchange. It basically just clarifies  
2 that the Wellstone Mental Health Clarity Act applies to  
3 plans offered in the exchange and would ensure that  
4 individuals and families with mental health and substance  
5 abuse disorders receive health care with other medical  
6 conditions that are covered through the exchange.

7 We know that the Institute of Mental Health has  
8 shown that success rates of treatment for disorders such  
9 as schizophrenia, depression and panic disorders surpass  
10 those of their medical conditions. So we know when there  
11 is treatment there is success. We know that when there  
12 is not treatment, there are tremendous economic burdens  
13 on families and communities and employers and so on.

14 So this would just clarify that Wellstone Mental  
15 Health Clarity Act which is on the books would apply the  
16 insurance plans that are offered through the exchange and  
17 as I indicated, CBO said extending this is budget neutral  
18 and I am hopeful that we would be able to accept this.

19 Senator Wyden and Senator Kerry are co-sponsors and  
20 I appreciate that.

21 Senator Kyl. Mr. Chairman? Would the Senator  
22 yield for a question? I was just advised by Staff in  
23 Title 1 this is already included. I am just wondering if  
24 there is a reason therefore.

25 Senator Stabenow. It is my understanding there was

1 some clarification that was needed. There was some  
2 specific statutory cross-references that were needed just  
3 to clarify.

4 Senator Kyl. Would it be possible to have Staff  
5 just explain that for us, then?

6 The Chairman. Okay. From my understanding, this  
7 is budget neutral. Are there any questions?

8 Senator Kyl. Well, Mr. Chairman, I just have a  
9 question. Does it have all the other features exempting  
10 companies under 50 and all of that? In other words, is  
11 it the same as what is in Title 1 already? Could Staff  
12 explain why this is necessary since it was supposed to be  
13 already covered and whether it is any different than any  
14 of the other items that are covered, that are specified  
15 in Title 1?

16 Ms. Fontenot. Currently the Wellstone Mental Health  
17 Act does not apply to groups smaller than 50. So we had  
18 not clarified in the mark that the categories of benefits  
19 would apply to mental health. We simply specified that  
20 mental health is a benefit that would have to be covered.

21 So we were waiting on a score from CBO to ensure  
22 that this didn't add extra costs, and they have told us  
23 that it would be budget neutral.

24 The Chairman. Mr. Schwartz, do you want to add?

25 Mr. Schwartz. Thank you, Mr. Chairman. So I think

1 Senator Kyl, the difference is that mental health  
2 benefits are included as you see in the mark, but the  
3 Wellstone Mental Health Parity, the parity part is what  
4 is key there.

5 So that law says that if a plan covers traditional  
6 med surg and mental health, they have to be covered on  
7 par and it is the on par part that I think Senator  
8 Stabenow's amendment would establish for plans in the  
9 exchange.

10 Senator Kyl. Mr. Chairman, I appreciate that. Is  
11 there a reason then why it is budget neutral? One would  
12 assume that it does add more coverage or more people or  
13 it wouldn't be necessary. If that is the case, then how  
14 is it that it is budget neutral?

15 Ms. Fontenot. The benefit level specified in the  
16 mark are actually according to actuarial values. So as  
17 long as the benefits that are provided are maintained  
18 within a certain actuarial value, there is no additional  
19 cost.

20 So in other words, if you are providing a 65 percent  
21 actuarial plan and you cover the specific benefit  
22 categories, the insurer has the flexibility to arrange cost  
23 sharing within all those benefits to just stay within  
24 that actuarial value without adding additional cost to  
25 the premium.

1           Senator Kyl.    Thank you, Mr. Chairman. I think I  
2 understand that. So if you covered one thing, you could  
3 have 65 percent, if you covered two things they would  
4 have to be equal and total that amount and so on. I  
5 understand. Thank you.

6           Senator Kyl.    Mr. Chairman, Staff has said  
7 something to me earlier that I hadn't processed.

8           Does the mental health parity apply to the  
9 individual market today and would the effect of this be  
10 to now make it apply to the individual market?

11          Ms. Fontenot. I do not believe the mental health  
12 parity act applies to the individual market today.

13          Senator Kyl.    Right. And is the effect of this  
14 amendment to do that?

15          Ms. Fontenot. I believe that is correct.

16          Senator Stabenow. If I might just respond to my  
17 colleagues just to indicate we are in fact changing the  
18 marketplace though.

19          Now instead of an individual marketplace where  
20 someone is approaching a company on their own, we are  
21 creating a new group market essentially pooling people,  
22 correct?

23          So it really is not a question of what was done on  
24 the individual market versus now because we are creating  
25 a different pool. Is that correct?



1           Ms. Fontenot. That is correct. Part of the  
2 difference would be that today a mental health parity in  
3 the individual market would actually increase premiums  
4 because it would be an additional benefit that insurers  
5 had to provide.

6           Under our construct as I had mentioned, it is all  
7 within particular actuarial value levels so it will not  
8 raise the cost of the plans.

9           Senator Ensign. Can I ask a question? Let us just  
10 take the bronze plan, for instance. If you included  
11 this, then something else may have to be sacrificed, some  
12 other kind of benefit.

13           If we went down this road of including mental  
14 parity, whatever other types of treatments, could we  
15 pretty much become so prescriptive as some of the things  
16 that maybe the person wanted, they would not be able to  
17 get.

18           Ms. Bishop. The benefit categories that the plan  
19 will have to cover are specified. So there would not be  
20 a service the person can get. The issue is the  
21 difference in cost-sharing that will apply due to the  
22 constraint to stay within the natural value.

23           Senator Ensign. But today, some states have up to  
24 42 specific items that are covered. What I am saying is  
25 if, for instance, we included all 42 of those, but maybe

1       there is something else, that somebody else would have  
2       wanted to buy a policy that covered the particular item  
3       that they wanted to make sure that was covered.

4               There is no preexisting condition. They happen to  
5       have that and they wanted it covered. Is that something  
6       they could maybe miss out on it?

7               Ms. Bishop. To the extent that we are already  
8       requiring the mental health and substance abuse be part  
9       of the defined benefit category, I do not believe it can  
10      knock out some other benefit that they wanted covered,  
11      because we have already specified that list, which would  
12      include the state benefit mandate.

13              Senator Ensign. No. I am talking about right now,  
14      in the individual market, we do not. This now would be  
15      required. I am saying if we start going down the line of  
16      requiring all of these various things that some states  
17      require, could we be getting into that type of a  
18      situation where somebody may not be able to get the kind  
19      of benefits that they want.

