

1 EXECUTIVE COMMITTEE MEETING TO CONSIDER
2 HEALTH CARE REFORM
3 THURSDAY, SEPTEMBER 24, 2009
4 U.S. Senate,
5 Committee on Finance,
6 Washington, DC.

7 The hearing was convened, pursuant to notice, at
8 9:40 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; Tiffany Smith, Professional Staff; Bridget
19 Mallon, Detailee; Kelcy Poulson, Tax Research Assistant;
20 Michael Smart, International Trade Counsel; Mary Baker,
21 Detailee; Chris Dawe, Professional Staff; and David
22 Hughes, Senior Business and Accounting Advisor.
23 Republican Staff: Kolan Davis, Staff Director and Chief
24 Counsel; and Mark Hayes, Republican Health Policy
25 Director and Chief Health Counsel.

1 Also present: David Schwartz, Professional Staff;
2 Yvette Fontenot, Professional Staff; Thomas Barthold,
3 Chief of Staff of the Joint Committee on Taxation; Josh
4 Levasseur, Deputy Chief Clerk and Historian; Athena
5 Schritz, Archivist; Shawn Bishop, Professional Staff; and
6 Neleen Eisinger, Professional Staff.

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

3

4 The Chairman. The Committee will come to order.

5 I would like to go over some of the amendments we
6 have pending now. First, yesterday was--to sum up, we
7 voted on only about 25 amendments, and I look forward to
8 an even more productive day today. Let me list the
9 amendments that are in one way or another available.

10 First, we have from the First Delivery Reform list--
11 that is how it is titled here--Wyden D-2, Rockefeller D-
12 10, Nelson D-1, Bingaman D-6, and Hatch D-3.

13 Then we have another category from the Second
14 Delivery Reform list. That is Roberts D-4, Wyden D-17,
15 Grassley C-9, Kyl D-8, Roberts D-5, and Nelson D-10.
16 That is Medicare Advantage. I guess I should give
17 titles.

18 Then from the Wednesday late night list, Cornyn D-5,
19 Access to Medicare Data Claims; Crapo D-1, Medical
20 Advantage Competitive Bidding; Grassley, GPCI; Wyden,
21 Hospice; Stabenow C-5, Access to Providers and the
22 Exchange; Stabenow C-7, Dental Plans and Exchange;
23 Stabenow C-8, Level Playing Field for Ratings Reform; and
24 Menendez C-9, Quality Health Care for Autism.

25 Okay. If we are ready, we will take amendments.

1 Let us get started here. Who wishes to offer an
2 amendment?

3 I see here this morning--Senator Conrad is here. I
4 do not see the Conrad Amendment. But Senator Kyl,
5 Senator Bunning--

6 Senator Kyl. Mr. Chairman, I would just note one
7 thing. As you know, Senator Roberts has got to watch his
8 health, and so there are some times when he is not here,
9 and the amendment that he and I have really need to go
10 together and so on. So I think we should defer that.

11 The Chairman. That is not D-8, is it?

12 Senator Kyl. No, that is--yeah, well, mine is D-8,
13 his is D-5, and actually there are a couple others that
14 go with that that are not on either of these lists.

15 The Chairman. Senator Hatch, I see D-3, Strike DSH
16 Provisions?

17 Senator Hatch. I am not quite prepared yet, Mr.
18 Chairman.

19 The Chairman. Okay, you are not quite ready.

20 Senator Conrad. Mr. Chairman?

21 The Chairman. Senator Conrad.

22 Senator Conrad. I do not have an amendment on that
23 list, but I would like to offer an amendment that would
24 rule out of order any amendments pending if the members
25 are not here to actually offer them. I would be happy to

1 withhold that amendment.

2 Senator Kyl. Well, Mr. Chairman, I think we should
3 vote on it right now without proxies.

4 [Laughter.]

5 The Chairman. I see Senator Wyden here. Senator
6 Wyden, you have one, two, three amendments here on three
7 different--each amendment on a different list, three in
8 total. One is Independence at Home. It is D-2. Then we
9 have D-17, Medicare Advantage modified. Then I see D-16,
10 Hospice.

11 Senator Wyden. Mr. Chairman, you are being
12 logical, and we are going to need a few minutes to work
13 with colleagues and get back to you and Senator Grassley
14 to see if we have a bipartisan agreement.

15 The Chairman. All right.

16 Senator Conrad. Mr. Chairman, while we are waiting
17 for colleagues to come to the hearing room to present
18 their amendments, do we have any more information
19 overnight on CBO's scoring of amendments that are
20 pending? Did we get any report overnight?

21 The Chairman. I do not think--nothing we want to
22 discuss publicly.

23 Senator Conrad. I was afraid of that. One thing
24 that would be, I think, very useful to disposing of as
25 many amendments as possible today is if we could get some

1 scheduling of amendments, talking to staffs. We have
2 tried to do that, the Chairman has tried to do that by
3 laying out in order of the type of amendments to be
4 considered at a time. But maybe it would be useful now
5 if colleagues knew when their amendments were going to be
6 considered, that that would help organize. We know that
7 colleagues, in fairness to them, have other
8 responsibilities. They have other Committee assignments.
9 They have meetings with people from back home. But
10 perhaps if they knew when their amendment was most likely
11 to come up--

12 The Chairman. Well, that is a good point, but
13 there is no better time than right now. Anyone could
14 offer an amendment now. But you make a good point. Let
15 us do that once we get started here. We are about ready.

16 Senator Wyden, how soon, do you think?

17 Senator Wyden. Mr. Chairman, again, we are going
18 to need a few minutes on Medicare Advantage. We are
19 going to need colleagues here. And as you know, last
20 night you asked us to defer on the hospice amendment. So
21 we will need a little bit more time, but that is why I am
22 here, to try to work as expeditiously as possible.

23 Senator Hatch. Mr. Chairman, I am ready to offer
24 my amendment if you want.

25 The Chairman. Okay. Senator Hatch? You are good

1 man, Senator Hatch.

2 Senator Hatch. Thank you. I thought I would pull
3 you out of this lethargy you are in here.

4 The Chairman. Thank you.

5 Senator Hatch. I would call up amendment C-2 to
6 the America's Healthy Future Act of 2009. Now, the short
7 title of this amendment--

8 The Chairman. It is not on this list, but that is
9 fine with me to offer the amendment.

10 Senator Hatch. It is what, now? I did not hear
11 you.

12 The Chairman. C-2.

13 Senator Hatch. C-2. What this amendment does is it
14 ensures Americans can keep the coverage that they have.
15 This is one of the major points that the President has
16 made over and over and over, and I think we ought to at
17 least try to help live up to that if we can; that is, if
18 you have coverage that you like, you will be able to keep
19 it under this bill. And yet there are lots of provisions
20 in this bill that will make it so you cannot keep your
21 coverage.

22 So I have got a way, maybe, of helping us to be a
23 little more perspicacious on this particular level in
24 this matter.

25 Senator Conrad. Would the Senator yield? What was

1 that last word that you used?

2 Senator Hatch. Well, I do not know what it means
3 either, but--

4 [Laughter.]

5 Senator Hatch. "Perspicacious." It is something I
6 would like to see more from you.

7 Senator Conrad. Well, what does it mean?

8 Senator Hatch. I want you to look it up. You have
9 your BlackBerry. Just get it out.

10 Senator Conrad. Okay.

11 Senator Kyl. Perspicacity.

12 Senator Hatch. That is right.

13 Senator Kyl. A capacity to see things in great
14 dimension and time.

15 Senator Conrad. I see.

16 Senator Hatch. I knew that Senator Kyl would set
17 us straight.

18 Senator Conrad. Very, very good word.

19 Senator Grassley. He was born in Iowa.

20 Senator Hatch. Well, back to the amendment. The
21 purpose of this amendment is simple. If the Secretary of
22 Health and Human Services certifies that more than 1
23 million Americans would lose the current coverage of
24 their choice because of this bill, then this bill would
25 not go into effect. It seems like a very, very simple

1 but perfect amendment for those of us who have integrity.

2 This amendment is simply trying to safeguard
3 President Obama's pledge to the American people that you
4 will get to keep what you have. And even allowing for a
5 million people, up to a million people, 999,999. And it
6 is a straightforward amendment that explicitly tests our
7 Committee's commitment to the President's promise without
8 any technical nuances.

9 Now, let me make this point here. Especially in the
10 light of our Medicare Advantage debate that we had
11 yesterday--and I have to say, I am very disappointed in
12 this Committee for what we did on Medicare Advantage.
13 The American people are tired, I think just tired of
14 promises being made that are simply forsaken based on
15 technicalities and nuances.

16 For example, we will not cut your Medicare benefits.
17 That has been said over and over and over. But as we
18 saw yesterday, that only happens unless you are one of
19 the almost 10 million Medicare Advantage seniors whose
20 extra benefits will be cut--the technicality here being
21 it is not a statutory benefit; it is an extra benefit
22 like vision or dental care.

23 Well, Mr. Chairman, seniors do not know the
24 differences between statutory benefits or so-called extra
25 benefits. They only know benefits. And I think vision

1 and dental benefits, even though they are being
2 classified as extra benefits, are real benefits for our
3 seniors.

4 So we have made this amendment very simple and
5 straightforward so that we can make a clear decision on
6 if the majority supports the President's promise of you
7 can keep what you have, or not, no technicalities, no
8 nuances, we all believe that health care reform should
9 not impact Americans who currently enjoy the health care
10 of their choice. The purpose of this legislation, as the
11 chairman has repeatedly indicated, is to increase our
12 choices, not to eliminate them. And yet yesterday we
13 basically eliminated the choice of 10 million Americans.

14 And what really got me upset is to say that because
15 we want to keep Medicare Advantage as it is--it works
16 beautifully, people have better health care outcomes, it
17 actually saves money in the long run, it actually helps
18 people, senior citizens, if you will--but it does cost a
19 little more. But all of those advantages more than make
20 up for the cost, in my opinion. And if all of us around
21 the table believe that in this bill delivering the
22 President's promise, we should have no problem supporting
23 this amendment. And I have even allowed a little leeway
24 here, although I do not even like that, but I thought I
25 would go that far, that if it is less than a million, you

1 can do what you want, but up to a million, a million or
2 more, then they ought to be able to keep the current
3 coverage of their choice. And these 10 million
4 Americans, 90-some percent of them love Medicare
5 Advantage. And the reason we did Medicare Advantage is
6 because the senior citizens were not being helped in the
7 rural others, among others. In some of these distinctly
8 difficult areas of providing health care, we were not
9 getting to them. We were not helping them. Medicare
10 Advantage has had a tremendous advantage to them.

11 And if there are any cuts, the \$113 billion taken
12 out of Medicare Advantage is a cut--or, should I say, a
13 massive amount of cuts that affect 10 million people in
14 this society, some of the most vulnerable people that I
15 know of.

16 So I hope that our colleagues will consider this
17 amendment and vote for it because we ought to be willing
18 to do that, and I have been very generous in allowing up
19 to a million people--or more than a million people to
20 give some leeway to the Committee, but even that, I have
21 got to admit, I do not like but I am willing to offer
22 this amendment on that basis.

23 The Chairman. Any discussion?

24 Senator Conrad. Mr. Chairman?

25 The Chairman. Senator Conrad.

1 Senator Conrad. Mr. Chairman, if I ever need a
2 lawyer to represent me if I have a very bad case, I am
3 going to try to get Senator Hatch to represent me,
4 because he can make the best of a bad case of almost
5 everybody I have ever seen.

6 Senator Hatch. You know, Senator, I feel the same
7 about you when it comes to budgetary matters, because
8 nobody can explain it better than you and get away with
9 what you do from time to time.

10 [Laughter.]

11 Senator Conrad. Well, that is sort of a back-
12 handed compliment, but I will take it this morning.

13 The reason I gave you the compliment I did is
14 because--

15 Senator Hatch. You are very kind.

16 Senator Conrad. --we all know the truth. The
17 truth is Medicare is headed for bankruptcy. We all know
18 that Medicare Advantage is one of the key reasons that
19 that is so, because Medicare Advantage, which was sold
20 initially on the basis that it would save money--in fact,
21 it was capped at 97 percent of fee-for-service Medicare.

22 We now have Medicare Advantage plans that cost 150
23 percent of fee-for-service Medicare, and we have a
24 runaway train. And it is costing all of those who are in
25 Medicare more money to float the boat for those who are

1 getting very advanced and enhanced benefits we simply
2 cannot afford.

3 And what Senator Hatch promoted last night, and
4 apparently wants to continue to promote today, is the
5 false sense to people who are on Medicare Advantage that
6 we can keep on paying for something that is clearly
7 unaffordable and is going to contribute to the bankruptcy
8 of Medicare.