20              They may not get the kind of plan they want, because  
21      we start mandating. Not just with this. I am saying  
22      that if we start going down this line, because once you  
23      do one particular item, people want to -- we are going to  
24      be lobbied on including the next one and the next one and  
25      the next one. I just wanted to make that as a point.

1           Senator Stabenow.    If I might respond to my  
2   colleague.  First of all, we already have federal law we  
3   have passed setting up the Mental Health Parity Act.  So  
4   that is already in law.

5           Senator Ensign.    Yes, but it is not in the  
6   individual market.

7           Senator Stabenow.   But we are not going to have an  
8   individual market, essentially, in the same way.  We are  
9   pooling everybody in the exchange to be able to get large  
10  group plans.

11          Already in the plans, there is mental health  
12  coverage.  This is just simply a clarifying amendment.  
13  It was not meant to be --

14          Senator Ensign.    But there is still a separate  
15  small group market, correct, and a separate individual  
16  market?

17          Senator Stabenow.   But in the bill right now, the  
18  basic plan includes mental health, as well as physical  
19  health, because one of the positive things about doing  
20  this is we are integrating care.  We are bringing them  
21  together.

22          So we are allowing people to be treated, whether it  
23  is a physiological problem or a physical problem.  We  
24  have a federal requirement right now, passed  
25  overwhelmingly, bipartisan bill on mental health parity.

1 This is just to clarify that it applies to this new  
2 marketplace.

3 Senator Conrad. Would the Senator yield for a  
4 question?

5 Senator Stabenow. Yes.

6 Senator Conrad. As I understand this -- and,  
7 Senator Ensign, if you would listen for a moment, see if  
8 I have got this. My understanding of it is you would not  
9 be able to discriminate. For example, you would not be  
10 able to make a 50 percent co-pay for mental health and a  
11 20 percent co-pay for everything else.

12 That is really in line with what the federal law is  
13 previously in terms of not discriminating on mental  
14 health. Is that not what this does?

15 Senator Stabenow. That is correct.

16 Senator Ensign. The only point I was making is it  
17 is not in the individual or the group market or the small  
18 group market or individual market today. So this is in  
19 addition. We are changing that. I just want people to  
20 be aware we are changing that.

21 The Chairman. But if I might say, Senator, we are  
22 not talking about the state mandates here. We are  
23 talking mental health. I think that is a different  
24 category. People want mental health parity, basically,  
25 across the country. I think it is the right thing to do.

1           Now, you raise a separate issue and that is the  
2 degree to which any action we take here preempts state  
3 mandates or to which we add additional mandates. That is  
4 a separate issue.

5           I agree with you that that is a whole different ball  
6 of wax and that is something that we need to be very  
7 careful about. But we are just talking about mental  
8 health, making sure that there is, in fact, parity. That  
9 is all this is.

10           Senator Stabenow. That is right. That is correct.

11           The Chairman. And I, therefore, suggest that we  
12 have a voice vote on the Senator's amendment.

13           All those in favor, say aye.

14           [A Chorus of Ayes.]

15           The Chairman. Those opposed, no.

16           [No response.]

17           The Chairman. The ayes have it and the amendment  
18 is agreed to.

19           Senator Stabenow. Thank you, Mr. Chairman.

20           The Chairman. You are welcome. All right. I  
21 think I found some more amendments and the delivery  
22 system for amendments, and they are basically all by  
23 Senator Cornyn.

24           So, Senator, you can choose whichever one you want  
25 first and we will try to do the others, unless there are

1 Senators on this side who want to offer their amendments,  
2 too, go back and forth.

3 Senator Cornyn?

4 Senator Cornyn. Thank you, Mr. Chairman. I would  
5 call up amendment D-2.

6 The Chairman. Cornyn D-2.

7 Senator Cornyn. This is along the lines that we  
8 discussed earlier, making sure that the coverage under  
9 Medicaid would actually produce access to a physician.

10 Because of low reimbursement rates, more and more  
11 physicians, as we know, are refusing to see new Medicaid  
12 patients or refusing to see them at all and many Medicaid  
13 patients are struggling to find doctors.

14 According to the 2002 MedPAC report, 40 percent of  
15 physician restricted access for Medicaid patients because  
16 of concerns about reimbursement and billing paperwork.

17 Since Medicaid patients cannot find doctors in large  
18 numbers who will see them, many are not getting the care  
19 that they need. In California, only 51 percent of family  
20 physicians participate in Medicaid, while, in Michigan,  
21 the number of doctors who will see Medicaid patients has  
22 fallen from 88 percent in 1999 to 64 percent in 2005.

23 According to an article in the *Journal of Health*  
24 *Affairs* this summer, physicians typically have been less  
25 willing to take on new Medicaid patients than patients

1 covered by other types of health insurance.

2 Medicaid fees are reimbursed at a national average  
3 of 72 percent of Medicare, which we know Medicare does  
4 not reimburse like private insurance, and Medicaid is 72  
5 percent of Medicare.

6 In real terms, Medicaid physician fees, on average,  
7 are declining about 1 percent annually relative to  
8 general inflation over the last five years and this, of  
9 course, has a direct impact on patients.

10 Numerous studies have documented the poor patient  
11 outcomes in the Medicaid program relative to patients in  
12 private plans. For example, Medicaid patients are almost  
13 50 percent more likely to die after coronary artery  
14 bypass surgery than patients with private coverage or  
15 Medicare.

16 Let me say that again. Medicaid patients are almost  
17 50 percent more likely to die after coronary artery  
18 bypass surgery than patients with private coverage or  
19 Medicare.

20 One study published in the *Journal of the American*  
21 *College of Cardiology* in 2005 found that Medicaid  
22 patients were almost 50 percent more likely to die after  
23 coronary artery bypass surgery than patients with private  
24 coverage.

25 There is an acute lack of access to medical

1 specialists for Medicaid patients. A recent Merritt  
2 Hawkins survey found that Medicaid is not widely accepted  
3 in most markets surveyed, in at least some of the medical  
4 specialties reviewed and, in some cases, all of them.

5 The Chairman's mark provides Medicaid coverage to  
6 individuals up to 133 percent of the poverty level, but  
7 it does not give the Medicaid patient access to a  
8 physician, because the reimbursement rates are low, even  
9 though it goes from 100 percent to 133 percent of  
10 poverty.

11 I would just note that the President said in his  
12 inaugural address, "The question we ask today is not  
13 whether our government is too big or too small, but  
14 whether it works, whether it helps families."