9 Now, at some point we have to look people in the eye
10 and tell them the truth. The Medicare trust fund has
11 already gone cash negative. The trustees have told us
12 Medicare will go broke in 8 years. So the notion that we
13 do not have to change anything, just stick with the
14 status quo, is a prescription for a disaster--a disaster
15 for Medicare beneficiaries, a disaster for the Federal
16 Government because the biggest unfunded liability of the
17 United States is Medicare. The unfunded liability in
18 Medicare is \$36 trillion.

19 Now, if you do not want to do anything about that,
20 if you just want to stay on cruise control until we go
21 right over the cliff, then support the Hatch amendment.

22 Senator Hatch. Well, Mr. Chairman, let me just
23 answer that. You know--

24 The Chairman. Anybody else seeking recognition?

25 Senator Hatch. I see recognition. It is my

1 amendment. I should be able to answer it.

2 The Chairman. I know, but a lot of the Senators
3 wish to speak, too.

4 Senator Hatch. A point of privilege. I--

5 The Chairman. Okay, Senator Hatch. You can speak.
6 You are recognized.

7 Senator Hatch. Look, the distinguished Chairman of
8 the Budget Committee has made a point, and that is, we
9 are \$38 trillion in unfunded liability in Medicare. So
10 we are going to take \$113 billion from people who benefit
11 greatly from a program that was designed to benefit them
12 greatly, senior citizens, 25 percent of all Medicare
13 recipients, who love the program, have benefited greatly,
14 it functions greatly, because they would go to a fee-for-
15 service situation that does not function anywhere near as
16 good. And, frankly, I do not see it. If the President
17 meant what he said, that if you like what you have you
18 can keep it, why would we take this away from 10 million
19 people?

20 I hate to say it, but there are times when I
21 actually believe that the only reason they want to get
22 rid of Medicare Advantage is because they consider it a
23 Republican program, when it is not. It was a bipartisan
24 program. The distinguished Chairman was there in the
25 Medicare Modernization Act work that we all did together.

1 I was sitting right there with him. And, frankly, we
2 did this because it was necessary. We could not get the
3 care to people in the rural areas in this country.

4 But you know what really bothers me? It looks as
5 though the majority is willing to support the Nelson
6 amendment when they say that, well, this is going to cost
7 an inordinate amount of money, even though it works, that
8 takes care of a number of States, mainly in the East, and
9 mainly States where the costs are exorbitant compared to
10 other States. I would like to see every State in the
11 Union--and let me just say this, let me refocus, my dear
12 friend from Montana--not Montana, but North Dakota, on
13 this amendment.

14 The Chairman. They are all the same up there,
15 those Northern States.

16 Senator Hatch. Well, I did lump you together. I
17 do not think there is any question about that.

18 Now, Medicare Advantage includes--my amendment
19 includes all Americans--all Americans with coverage of
20 their choice, both public and private. So let us get
21 back to my amendment which applies to all Americans.

22 And, look, the fact that you take care of these 10
23 million people, you know, it seems to me, who have
24 benefited greatly in a system that works, that works
25 better than the fee-for-service system that they want to

1 move all that \$113 billion in and cut these people, one-
2 quarter of our senior citizens in this country, and they
3 are willing, maybe, to do it for a limited number of
4 States, that argument that has just been made does not
5 cut water, as far as I am concerned. They are willing to
6 do it to a limited number of States, but they are not
7 willing to do it to keep the President's promise.

8 Now, if this program was not good, if it did not
9 work, or even if it was just modest in nature, I might
10 feel differently. But this is a terrific program that
11 has really helped our seniors, those who are on it, and
12 has really helped rural America, which is often left out
13 of some of the Federal health care approaches. And this
14 is one thing we did to make sure they were not left out.

15 And it works. That is the thing that bothers me.

16 And then I hear this argument, well, we are \$38
17 trillion in unfunded liability. This is a smidgeon
18 compared to what they are willing to spend with regard to
19 Medicare otherwise.

20 Now, yes, we have to do something about Medicare and
21 its high deficits. But we should not do it on the backs
22 of these 10 million American seniors who have, for once
23 in their lives, had basically decent and honorable health
24 care.

25 The Chairman. I would like to address the

1 underlying assumption of this amendment. The assumption
2 of the amendment certainly implies that nobody is losing
3 coverage today. It implies that anybody today could keep
4 whatever insurance plan he or she currently has today.
5 Whereas, under this legislation we are considering, the
6 assumption is coverage would be lost, that is, some will
7 not be able to keep their own plan.

8 That is a patently gross, inaccurate assumption.
9 Under current law, coverage today is very much at risk.
10 Very much at risk. Fourteen thousand people a day lose
11 health insurance. Fourteen thousand a day due to job
12 loss, they are losing their coverage. They cannot keep
13 what they have. Just think of all the people who wake up
14 and find their insurance plan has been changed. Copays
15 are up. Deductibles are up. Less coverage. Rescission
16 clauses added. You know, coverage limits increased. And
17 what the company will pay is less.

18 Time and time and time again, people cannot rely on
19 their current plan. They cannot keep what they have
20 today. They can't keep what they have today. Everybody
21 feels insecure about his or her coverage, afraid it is
22 going to deteriorate, something is going to happen to it.

23 You cannot keep today--today--what you might want to
24 have.

25 There are lots of examples. There is one example

1 some of us have heard about where an individual is
2 diagnosed with cancer, but because she did not report
3 acne on her insurance application, she is denied
4 coverage. Just think of that. Time and time again,
5 insurers--what do they do? They go back and comb your
6 medical records to try to find some reason to deny
7 coverage. And they do a pretty good job at it. They
8 find something somewhere that you did not report,
9 innocuous, something small. Today, let us remind
10 ourselves you cannot keep what you have today, you are
11 very much at risk.

12 Most Americans do like their employer-sponsored
13 coverage and want to keep it, and this legislation helps
14 build upon that. We are allowing lower-income people,
15 too, some people, Medicaid expansion to get insurance
16 they do not now have and have a hard time getting.

17 Think of small businesses. Small business-provided
18 coverage, you cannot do it. Lots of people are losing
19 coverage in a small business.

20 The status quo today is very, very insecure
21 insurance coverage if you are able to get it in the first
22 place. And many people cannot get insurance coverage
23 because of some pre-existing condition. We are changing
24 that. We are stopping that. So let us be clear here.

25 The status quo, which will occur if this legislation

1 is not passed--and I will state it more starkly. People
2 who vote against this legislation are voting for the
3 status quo. They are voting to keep that insecurity.
4 They are voting to deny more people the insurance that
5 they may want to have because they are losing more of
6 their coverage every day.

7 A vote against this bill is a vote for continuing
8 insurance companies denying people coverage based on a
9 pre-existing condition. A vote against this bill allows
10 insurance companies to deny coverage based upon health
11 status. A vote against this bill allows excessive
12 rescissions. That is the status quo. That is what a
13 vote against this bill is all about.

14 So I want to make it very clear when people raise
15 some criticism that there may be some minor imperfection
16 about this bill that can be remedied, that we are working
17 on, that that person--I am not being personal here,
18 Senator Hatch, but basically any attacks against this
19 bill are essentially a defense of the status quo. They
20 are a defense of the status quo because there is not an
21 alternative on the other side. There is not. There is
22 not. All the amendments today are not a health reform
23 plan, but rather they are attacking this or attacking
24 that, something here, something there.

25 I do not know what the Republican alternative is.

1 The only thing I know a little bit about is the campaign
2 of Senator McCain talked about his approach to health
3 care. I do not see a massive or a big, large proposal on
4 the other side for an alternative. I do not see one.

5 Now, if we could debate alternatives here, that
6 would be interesting. But we are not debating
7 alternatives. We are just debating amendments that want
8 to attack this part of the mark, that part of the mark,
9 so on and so forth.

10 I know I am slightly overstating the point. I grant
11 you that. I am slightly overstating the point.

12 Senator Hatch. Yes, I would say slightly.

13 The Chairman. But not a heck of a lot overstating
14 it. Slightly but not a heck of a lot. And I hope I am
15 proven wrong. I want to see an honest proposal, an
16 alternative that is comprehensive that we can look at.
17 But so far I have not seen it.

18 Senator Hatch. Mr. Chairman?

19 Senator Bingaman. Mr. Chairman?

20 The Chairman. Senator Bingaman.

21 Senator Bingaman. Mr. Chairman, I just wanted to
22 make the obvious point, which I think you sort of made to
23 some degree there. I keep hearing the figure that over
24 14,000 people lose their coverage today, and I have not
25 heard anyone dispute that number. Maybe there is a basis

1 for disputing it. But if you just multiply that out, if
2 that is true, if there are 14,000 people per day losing
3 their coverage, then every 10 days there are 140,000,
4 every hundred days there are 1.4 million, every year
5 there are over 4 million people losing their coverage.
6 That is the status quo.

7 I think the amendment the Senator is offering says
8 that we cannot go ahead with the Chairman's mark if a
9 million people might lose current coverage. They are
10 losing current coverage, and they are going to keep
11 losing current coverage unless we take some action.

12 Senator Hatch. Mr. Chairman, I have got to answer
13 that. Mr. Chairman?

14 The Chairman. Senator Hatch.

15 Senator Hatch. I think you need to look at my
16 amendment. I do not think any of us doubt that some
17 people are losing their coverage. They go in and out of
18 coverage every year. And some really are in dire
19 straits, and we should straighten that out.

20 As I said before, I would prefer to have the States
21 handle these problems in accordance with their own
22 demographics and have the Federal Government give the
23 money to the States to do it. And States like Utah are
24 doing a terrific job in health care, and that could be
25 used as an example for all the other States that are not.

1 There are a number of other States; Minnesota is a great
2 example.

3 So there is no dispute that some people are losing
4 their coverage, but look at this amendment. My amendment
5 says if a million lose their coverage because of this
6 bill--because of this bill--no other reason, just this
7 bill. That is what the amendment says.

8 Now, I cite Medicare Advantage because already the
9 way we have configured this bill, there are 10 million
10 people who are going to lose their coverage, not just
11 14,000 a day or 4 million a year that go in and out of
12 the process and some lose their coverage that we should
13 try and take care of.

14 If this bill causes a million people or more to lose
15 their coverage, it seems to me if the President's words
16 mean anything--and I think they do to him. Do they mean
17 anything to us as members of this Committee as we are
18 trying to mark up a bill? He said that if you like your
19 coverage, you are not going to lose it. Yet 10 million
20 people, just to cite on illustration--I think we probably
21 could give more. But since we have concentrated on
22 Medicare Advantage, 10 million people are going to lose
23 their coverage.

24 And then I hear this argument, well, we are \$38
25 trillion in unfunded liability--yeah, we are, but these

1 are 10 million people, and it is a small, small
2 percentage of that \$38 trillion. And I would like to do
3 something about that \$38 trillion, but what I do not want
4 to do is take coverage away from people who love their
5 coverage, who would not get it otherwise, who were not
6 treated fairly--that is why we did the Medicare
7 Modernization Act and put Medicare Advantage to begin
8 with, to help them to get some coverage in those rural
9 areas and other areas where it was difficult to get
10 coverage. And, yes, it does cost a little bit more, but
11 it has been proven to be efficacious and better than most
12 coverage in our society from a fee-for-service basis.
13 And I am not criticizing that. I am just saying in this
14 area with these 10 million senior citizens, they should
15 not lose this \$113 billion that goes to them.

16 I could even agree to cut that back a little bit,
17 but what gets me is that at the same time we are arguing
18 that 14,000 are losing their coverage, we have got an
19 amendment from the distinguished Senator from Florida--
20 and I do not blame him. I think he is doing a terrific
21 job for his State, and the few States that will get some
22 Medicare Advantage coverage or get what basically is
23 Medicare Advantage coverage. Well, how can they justify
24 that and take it away from others? That is the reason
25 why this amendment--and, look, I have raised it to a

1 million people. That seems to me to be a reasonable
2 number. And if this bill takes it away--and remember the
3 key word is "If this bill causes their loss of coverage,
4 then the amendment becomes effective.