15 Where the answer is yes, we intend to move forward.  
16 When the answer is no, programs will end.

17 Mr. Chairman, the Medicaid program is not working  
18 today for patients and my amendment would simply say that  
19 before Congress expands the Medicaid program, we should  
20 ensure that the patients we are promising coverage to  
21 have access to a doctor.

22 So what this does, in conclusion, is prior to  
23 implementing the mandatory Medicaid program expansions in  
24 the Chairman's mark, the Secretary of Health and Human  
25 Services must certify that at least 75 percent of



1 physicians in the country accept Medicaid patients.

2 The Chairman. If I could just ask a question,  
3 Senator, for clarification. Are you talking about new  
4 Medicaid patients or current Medicaid patients? How does  
5 that work?

6 Senator Cornyn. That is a good question, Mr.  
7 Chairman. In my state, for example, we have roughly  
8 900,000 Medicaid and SCHIP eligible children that are not  
9 even signed up for existing programs. It is something we  
10 have been chipping away at, but have not been successful  
11 in reversing.

12 But this would apply to the expansion, going from  
13 100 to 133 percent. Those expansions would not be  
14 implemented until at least 75 percent of physicians in  
15 the country accept Medicaid patients.

16 Senator Conrad. Mr. Chairman?

17 The Chairman. Senator Conrad?

18 Senator Conrad. Mr. Chairman, I am just not sure  
19 that is a realistic test. I am not sure any public or  
20 private plan could get 75 percent of the doctors in the  
21 country signed up.

22 I would just tell you, we have got, under a federal  
23 employee health benefit plan, my wife and I have  
24 coverage. Not a single one of my wife's doctors will  
25 take it in this town. Not a single one of my wife's

1 doctors will take Blue Cross/Blue Shield patients, not  
2 one.

3 So now we are talking Medicaid. To have a standard  
4 that you have got to get 75 percent of the doctors to  
5 take Medicaid patients, that is not going to happen.

6 So I think it is well intended as an amendment, but  
7 I do not think it is realistic.

8 The Chairman. If I might say, too, it is my  
9 understanding, following along the lines of the point  
10 made by the Senator from North Dakota, that 75 percent  
11 would be higher than the acceptance rate of doctors in  
12 either Medicare or in private practice or the private  
13 sector -- I mean, private health insurance.

14 It is my understanding that for Medicare and for  
15 private health insurance, about 70 percent of doctors  
16 take new patients under Medicare or under private health  
17 insurance.

18 So to set a level at 75 percent would be higher than  
19 for private health insurance, and I think the rate for  
20 Medicaid is quite low. There is no doubt about that.

21 So you identify a problem, but I do not know that  
22 this is the solution. I am just trying to figure out how  
23 we skin this cat, basically. How do we find a solution  
24 to a real problem that you have put your finger on. I do  
25 not think it is 75 percent.

1           Senator Cornyn.    For example, in Texas, the  
2           percentage of physicians that will see a new Medicare  
3           patient is 58 percent.

4           The Chairman.    Nationwide, I think it is 70.

5           Senator Cornyn.    So you are right.    But I would  
6           suggest that, in a way, Medicaid is sort of like a shell  
7           game.    We promise coverage, but have not done whatever we  
8           need to do to provide access.

9           I think Senator Wyden and some other people have  
10          proposed some Medicaid reforms which would basically make  
11          -- and we have got some ideas along those lines -- make  
12          Medicaid beneficiaries eligible for basically a private  
13          health insurance coverage, which would compensate  
14          physicians at a higher level and provide meaningful  
15          access.

16          So I guess the question I would ask my colleagues is  
17          if 75 percent is too high, what would be realistic?

18          The Chairman.    I was afraid you were going to ask  
19          that question.    I do not know if it is wise to set  
20          arbitrary limits.    I wonder if maybe Mr. Schwartz or Ms.  
21          Fontenot could perhaps shed some light on this.

22          Mr. Schwartz.    I would be happy to try, Mr.  
23          Chairman.

24          The Chairman.    Speak up, please, Mr. Schwartz.

25          Mr. Schwartz.    I would be happy to try.    I think a

1 number is very difficult and I wonder what is it that a  
2 physician would do. According to the amendment it says  
3 that they accept Medicaid patients, but I do not actually  
4 know how that is enforceable.

5 So picking a number and having the Secretary certify  
6 that that is the right thing, whatever that number is,  
7 and then where do we go from there. I think all of the  
8 members have shared their concern about the difference  
9 between a coverage level and an access level.

10 But I think picking a number arbitrarily, it will  
11 vary tremendously by state to depending -- the states  
12 that are less well off will have higher percentages of  
13 Medicaid beneficiaries and they might need a high number,  
14 but states that are wealthier might need a lower number.

15 I think this is another issue similar to Senator  
16 Grassley's amendment that is ripe for more investigation,  
17 and I think the Medicaid and CHIP Payment and Access  
18 Commission would probably be a great place to look at  
19 this.

20 Senator Conrad. Mr. Chairman?

21 The Chairman. Senator Conrad?

22 Senator Conrad. Just very briefly. I would say to  
23 the Senator from Texas, maybe this is one place where we  
24 ought to look to the supply side of the issue. In the  
25 Chairman's mark, he has 10 percent bonus payments every

1 year for the next five years for doctors who are primary  
2 care physicians.

3 One of the big problems that we have in Medicaid, I  
4 am told by those that run the program in a number of the  
5 states, is that the pool of primary care docs, who are  
6 the primary pool that deal with Medicaid patients, is  
7 inadequate.

8 We have got to change reimbursement levels. We have  
9 got to change incentives to get more doctors into primary  
10 care, and that is the intent of the Chairman's mark by  
11 having 10 percent bonuses every year for the next five  
12 years for primary care physicians.

13 Senator Cornyn. I would say to my colleague, I  
14 believe that is just for Medicare in the Chairman's mark.

15 The Chairman. No, no. That is correct. Medicare  
16 is reimbursing. That is correct.

17 Senator Conrad. But the idea, if I could just  
18 complete the thought, is that that will encourage more  
19 doctors to be in primary care, because that is a  
20 significant component of many of their practices.

21 Now, maybe we need to go further and have something  
22 like that for Medicaid.

23 Senator Cornyn. We do know, Mr. Chairman, the  
24 states pay doctors and know who they are. So it is not a  
25 mystery. We can find out who they are.

1           But I would submit that the most obvious explanation  
2           is the lousy reimbursement for Medicaid and we need to do  
3           something about that. I just wonder when we are going to  
4           deal with it.