5 Senator Nelson. Would the Senator yield, since he
6 has invoked my name?

7 The Chairman. Senator Nelson.

8 Senator Nelson. If the distinguished Senator, my
9 friend, would yield--

10 Senator Hatch. I do.

11 Senator Nelson. He just made a statement that the
12 Senator from Florida's amendment would take it away from
13 others. I would like to correct that--

14 Senator Hatch. I did not say that. I did not say
15 that.

16 Senator Nelson. I thought I heard that is what you
17 said.

18 Senator Hatch. My point is that--and I do not
19 blame you for this. I commend you for it. You are
20 trying to make sure that your people are taken care of
21 and in a limited number of States and about 30 counties
22 in this country--

23 Senator Nelson. No, no, no. No, no. No, no. The
24 one that I am offering on grandfathering existing
25 Medicare Advantage beneficiaries will affect almost every

1 State of the 50 States, and the limited amendment that I
2 would offer will affect about half the counties in those
3 States.

4 Senator Kyl. Mr. Chairman?

5 The Chairman. Senator Kyl, and then I would like
6 to vote pretty quickly on this. Senator Kyl.

7 Senator Kyl. Thanks, Mr. Chairman. Let me try to
8 respond to three specific points, the first by Senator
9 Conrad, who argues that Medicare is headed for
10 background. We all appreciate that it is financially
11 unstable.

12 Secondly, his view that Medicare Advantage can be
13 cut by over \$100 billion and that will save money. Well,
14 that would certainly save money. We can argue about
15 whether that is a good thing to do. Those of us on this
16 side, of course, have pointed out why it is not a good
17 thing to do.

18 But whether it is or not--you can argue with the
19 premise, but the bottom line of taking over \$100 billion
20 out of Medicare Advantage is that about a fifth of the
21 seniors who have Medicare Advantage coverage are going to
22 see that coverage gone. And so they do not have the
23 option of that coverage anymore. So when the President
24 says if you like your coverage you get to keep it, the
25 answer is: That is not true for those people.

1 Secondly, it is not just people who are on Medicare.

2 In fact, let me get to that point in just a moment and
3 diverge to a point that the Chairman said. He said the
4 assumption is that you get to keep your coverage today,
5 and this is a direct quote: "That is a patently gross
6 inaccurate assumption." A patently gross inaccurate
7 assumption. Well, it is an assumption the President of
8 the United States has been making for months. I do not
9 know how many hundred times he said if you like your
10 insurance you get to keep it.

11 The problem is, of course, that while it is true
12 that an automobile company does not necessarily have to
13 make the same care that you like to buy every year, and
14 in that sense if you like your 1987 Grand Am, you know,
15 in the year 2010 you may not be able to buy a 1987 Grand
16 Am, you still have the choice to buy whatever the market
17 offers, and the market is not constrained in what it can
18 offer. But under this bill, the Government would define
19 what you can buy and what you cannot buy, and what you
20 have had will not exist anymore, at least after 5 years.

21 And so even if you like what you have, you cannot keep
22 it.

23 And that brings up the point that I started to make,
24 which is that this does not apply only to Medicare, as
25 Senator Hatch pointed out. It applies to everyone. And

1 there are two specific provisions in the bill that make
2 the promise that if you like what you have you get to
3 keep it a false promise.

4 The first is the rating rules that are phased in for
5 small-group plans and the individual market over 5 years.

6 After that, you are not going to be able to buy the
7 plans that you currently are offered or that you
8 currently have. There are brand-new rules that are going
9 to apply that are going to drastically change the kind of
10 insurance that is offered.

11 Under the exchange, basically everything will be
12 controlled by the Government, what you have to offer as a
13 minimum, what you can offer as a maximum; everybody has
14 to offer at least two plans, but you cannot offer any
15 more than four plans. They are defined in terms of the
16 mandated benefits, the premiums. Everything is affected
17 by the rules and regulations.

18 And that gets to the second point. No tax credits
19 for grandfathered plans, and the purpose, of course, is
20 because we want to encourage people to transition to the
21 plans offered in the exchange. And it is more than
22 encouragement. Essentially, they are not going to be
23 able to do business without going to those new plans.

24 So the reality is that all of the insurance in the
25 small market and in the individual market will, in fact,

1 be altered, and after five years it is not going to look
2 anything at all what it looks like today. So regardless
3 of whether you like what you have, you are not going to
4 be able to keep it.

5 Now, the third and final point. The Chairman has
6 made this argument before, and I have got to say that if
7 we continue to hear this argument, then we are going to
8 have to have a separate debate about just this point. He
9 has basically said that a vote for this amendment is a
10 vote for the status quo. Well, of course, it is nothing
11 of the kind. We have pointed out time and time again
12 that we believe in a lot of different kinds of reforms.
13 This amendment is just targeted to people who lose their
14 coverage as a direct result of this bill. And what
15 Senator Hatch is saying is if you cannot certify that a
16 million people are not going to lose their coverage, then
17 you should not go ahead with what is in this bill because
18 of the commitment that if you like your coverage you get
19 to keep it.

20 If we are not willing to keep that commitment, then
21 let us get that straight right up front. But as the
22 Chairman said, any attack is a support on status quo, a
23 vote for the status quo, a denial of an attempt to do
24 anything about pre-existing conditions. None of that is
25 true, of course. I led off my opening statement with a

1 series of things that Republicans wanted to do.

2 Now, the Chairman is correct about one thing. He
3 has not seen a "massive GOP alternative." And there is
4 one main reason for that. We do not believe in a massive
5 Government takeover. That is the fundamental difference
6 between what the mark does and what Republicans are for.

7 The mark says we cannot do what we want to achieve
8 unless we basically scrap what we have and substitute a
9 new Government takeover of how insurance is going to be
10 offered in this country, and the net result of that is
11 going to affect how your care is delivered in this
12 country.

13 It is correct, you will not see a massive Republican
14 bill that tries to do anything like that. As I pointed
15 out in my opening statement, what we believe in is a
16 targeted approach. We have a problem of too much cost?
17 Let us target some solutions to that.

18 I will just note one example I gave. Insurance
19 costs too much, health care costs too much. Let us see
20 if we can reduce the cost. What is one of the cost
21 drivers? Well, I pointed out a study that said that--

22 The Chairman. Senator, Senator--

23 Senator Kyl. Mr. Chairman, let me just complete my
24 thought here.

25 The Chairman. You have about 1 minute to complete

1 your thought. Okay. We have got--

2 Senator Kyl. Let me complete my thought and then
3 make another point--

4 The Chairman. You are delaying, Senator, and we--

5 Senator Kyl. Mr. Chairman, Mr. Chairman, I am not
6 delaying. I am making an extremely important point.

7 The Chairman. It is a very, very important point,
8 but you are also delaying. So let us--do other Senators
9 have amendments they wish to offer? Go ahead, complete
10 your thought. Then I am going to have to recognize
11 another Senator in deference to--to be courteous to other
12 Senators who also--

13 Senator Kyl. Mr. Chairman, it is courteous if you
14 do not interrupt somebody right in the middle of a
15 sentence of an important point they are trying to make.
16 I have not dominated this discussion. I have not
17 filibustered in this markup that we have been having. I
18 think that everything I have said has been directly on
19 point. I am responding directly to a point that you
20 made--

21 The Chairman. Okay. Why don't you wrap up--

22 Senator Kyl. --and I will try to restate the point
23 that I was trying to make--

24 The Chairman. Wrap up, please.

25 Senator Kyl. --which is that if our object here is

1 to try to reduce the cost of health care, Republicans
2 believe we should directly target solutions to that.
3 What is one of the big cost drivers? Malpractice. We
4 know that, by one of the studies I cited, \$100 billion--
5 \$100 billion a year--could be saved with good medical
6 malpractice reform. Our amendments were ruled out of
7 order trying to deal with that. And yet that is a
8 targeted solution that would directly allow us to save
9 money, which would, of course, make insurance less
10 expensive and cost more affordable. So there is an
11 example of the specific Republican alternative.

12 Mr. Chairman, I support the Hatch amendment. If we
13 cannot keep the promise that if you like the insurance
14 you have you get to keep it, then we should not be
15 supporting the legislation that would deny that promise.

16 The Chairman. Okay. Senator Conrad.

17 Senator Conrad. First of all, maybe it would be
18 good for all of us to take a deep breath, because this is
19 a critically important debate. We all get heated at
20 times, and that is understandable. I have, too, so I
21 will put myself on notice as well.

22 But I would say to Senator Kyl to suggest that the
23 Chairman's mark represents a big Government takeover,
24 that is not true. That is not true. The Chairman's mark
25 is the product of over a year of effort, with Republicans

1 and Democrats contributing.

2 The Chairman's mark has no public option, has no
3 employer mandate, has the tax reform that many
4 Republicans were advocating, including your colleague
5 Senator McCain in the Presidential race, to reduce
6 overutilization.

7 The Chairman's mark tries to make clear that people
8 who are here illegally will not get covered; that there
9 will not be taxpayer funding of abortion.

10 To assert that this in any represents some big
11 Government takeover, that is not fair criticism, and it
12 is not accurate criticism.

13 This represents building on the current employer-
14 based system in the United States with employers
15 contributing, with employees contributing, but with
16 important insurance market reform to say that you cannot
17 deny people coverage based on pre-existing condition,
18 that you cannot impose annual limits that takes insurance
19 away from people who have been paying their premiums when
20 they get sick. And it says you cannot yank people's
21 health care coverage when they have a diagnosis of
22 cancer, and then some insurance companies--not all. Many
23 insurance companies operate very honestly and ethically.

24 But we know there are many abuses. I have a file folder
25 full of them from just my home State of North Dakota.

1 To go directly to medical malpractice, there are
2 many on our side who believe there do need to be reforms.

3 Senator Kyl, when you referenced last night an idea on
4 medical malpractice, you may recall I said to you
5 publicly at the time my State has put in a requirement
6 for people to have a statement that their case has merit
7 before they are able to advance it. That is something
8 where we may have common ground and we should pursue it.

9 The reason it is ruled out of order here, as the
10 Senator knows, is this is not the Judiciary Committee.
11 It is not in our jurisdiction. But we will have a chance
12 on the floor to revisit that, and maybe we can work
13 together to improve the package.

14 But on this amendment, in fairness, 4 million
15 people, more than 4 million people a year are losing
16 their coverage now. To try to determine and certify that
17 somebody has lost coverage as a result of this
18 legislation or the fact that millions are losing their
19 coverage through some other way is an administrative
20 impossibility.

21 The hard reality is millions of people will get
22 coverage as a result of this legislation, and let me just
23 conclude on this point.

24 The Congressional Budget Office has said we will
25 expand coverage to 94 percent of the people are a result

1 of the Chairman's mark. It is not 100 percent, but it is
2 substantially more than have coverage now. And on this
3 final point, Senator Hatch, you have repeatedly said 10
4 million people who are on Medicare Advantage are going to
5 lose their coverage. That is not true.

6 Senator Hatch. No, that is not what I--

7 Senator Conrad. Well, you have said it repeatedly.

8 Sir, you have said it repeatedly, that 10 million people
9 are going to lose coverage under Medicare Advantage.

10 Senator Hatch. Correct, that they will lose
11 benefits--

12 Senator Conrad. I would like to ask the staff:
13 What has CBO told us? At the end of this period, will
14 there be fewer people under Medicare Advantage or more
15 people?

16 Ms. Bishop. So according to CBO, their estimate of
17 the competitive bidding proposal is that there will be
18 about 200,000 more beneficiaries in Medicare Advantage
19 than there are today. That is a chase from baseline, but
20 there will be more beneficiaries in Medicare Advantage in
21 2019 than there are today.

22 Senator Conrad. So there will be more people
23 covered under Medicare Advantage at the end of the day
24 than are covered now.

25 The Chairman. That is 2019.

1 Ms. Bishop. By 2019, there will be about 200,000
2 more beneficiaries.

3 Senator Hatch. Will the Senator yield? Under
4 current law, isn't it true that there would have been 3.5
5 million who would have come in.

6 Ms. Bishop. That is right, so under baseline--

7 Senator Hatch. So you are getting 200,000 instead
8 of 3.5 million who would qualify for these extra
9 benefits.

10 Ms. Bishop. Who would choose--

11 Senator Hatch. And to correct the record--

12 Ms. Bishop. --to enroll in Medicare Advantage.

13 Senator Hatch. Excuse me. I did not mean to
14 interrupt you. But to correct the record, if I misstated
15 in some way--but I have been talking about the benefits
16 here.

17 Could I ask a few questions, Mr. Chairman, since we
18 are on that?

19 The Chairman. Sorry?

20 Senator Hatch. Could I ask a few questions?

21 The Chairman. A couple. But we have been on this
22 amendment 34 minutes.

23 Senator Hatch. Well, it is an important amendment
24 because it makes a point here--

25 The Chairman. Go ahead. Ask questions.

1 Senator Hatch. --that has to be made.

2 Let me ask Ms. Bishop--and I personally have
3 appreciated you being on the spot all the time, but it is
4 a tough set of issues. If the modification to
5 grandfather Medicare Advantage benefits that we did
6 within the last 24 hours, the distinguished Senator from
7 Florida, and I do not blame him, so he is my friend, but
8 it is just a factor. In other words, this Committee was
9 willing to take that, and yet they are not willing to
10 take what affects 10 million others.