5           Senator Wyden. Mr. Chairman?

6           The Chairman. I would like to vote on this very  
7           quickly, but go ahead.

8           Senator Wyden. I will be very brief. I think the  
9           Senator from Texas is raising some important issues. The  
10          Medicaid program in this country is broken. If I had my  
11          way, we would have the poorest and most vulnerable in our  
12          society getting the same kind of choices that members of  
13          Congress have.

14          I think we ought to make it possible in this country  
15          in a doctor's office for the poor person to walk right by  
16          the Congressperson.

17          I just want you to know that I am going to keep  
18          working with you on this issue. I think dollar for  
19          dollar, we can get a better deal for the poorest and most  
20          vulnerable in our society than we are doing today and we  
21          are going to have this issue come up further in the  
22          debate about health reform.

23          Thank you, Mr. Chairman.

24          The Chairman. I would like to wrap it up, if we  
25          could, please. First of all, states do set provider

1 rates. That is up to states. If they want to compensate  
2 doctors more, that is their choice. I encourage them to  
3 do so, because they get a federal match when they do so.

4 Second, as Senator Conrad pointed out, we do give a  
5 significant bump to primary care docs, which will help  
6 the situation. But the amendment basically would have  
7 the effect of reducing, not increasing, significantly  
8 reducing coverage for poor people. That is the effect of  
9 this amendment, significantly reducing, not only not  
10 increasing, but significantly reducing health coverage  
11 for poor people.

12 I do not think that is the direction in which we  
13 want to go and, for that reason, I would urge us to --

14 Senator Kyl. Mr. Chairman, how is that so? I am  
15 sorry.

16 The Chairman. Because it is going to be difficult  
17 to certify 75 percent. It is going to be so difficult to  
18 certify 75 percent that essentially the states will be  
19 unable to certify the 75 percent, so they are cutting  
20 back on coverage on Medicaid.

21 Senator Kyl. Mr. Chairman, maybe I could ask my  
22 colleague from Texas a question. Is there anything in  
23 your amendment that reduces the people that are covered  
24 by Medicaid if the certification is not possible?

25 The Chairman. Say again.

1           Senator Kyl.    Is there anything in his amendment  
2   that reduces -- you said it will reduce the number -- Mr.  
3   Chairman, you said that it would reduce the number of  
4   people covered by Medicaid.

5           The Chairman.   It is mandatory expansion.  I am  
6   talking about expansion.

7           Senator Kyl.    So it is not true that it will  
8   reduce.  It may not allow --

9           The Chairman.   I overstated the point, but it will  
10   certainly prevent the expansion of coverage.

11          Senator Kyl.    And if that is a certainty, then we  
12   have got a big problem.

13          The Chairman.   We have got a problem.

14          Senator Kyl.    Yes.  And what we are going to do is  
15   promise folks care that we are not going to be able to  
16   deliver, which is the point of the Senator's amendment.

17          The Chairman.   No, no, that is not fair.

18          Senator Kyl.    Well, we are going to promise that  
19   people have new coverage.  We are going to add more  
20   people to Medicaid, but we are already certain that there  
21   are not going to be enough doctors to take care of them.  
22   I think that is promising them something that they are  
23   not going to get.

24          The Chairman.   All right.  Let us vote.

25          Senator Kyl.    Well, let me just make the point



1 here. This is a huge, huge problem. In my state, in  
2 particular, it is a big problem and, frankly, one of the  
3 things that bothers me the most is that in a lot of  
4 places and a lot of times, there is a dual standard here.  
5 Folks on Medicaid do not get the same quality of care as  
6 everybody else, because there is a subtle kind of  
7 rationing that occurs in Medicaid.

8 If you ask the physicians in the Senate, like Dr.  
9 Coburn and Dr. Barrasso, they will tell you that is  
10 exactly true. And if you ask friends of yours in the  
11 medical profession, they will you it is true.

12 There are a variety of reasons for it. These are  
13 not the patients that are the best about follow-through  
14 and making their appointments and all of those kinds of  
15 things and they also are the patients that provide the  
16 least reimbursement to the physicians.

17 As one of them said to me, they look around -- being  
18 semi-facetious here -- you look around the waiting room  
19 and you wait until the last patient there is the Medicaid  
20 patient to take that patient.

21 The bottom line here is that if, in fact, we are  
22 adding more patients and we cannot ensure that we are  
23 going to have enough physicians to take care of them, we  
24 are going to provide a higher degree of this kind of  
25 subtle rationing, and it is not right.

1           It is not fair and I think it would point out that  
2 we have a lot of reasons why we do not have enough  
3 physicians that are due to federal government policies or  
4 a lack of attention to things like medical malpractice.

5           The reimbursement levels are the first and foremost.  
6 There are a lot of other factors, like medical school and  
7 other factors. But this is something that deserves  
8 attention and Senator Cornyn's amendment, I think, is  
9 right on point to provide the kind of attention that it  
10 deserves.

11          The Chairman. I think sometimes we forget what one  
12 of the underlying purposes of health care reform is and  
13 that is delivery system reform, where we just change the  
14 way we pay docs and providers, away from quantity and  
15 volume and much more toward value and outcomes.

16          It is going to take a little while for us to get  
17 down that road, but I would say 75-80 percent of  
18 providers in this country agree that that is a direction  
19 in which we need to go. It will take a little while for  
20 us to get there.

21          How do we do this? We do it with pilot projects and  
22 bundling. We do it with increasing primary care  
23 reimbursement. We do it with accountable care  
24 organizations. We do it with addressing excessive  
25 hospital readmission rates. We do it with comparative

1 effectiveness analysis.

2 There are a whole host of ways that will help get at  
3 some of these problems that we are talking about here  
4 indirectly. So when we are talking about Medicaid  
5 doctors' participation, et cetera, it is a big issue.

6 But it also is important to remember the underlying,  
7 game-changing, transformative changes in this bill which  
8 are going to help down the road address a lot of these  
9 problems that we are now talking about, because we are  
10 going to have a system in this country which is much more  
11 patient focused. It is much more coordinated.

12 It is similar to the integrated systems that we all  
13 talk about, the Geisinger system, as we all know, Mayo,  
14 Kaiser and InterMountain. In my State of Montana, there  
15 is a Billings clinic. There are lots of these integrated  
16 systems.

17 I just think it is important for us to remember the  
18 good here, so we get this legislation passed. Otherwise,  
19 if this is not passed, it is the status quo. The status  
20 quo would mean that doctors' participation in Medicaid is  
21 going to get worse, not better.