11 Did the modification to grandfather Medicare
12 Advantage benefits in certain areas cost about \$10
13 billion?

14 Ms. Bishop. Yes.

15 Senator Hatch. Okay. So we are willing to spend
16 \$10 billion on what I would like to have for all of those
17 who have been on Medicare Advantage.

18 Would almost all of this \$10 billion go to pay for
19 extra benefits in what you would consider higher-cost
20 areas, areas where plans can bid as much as 15 percent
21 below fee-for-service?

22 Ms. Bishop. Yes.

23 Senator Hatch. It would?

24 Ms. Bishop. Yes.

25 Senator Hatch. Okay. So this money would go to

1 preserve things like dental coverage--this is money that
2 the majority has agreed to--like dental coverage,
3 eyeglasses, and maybe gym club memberships.

4 Ms. Bishop. Yes.

5 Senator Hatch. And it probably would not do much
6 of anything to help higher quality in lower-cost areas
7 that have traditionally low FFS spending, places like
8 Iowa, Utah, Oregon, Minnesota. Is that right?

9 Ms. Bishop. That amendment would not have an
10 effect on low-cost areas.

11 Senator Hatch. That is right. Some members of the
12 Committee have spent a lot of time over the past couple
13 of days criticizing the amount of extra benefits that
14 Medicare Advantage plans offer. But the modification
15 that was accepted within the last 24 hours by the
16 majority added \$10 billion to pay for these extra
17 benefits. Is that correct?

18 Ms. Bishop. To transition the amount of extra
19 benefits in high-cost areas to the amount of benefits
20 that will be available under competitive bidding.

21 Senator Hatch. But only in those areas that were
22 covered.

23 Ms. Bishop. Because they have a higher--they are
24 starting at a higher base, so the transition is just
25 going to--

1 Senator Hatch. They are high-cost areas compared
2 to areas like Utah, for instance.

3 Ms. Bishop. Right.

4 Senator Hatch. After years of listening to some
5 people criticize the overpayments in Medicare Advantage,
6 can you explain the policy rationale behind spending \$10
7 billion to subsidize places that have a record of
8 inefficient care and the greatest amount of overpayments?

9 Can you qualify that?

10 Ms. Bishop. Well, the Chairman's mark, as you
11 know, Senator, would create a new payment system for
12 Medicare Advantage, and the rationale for that payment
13 system--

14 Senator Hatch. That system would be less than the
15 current system, right?

16 Ms. Bishop. Well, the rationale is to pay plans
17 the average costs for the Medicare benefits, their
18 profit, and their marketing. We are going to pay them
19 average cost. We create bonus payments on top of the
20 competitive bid. The bonus payments are going to be
21 replacing the rebates that are available today, and the
22 bonus payments are going to be up to 5 percent of the
23 national average Medicare cost available everywhere in
24 the country.

25 So, to a certain extent, the policy rationale under

1 the mark is to provide more areas of the country with
2 available extra benefits than are able--than exist under
3 the current law. So the mark actually provides a lot of
4 benefit to low-cost States. That is the whole point of
5 the mark. But in doing that, it is going to have the
6 greatest effect on high-cost areas, whether they had--you
7 know, they--

8 Senator Hatch. I am just asking about the \$10
9 billion to selected high-cost counties.

10 Ms. Bishop. Right. So I guess what I am trying to
11 say is that the mark--the policy rationale for the mark
12 is to provide more resources to low-cost States. It is a
13 reward.

14 The amendment accepted into the mark would allow a
15 longer transition in areas that have higher rebates,
16 higher extra benefits today to the amount of benefits
17 that are going to be available under competitive bidding,
18 because as you said, today the high-cost areas have the
19 highest level of extra benefits. So going from
20 competitive bidding--going from that system to
21 competitive bidding is going to take them more time.

22 So the mark allows for 4 years transition to
23 competitive bidding, and this amendment would allow a
24 longer transition in those areas. The extra benefits are
25 going to be--

1 Senator Hatch. For selected, targeted counties.

2 Ms. Bishop. Right.

3 Senator Hatch. Right. Okay, well, here is the
4 bottom line. Will the 10 million people see a loss in
5 their extra benefits? The answer to that, of course, is
6 yes. So their coverage is not the one that they have
7 right now. So they are really not keeping what they
8 have.

9 Ms. Bishop. Is that a question? Is that a
10 question?

11 Senator Hatch. Yes.

12 Ms. Bishop. The effect of competitive bidding is
13 to lower the amount of--

14 Senator Hatch. I just want a yes or no on that. I
15 do not think it takes a lot of explanation.

16 Ms. Bishop. Well, it is--categorically there--

17 Senator Hatch. Take your time.

18 Ms. Bishop. Categorically 10 million beneficiaries
19 are not going to be losing their extra benefits, the
20 extra benefits that they have today. Some will be
21 gaining, because competitive bidding is going to
22 equalize, make consistent the amount that is available
23 for extra benefits. So in low-cost States, low fee-for-
24 service States today, the amount of extra benefits is
25 very small. It is minimal.

1 Competitive bidding will allow good plans that
2 coordinate care, that achieve quality rankings, to earn
3 up to 5 percent of the national average, and that is
4 going to bring more extra benefits to low-cost States.
5 That is exactly--so it is not accurate, Senator, to say
6 that all 10 million beneficiaries are going to have less
7 extra benefits than they do today. That is not the case.

8 It is going to be some with more, some with less.

9 Senator Hatch. How can you not have--let me just
10 say the bottom line--

11 The Chairman. Okay, Senator, we are going to have
12 to--we are going to vote on this--

13 Senator Hatch. I am going to finish--

14 The Chairman. We are going to vote on this
15 amendment in about 2 or 3 minutes.

16 Senator Hatch. Mr. Chairman, wait just--

17 Senator Enzi. Mr. Chairman, I have been trying to
18 get recognition for 15 minutes.

19 The Chairman. Well, that is why I am trying to get
20 Senator Hatch to shorten--

21 Senator Enzi. It has not just been our side. It
22 has not been our side. You have had more time than we
23 have out of the 40 minutes.