22 The status quo is we are not going to address the  
23 insurance market reform. So a lot people are denied  
24 coverage based upon a preexisting condition or health  
25 care status. The status quo is that the Medicare costs

1 are going to go up so high that we are going to have to  
2 start whacking Medicare, whacking Medicaid. The cost for  
3 business is going to go so high that it is going to make  
4 American business anticompetitive.

5 Let me tell a little story. Three or four years  
6 ago, I took a bunch of Montanans to Asia and to India and  
7 we were in Bangalore, India, Jack Welch Technology  
8 Center. I think Senator Enzi has written me and said to  
9 tell this story.

10 General Electric has three major research facilities  
11 worldwide. One of them is in Bangalore and it is a "gee  
12 whiz" research center, you go through it and they are  
13 developing all these new products.

14 There are lots of people that are working there.  
15 They basically all were Indians. I ran up to the head  
16 man, the manager, afterwards and said, "Why are you here  
17 in Bangalore?" His answer is "greatest talent pool."

18 I asked him, "What country has the next greatest  
19 talent pool?" He said, "China." I asked him, "Where are  
20 we? Where are we Americans? How is our talent pool?  
21 "Oh, you're pretty far down there," he said.

22 "How do we get up there," I asked him. Without  
23 skipping a beat, he looked right at me and he said,  
24 "Education and health care." He said, "You Americans are  
25 just going to have to educate your people better and,

1 second, you have got a health care system that is making  
2 your companies anticompetitive."

3 So we have got to start addressing that. This is  
4 not an education bill. This is a health care bill. So  
5 when we start to reduce the rate of growth of health care  
6 costs in America by the passage of this bill, we are  
7 going to help make American companies more competitive.

8 I talked to the head of Boeing just four days ago  
9 and he told me that 40 percent of his personnel costs are  
10 health care. We all know what happened to GE. We know  
11 the airline stories. We know the legacy costs.

12 The status quo, by not passing this bill, is to say  
13 to those companies, "We want you to remain  
14 anticompetitive because it increased the health care  
15 cost."

16 So I just want to remind all of us here that when we  
17 are talking about the Cornyn amendment, that there is a  
18 lot in this bill that we should be working on so that we  
19 Americans and our people that we work for can have a  
20 health care system we can all be proud of.

21 I am sorry, I spoke too long. We have got to bring  
22 this debate to a close. I am the biggest culprit here.

23 Senator Conrad. Mr. Chairman, may I respond just  
24 briefly?

25 The Chairman. Senator Conrad.

1           Senator Conrad.   Well, I just wanted to make the  
2 point again that the federal government does not decide  
3 the reimbursement rates for doctors in Medicaid. We do  
4 not do that. The states do.

5           So to Senator Kyl, if you are unhappy with Medicaid  
6 reimbursement in your state, the answer is to write a  
7 letter to the governor and talk to your state  
8 legislators, because they decide. We do not decide that.  
9 And if they improve their rates, we match it. They get  
10 increased federal match.

11          The Chairman.   All right. All in favor of the  
12 amendment --

13          Senator Cornyn.   Mr. Chairman, may I please respond  
14 just briefly?

15          The Chairman.   Sure.

16          Senator Cornyn.   Under the Medicaid expansion in  
17 this bill, my state estimates that it will cost, in an  
18 unfunded mandate on my state, \$20 billion over the next  
19 10 years.

20          I have heard people talk about the public option,  
21 government options. I have heard people say we need  
22 Medicare for all. We need another government plan to  
23 deliver health care to the American people.

24          Well, the fact is Medicaid is broken, Senator Wyden  
25 said. We have the promise of coverage, but no access for

1 so many low income people. I just would respectfully  
2 suggest that we need to spend time to fix the system  
3 before we expand it.

4 I agree with you on delivery system reform and there  
5 are actually people who do handle Medicaid and the kind  
6 of continuity of care that you are talking about, where  
7 they can actually break even. But that does not work  
8 everywhere, particularly in big states and particularly  
9 in rural areas where that is just not possible.

10 The Chairman. I hear you, Senator. But in Texas,  
11 Texas is going to make out to the good the first three  
12 years under this bill in the Medicaid FMAP payments.  
13 Texas will come out ahead in the first three years.

14 I do not know what Texas is over 10 years. I can  
15 say this. On an average, nationwide, the increase that  
16 states are going to have to pay, on a net basis, it is  
17 FMAP plus the Medicaid rebate, drug rebate, et cetera.

18 On a net basis, in our country, nationwide, the  
19 average is 0.89 percent increase in the obligation on  
20 states. I do not know what it is in Texas. Mr.  
21 Schwartz, what is it in Texas?

22 Mr. Schwartz. Mr. Chairman, I need to start,  
23 unfortunately, by correcting you. We have data numbers.  
24 The updated number is based on new information from CBO.  
25 I realize that is risky, especially at this hour.

1           But the national average has gone up slightly. It  
2           is 1.3 and the Texas-specific number, it is still,  
3           obviously, a saver over the first three years and, over  
4           the 10-year window, would be a 2.8 percentage point  
5           increase over baseline spending, which means whatever  
6           Texas was planning to spend on Medicaid and CHIP, which  
7           we show as 102.8, so it is \$102 billion, would be almost  
8           a \$3 billion increase. It is 2.892.

9           Senator Cornyn. Mr. Chairman, if I can just  
10          respond.

11          The Chairman. I would like to vote, sir. We are  
12          going back and forth.

13          Senator Cornyn. Mr. Chairman, you made the point  
14          we need accurate data.

15          The Chairman. Well, they gave the data.

16          Senator Cornyn. Well, I would suggest that the  
17          data just being provided and the data being provided to  
18          me by Medicaid experts in the state are vastly different.

19          So we need to get to the bottom of it.

20          The Chairman. But the data has nothing to do with  
21          the amendment. If we are talking about a 75 percent  
22          reduction and if states do not get 75 percent, that is  
23          what this amendment is all about.

24          It has nothing to do with the FMAP payments. That  
25          is just a whole different issue.



1           So all those in favor of the current amendment --

2           Senator Kyl.   Mr. Chairman, I would like to respond  
3 to three things you said, very quickly.

4           The Chairman.   I am sorry, Senator. You still have  
5 got about five minutes and then we are voting.

6           Senator Kyl.   Well, that is fine. It will not take  
7 me long at all.

8           The Chairman.   Five minutes.

9           Senator Kyl.   You talked about the un-  
10 competitiveness of American business as the result of  
11 their health costs. Every economist will tell you that  
12 is false. The companies pass their health care costs on  
13 to their employees. This is not a cost of business that  
14 makes them less competitive, number one.

15                       Second, you said that the delivery system is  
16 going to be changed by the way we pay the providers,  
17 including the doctors. And while I know that is the way  
18 that a lot of folks here look at it, that is not the  
19 right way to look at it.

20           I appreciate the fact that you can use what you pay  
21 as a disincentive or an incentive to change behavior of  
22 doctors and providers. I happen to think that is a false  
23 choice and not the best way to get quality health care  
24 change. That is precisely what results in rationing.

25           The Chairman.   All right. All those in favor of

1 the amendment, signify --

2 Senator Kyl. The third point is, Mr. Chairman,  
3 that you talked about integrated systems and while it is  
4 true that integrated systems can make a lot of  
5 difference, it is also true that they are the exception.  
6 They can never be the rule. Not every physician wants to  
7 be an employee of the Mayo Clinic.

8 If you talk to the folks at these clinics that you  
9 cite, they will all tell you that they are in unique  
10 environments and that their situations represent very  
11 good care, but that they do represent the exception, not  
12 the rule.

13 And finally, the alternative is not the status quo.  
14 In my opening statement, I pointed out at least three  
15 specific things that would reduce costs. We do not just  
16 have to reduce the pay that physicians receive in order  
17 to change the nature of the costs in our system and,  
18 therefore, make insurance more affordable.

19 I know you basically ignored our suggestions, but do  
20 not continue to repeat that the alternative is the status  
21 quo, because, in effect, what you are saying is that  
22 those of us who have continually come up with other  
23 alternatives do not have alternatives, and that is simply  
24 not true.

25 The Chairman. All right. Thank you, Senator.

1 That was under five, appreciate that very much.

2 The question is on the amendment. All those in  
3 favor of the Cornyn amendment, signify by saying aye.

4 [A Chorus of Ayes.]

5 The Chairman. Those opposed, no.

6 [A Chorus of Nays.]

7 The Chairman. In the opinion of the Chair, the  
8 nays have it. The amendment is not agreed to. Senator  
9 Cornyn, do you have another amendment?

10 Senator Cornyn. Mr. Chairman, if everybody is  
11 listening and receptive to arguments, I will be glad to  
12 move to Cornyn amendment D-4. This amendment is designed  
13 to ensure that seniors have access to physicians beyond  
14 2010.

15 The Chairman. This is D-4.

16 Senator Cornyn. Yes, sir. The Chairman's mark  
17 cuts \$409 billion from Medicare payments, but fails to  
18 permanently ensure that seniors under the program have a  
19 stable access to a doctor.

20 The Chairman's mark provides only a one-year fix to  
21 the sustainable growth rate for 2010. As I recounted  
22 earlier, I believe every time that the Balanced Budget  
23 Act would whack doctor reimbursement payments, we have  
24 acted to reverse that and I predict that we will do so  
25 again.

1           In 2011, physicians serving Medicare face a 25  
2 percent pay cut and we all know, as I say, from recent  
3 history, that Congress will not let that happen. We will  
4 have to rush to pass another DOC FIX at the last minute,  
5 but since this bill cuts \$409 billion over the next 10  
6 years, finding offsets will be difficult.

7           I am just asking a question of why we are not  
8 providing a lasting solution to a physician payment  
9 formula that we know is broken and we know we will have  
10 to fix, because a permanent fix here, of course, will add  
11 more than \$200 billion to the cost of the bill, and that  
12 proves to be an inconvenient fact.

13           Instead of reducing the deficit by \$49 billion, a  
14 real solution would result in a bill that substantially  
15 increases the deficit when you add the true cost of the  
16 DOC FIX over 10 years. I suggest this is strictly a  
17 matter of candor and honesty with the American people  
18 about the real costs of this bill and the real costs of  
19 keeping promises to seniors.

20           My amendment reduces outlays under the bill to  
21 ensure that seniors have access to their doctors through  
22 2010.

23           The Chairman. For my information, Senator, is this  
24 a 10-year SGR fix, as they say? As I look at the  
25 amendment, it just says beyond 2011.

1           Senator Cornyn.    It is a two-year fix.

2           The Chairman.    So the mark is one year with a half-  
3 percent update in 2010.  Your amendment is what?

4           Senator Cornyn.    It goes two years, but, Mr.  
5 Chairman, we know we are going to do it over the 10  
6 years, we might as well do it.

7           The Chairman.    That is not my question.  My  
8 question is what is this amendment.

9           Senator Cornyn.    I answered your question.

10          The Chairman.    So it is two years at what percent  
11 update?

12          Senator Cornyn.    It is a zero update.  It holds it  
13 flat.

14          The Chairman.    All right.  The mark gives a half-  
15 percentage update for 2010.  Yours is no update for 2010  
16 and 2011.

17          Senator Cornyn.    It stops a 25 percent cut.

18          The Chairman.    So does ours.  The mark stops the  
19 cut and it replaces the cut with a half-percent update.

20          Senator Cornyn.    For one year.

21          The Chairman.    For one year.  Yours stops the cut  
22 and replaces --

23          Senator Cornyn.    Holds it flat for two years.

24          The Chairman.    Holds it flat for two years.

25          Senator Cornyn.    That is correct.

1           The Chairman.   All right.  Thanks.  And it is  
2   offset by striking the tax credit for individuals between  
3   300 percent and 400 percent of poverty, by striking that  
4   provision.  Is that correct?

5           Senator Cornyn.   Striking the premium tax credit  
6   for individual between 300 and 400 percent of poverty.

7           The Chairman.   Let me ask Mr. Dawe.  How much will  
8   that cost?

9           Senator Cornyn.   And reducing the Medicaid  
10   administrative reimbursement rate to 50 percent.

11          The Chairman.   Mr. Dawe, how much will that cost?

12          Mr. Dawe.   We are checking with CBO, but it will  
13   depend on what the amendment does in the third year.

14          The Chairman.   It is zero in the third year.

15          Mr. Dawe.   Well, does it revert to current law?

16          The Chairman.   Will there be a cut or dip in the  
17   third year?  That is the question.

18          Mr. Dawe.   That is correct.  It sounds like there  
19   will be.

20          The Chairman.   Is there?  Will there be a dip and a  
21   cut in the third year?

22          Senator Cornyn.   Well, it is a two-year fix, which  
23   I imagine we will come back in current three and do it  
24   all over again, as we will for every year during the 10-  
25   year budget window.

1           The Chairman.    I just urge us to vote down this  
2 amendment.   I mean, we should not be cutting the tax  
3 credits in the exchange.   So I urge that we do not adopt  
4 this amendment.

5           Senator Ensign.   Mr. Chairman?

6           The Chairman.    The Senator from Nevada.

7           Senator Ensign.   Mr. Chairman, I think an important  
8 point that Senator Cornyn is making with the amendment  
9 and with his previous amendment is access to care.

10           We know every year, because of the low reimbursement  
11 rates, that more and more doctors, more and more health  
12 care providers are not taking new Medicare patients, are  
13 not taking Medicare patients, or are opting out of  
14 Medicare.   Same thing with Medicaid.

15           While cost is a significant issue, at the same time,  
16 access to care.   We have all talked about access to care,  
17 how critical that is, because just because you have  
18 coverage, if you do not have access to care, the coverage  
19 does not get you anything.

20           We also know, and this point has been made over and  
21 over again, as a matter of fact, when you talk to the  
22 people from Mayo Clinic, you talk to people from the  
23 Cleveland Clinic, any of the folks that we had testifying  
24 in front of us, they talked about this cost shifting that  
25 goes on and the folks that I talk to say it is anywhere

1 from 20 to 30 percent, on a conservative estimate, the  
2 cost shift from Medicaid and Medicare to private health  
3 insurance plans.

4 The reason is because of the low reimbursement  
5 rates. The bottom line is we need to figure out, if you  
6 are going to continue with Medicare fee-for-service and  
7 Medicaid, we have got to figure out a way to do it to  
8 where physicians will continue to see senior citizens,  
9 people that are disabled, the poor, or otherwise we are  
10 going to be covering a lot of people, but nobody is going  
11 to have access to health care, because there are not  
12 going to be any health care providers that are going to  
13 see these folks.

14 Senator Conrad. Mr. Chairman?

15 The Chairman. Senator Conrad?

16 Senator Conrad. Mr. Chairman, if I could get  
17 Senator Cornyn's attention. I just want to say to the  
18 Senator I pushed for this position in terms of a two-year  
19 pay-for for the DOC FIX very hard in the group of six and  
20 until the very end, we had the two-year fix.

21 If you think about all the other things that are  
22 coming due in two years, that would put everything on an  
23 equivalent basis, the extenders, the tax cuts, the DOC  
24 FIX, all of these things, put it on a two-year basis,  
25 because then you would have before the Congress and the



1 American people the tradeoff.

2 So I very strongly support the first part of your  
3 amendment to have a two-year fix and I am very hopeful  
4 that before we are done with this process, we will have a  
5 two-year fix.

6 I wish you had not chosen that particular pay-for  
7 that you did, because that will hurt on the affordability  
8 side and I think most of us, in looking at the  
9 affordability tables, would say that is an area that  
10 still needs more work.

11 If you look at the percentage of income for people  
12 right over 300 percent of poverty, which is \$66,000 for  
13 family of four, we have got a continuing problem. Then a  
14 substantial improvement by the work of the group of six  
15 and the Chairman's mark, but I think most of us would  
16 look at the potential out-of-pocket exposure and the  
17 potential percentage of income people would have to pay  
18 and say it is too high.

19 So unfortunately, in that way, your amendment would  
20 make it worse.

21 The Chairman. Thank you for the discussion.

22 Senator Conrad. So I very much hope we can solve  
23 this problem with the DOC FIX.

24 The Chairman. Senator Menendez?

25 Senator Menendez. Mr. Chairman, I have a problem

1 when we hear voices talking about the concern about  
2 affordability in what we are trying to do and then the  
3 amendments come and they strike at a affordability, and  
4 that is the very essence of this.

5 And the Chairman's mark at least actually raises  
6 somewhat the DOC FIX, not only takes care of it in the  
7 first year, but gives them something extra.

8 So if the argument is that unless -- which I agree  
9 -- unless the providers, in this case, the doctors, are  
10 going to receive an incentive to continue to expand that  
11 universe, the Chairman at least provides somewhat of an  
12 incentive in his mark.

13 So it seems to me that the Chair's mark moves in the  
14 right direction while not undermining the affordability  
15 that this amendment would do. And so I hope we will  
16 reject it based upon both of those issues.

17 The Chairman. Senator Stabenow?

18 Senator Stabenow. Thank you, Mr. Chairman. First  
19 of all, I just want to say that I could not agree more  
20 that we need to fix SGL. We need, in my book, to throw  
21 out the sustainable growth rate and put something else in  
22 its place.

23 Senator Kyl and I have had legislation now for more  
24 than one Congress that would do that. I know that that  
25 is a desire. I know when we started this process, that

1 was what the Chairman was hoping to do and there has been  
2 discussion and commitment to, in the long run, be able to  
3 do that, because that is exactly what we need to do.

4 I am pleased that the Secretary of HHS has taken an  
5 important step in helping us do that by removing the cost  
6 of medicine from this formula. So that lowers the cost  
7 overall of what it will take to actually fix this and get  
8 this done.

9 So we are moving in the right direction by a step  
10 from the Secretary of HHS, but at this point, again, I  
11 would share the concerns of my colleagues. At least this  
12 is a half a percent increase for the coming year and we  
13 know we are going to come back and address this long  
14 term. We have to address it.

15 But at the same time, I want to make sure that  
16 middle income families have the opportunity to be able to  
17 afford health insurance. And so pitting one group  
18 against the other is something that I do not believe is  
19 wise.

20 Thank you, Mr. Chairman.

21 The Chairman. All right. Ready to vote? All  
22 those in favor of the Cornyn amendment, say aye.

23 [A Chorus of Ayes.]

24 The Chairman. Those opposed, no.

25 [A Chorus of Nays.]

1           The Chairman.    The nays appear to have it.  The  
2 nays have it.  The amendment is not agreed to.

3           Senator Cornyn.   I have another amendment, Mr.  
4 Chairman.  This is Cornyn amendment D-5.  This is about a  
5 patient's right to information on quality.  The amendment  
6 would require Medicare to release claims data to  
7 independent entities to create a *Consumer Reports*-like  
8 information repository for patients on the quality of  
9 their health care providers.

10           The amendment would mandate the protection of  
11 beneficiary privacy throughout the bill under both the  
12 HIPAA laws and the Privacy Act.  I think if there is one  
13 thing we found with the advent of health savings accounts  
14 and giving people the opportunity to get a little skin in  
15 the game when it comes to health care costs, they have a  
16 greater awareness of the money that is being spent for  
17 their health care, which they do not necessarily have  
18 with a prepaid health plan, which is really not health  
19 insurance.  It is prepaid health care.

20           I think this amendment would address, ultimately,  
21 through not a government entity, but a *Consumer Reports*-  
22 like entity, and I suspect there would be a cottage  
23 industry in producing this kind of information in the way  
24 that is most accessible and helpful to consumers, about  
25 quality of care and about costs in a way that creates a

1 true market and consumer awareness that will ultimately  
2 help bend the cost curve.

3 I think if we are interested in bending the cost  
4 curve, we have talked a lot about delivery system reform,  
5 we need to realign the incentives for the individual, and  
6 I think this will go a long way to do that.

7 So I would ask my colleagues for their support.

8 Senator Wyden. Mr. Chairman?

9 The Chairman. Senator Wyden?

10 Senator Wyden. Mr. Chairman, I am very attracted  
11 to the Cornyn idea. He and I have talked about this  
12 often over the years. The fact is if you are going to  
13 empower patients, and this is absolutely central, if you  
14 are going to change American health care anytime soon,  
15 one economist after another has said that unless you give  
16 people the opportunity to drive the decisions in this  
17 area, you are not going to get significant changes.

18 What Senator Cornyn is talking about is making sure  
19 that you empower individuals with the latest and most  
20 current information, objective information, essentially  
21 from the source that Senator Cornyn has described.

22 And it is my understanding, Senator, that you have  
23 kept the HIPAA privacy protections and I think the staff  
24 may have a question about one of the details about the  
25 issue, as I understand it, but I think we ought to work

1 this out.

2 I think this is one of the key issues in terms of  
3 promoting transparency, the public's right to know, and  
4 for those who want to make a market in American health  
5 care that empowers consumers, I think this is central to  
6 doing health care reform right. We ought to be taking  
7 the Cornyn amendment.

8 Thank you, Mr. Chairman.

9 The Chairman. Well, my concern -- and there are so  
10 many questions of first impression here of not knowing  
11 more about the subject -- is that this could cause a lot  
12 of confusion, because once this is -- this is  
13 commercialized.

14 It basically gets all the data. Medicare data would  
15 be commercialized in the sense that private entities take  
16 all this data and reach lots of different conclusions.  
17 And I do not know if we are going farther than we should  
18 have without giving this more careful thought.

19 So to be honest, I am kind of conflicted about this  
20 at this point.

21 Senator Snowe?

22 Senator Snowe. I share the Chairman's concerns.  
23 This may be unprecedented in terms of the extent to which  
24 we would be releasing de-identified claims data and it  
25 isn't narrow enough and there are concerns with having

1 this data shared even for purposes beyond consumer data  
2 and report-like information.

3 We considered this within the group of six and could  
4 not resolve the privacy question. I would wonder if the  
5 Senator would consider doing a study on the feasibility  
6 of it until we can have a better assessment in terms of  
7 privacy issues, because it would be far broader than has  
8 ever been done before.

9 Senator Cornyn. Mr. Chairman, I appreciate the  
10 concerns and as I said earlier and as Senator Wyden said,  
11 as well, both the protections under the Health  
12 Information Portability and Accounting Act and the  
13 Privacy Act would continue to apply here. So that should  
14 alleviate those concerns.

15 Rather than a study, which I am afraid that if we  
16 kick the can down the road with a study, if we are doing  
17 comprehensive health care reform, this has to be one of  
18 the cornerstones, I think.

19 So perhaps the better part of valor, given some of  
20 the reservations, if I could just ask the Chairman and  
21 Senator Snowe if we could try to work together to address  
22 your concerns, while providing a means to get this  
23 information to consumers, which I agree will empower them  
24 to make better decisions.

25 Let me just withdraw it at this time, if I can

1 please get your help to work together on it.

2 The Chairman. I appreciate that, Senator, and I  
3 very much want to work with you on this. I understand  
4 what you are trying to do and I generally believe that  
5 more information is better, but I am a little concerned  
6 that maybe there is just too much here.

7 Senator Cornyn. I would just note the Health  
8 Committee reported out a bill last year that had this  
9 type of provision, just FYI.

10 The Chairman. All right. So the amendment is  
11 withdrawn and we are going to work on it. I will take  
12 one more, if it is very quick, because I would like to  
13 give the staff a break.

14 Senator Stabenow. Mr. Chairman?

15 The Chairman. Let us find out what your amendments  
16 are before we act on them. What is your amendment,  
17 Senator Stabenow? What is it?

18 Senator Stabenow. Mr. Chairman, it is a modified  
19 version of C-7, which is actually in your modified mark.  
20 We thought it was set. There is just some clarification  
21 in the language. The language was not quite right.

22 You had already accepted it in your modified mark  
23 that deals with standalone dental plans, making sure they  
24 can be part of the change.

25 The Chairman. Let me just check with our staff and



1 see whether that has been worked out.

2 Senator Stabenow. And I believe that it has been  
3 all worked out with your staff. Which one is it?

4 Senator Stabenow. It is the dental plans, the  
5 standalone dental plans. We worked within your modified  
6 mark, but we evidently needed to clarify something.

7 The Chairman. I have been advised we still have to  
8 look at it, Senator.

9 Senator Wyden?

10 Senator Wyden. Mr. Chairman, Senator Grassley and  
11 I have worked with your staff on an amendment that I  
12 believe your staff and Senator Grassley's staff has  
13 agreed to. It is D-15. We are just getting it printed  
14 up.

15 Would it be acceptable to you, Mr. Chairman, if I  
16 just described it briefly?

17 The Chairman. It is my understanding it is  
18 acceptable on this side anyway, and I think Senator  
19 Grassley's. That is for Senator Grassley, too. Is that  
20 correct? I am told that is correct.

21 Senator Wyden. Would you like me just to describe  
22 it very briefly?

23 The Chairman. No. Just offer it.

24 Senator Wyden. All right. Offered, D-15. Quit  
25 while you are ahead.

1           The Chairman.    All those in favor, say aye.

2           [A Chorus of Ayes.]

3           The Chairman.    Those opposed, no.

4           [No response.]

5           The Chairman.    The ayes have it.  The amendment is  
6 agreed to.  We are going to recess now until 9:30  
7 tomorrow morning.  The committee is in recess until 9:30.

8           [Whereupon, at 11:12 p.m., the Committee was  
9 adjourned, to reconvene Thursday, September 24, 2009 at  
10 9:30 a.m.]

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I N D E X

PAGE

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