24 The Chairman. Senator Hatch, you have got anxious
25 people on your side, so think of them when you are

1 talking.

2 Senator Hatch. I want you to think of all of us,
3 Mr. Chairman. This is an important set of issues, and
4 they need to be raised even if you do not like the way I
5 am raising them. The fact of the matter is the bottom
6 line is there are 10 million people who are going to lose
7 benefits, and that is what it boils down to. And yet
8 your side is agreeing to target special benefits to about
9 30 counties in this country and saying that the other
10 counties throughout the country should not have the same
11 benefits.

12 The Chairman. Fifty percent of this discussion has
13 nothing to do with the amendment. I just urge us to
14 focus on the amendment here.

15 Senator Hatch. It has a lot to do with it.

16 The Chairman. Senator Enzi is seeking recognition.

17 Senator Enzi. Mr. Chairman, if a million people
18 are not going to lose it, you ought to accept this just
19 as easily as you have accepted ones from the other side.

20 But I suggest that that is not the case, and yes, I am
21 going to leave the topic slightly because you did and
22 Senator Conrad did.

23 You mentioned that there were no Republican
24 alternatives out there. That is not true. There are
25 four Republican alternatives out there. One of them is

1 mine. It has been on my website for 3 years, and besides
2 that, there is the Wyden-Bennett alternative. Why aren't
3 we bringing those up? If we are going to get 42 minutes
4 for an amendment, something as comprehensive as health
5 care for every American, how are we going to do that kind
6 of a debate?

7 I sat through 3 weeks of this kind of debate in the
8 HELP Committee, and we did get to put up one amendment
9 for an alternative. We got almost 2 hours to debate
10 that. We are going to do this for several days. We did
11 3 weeks in the HELP Committee. You cannot do a complete
12 alternative in that amount of time. Besides that, when
13 you put up a complete alternative, all you have to do is
14 pick out two weak issues, and then your side feels very
15 comfortable voting against it, and it goes down.

16 So that is not a fair process or a fair statement.
17 There are alternatives out there. We are trying to do it
18 in a very precise way of bringing up amendments as
19 amendments are appropriate for the area that we are in,
20 and that is not a way to slow things down. That is
21 actually a way to speed things up.

22 But people do not understand how comprehensive this
23 is. You and I and the others in the Group of Six spent
24 weeks working on this, so we have an idea of how
25 comprehensive it is. This will affect every single

1 American, and we have got to take the time to get it
2 right.

3 Thank you.

4 The Chairman. Other Senators? The vote is on the
5 Hatch amendment C-2. Senator, do you want a roll call
6 vote on the amendment?

7 Senator Hatch. Yes.

8 The Chairman. A roll call has been requested. The
9 clerk will call the roll.

10 The Clerk. Mr. Rockefeller?

11 Senator Rockefeller. No.

12 The Clerk. Mr. Conrad?

13 Senator Conrad. No.

14 The Clerk. Mr. Bingaman?

15 Senator Bingaman. No.

16 The Clerk. Mr. Kerry?

17 The Chairman. No by proxy.

18 The Clerk. Mrs. Lincoln?

19 Senator Lincoln. No.

20 The Clerk. Mr. Wyden?

21 Senator Wyden. No.

22 The Clerk. Mr. Schumer?

23 The Chairman. No by proxy.

24 The Clerk. Ms. Stabenow?

25 Senator Stabenow. No.

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

1 Senator Enzi. Aye.

2 The Clerk. Mr. Cornyn?

3 Senator Cornyn. Aye.

4 The Clerk. Mr. Chairman?

5 The Chairman. No.

6 The clerk will tally the vote.

7 The Clerk. Mr. Chairman, the final tally is 10
8 ayes, 13 nays.

9 The Chairman. The amendment does not pass.

10 All right. The next amendment is--I think Senator
11 Lincoln wishes to offer an amendment.

12 Senator Lincoln. Thank you, Mr. Chairman.

13 Mr. Chairman, I would like to call up my amendment--
14 it is C-2, Lincoln C-2--regarding the small business tax
15 credit.

16 The Chairman. All right.

17 Senator Lincoln. Mr. Chairman, this amendment
18 would modify the wage threshold that determines what
19 value of credit a business qualifies for. I am very,
20 very pleased and grateful to you and to your staff for
21 working with us and putting this credit in the mark. For
22 years, along with Senator Snowe, I have advocated for a
23 small business tax credit to help our smallest businesses
24 which are most severely impacted by the rising cost of
25 health insurance, and these businesses are truly the

1 engine of our economies.

2 According to NFIB, firms with one to ten employees
3 employ nearly 13 million workers, and firms with 11 to 24
4 employ over 11 million workers.

5 You know, as Senator Snowe and I worked on our SHOP
6 bill, along with Senator Durbin and others, we realized
7 that of the 35 million Americans that were uninsured, we
8 could really get a large chunk of those insured if we
9 worked with small businesses, self-employed, independent
10 contractors, and others to really form a pool and a group
11 there where we could access more affordable and available
12 health care to them with more meaningful coverage.

13 These businesses are least able to weather price
14 increases as they have very little capital to combat the
15 steep and the ever increasing rise in health care cost,
16 and particularly in these economic times that we find
17 ourselves, capital is not an easy thing for small
18 businesses to be able to get to. They run very slim
19 profit margins, and health care cost increases have a
20 very serious impact on their ability to do business, to
21 keep their doors open, to keep the employees that they
22 need. It is especially true, again, in today's economic
23 climate.

24 So focusing the small business tax credit on
25 businesses with 1 to 25 employees provides immediate cost

1 assistance to these businesses that need help the most in
2 terms of the rising health care costs that we have seen.

3 Clearly, the market reforms in the Chairman's mark
4 and the new exchange to help these businesses to pool
5 together will be very beneficial to them, but those
6 changes will take some time. But a tax credit can
7 provide immediate relief.

8 The credit in the mark is phased out based on the
9 average wage of employees in a business between \$20,000
10 to \$40,000. And the average wage of businesses employing
11 10 or fewer employees is right around \$28,000, according
12 to the U.S. Census data.

13 So this really means, Mr. Chairman, that the value
14 of the credit for most businesses that will be able to
15 claim it is already cut in half based on the way the
16 phase-out is set up in the Chairman's mark. And so what
17 I am trying to do in this amendment would increase the
18 wage threshold to qualify for the full credit up to
19 \$30,000, and so it would be from \$30,000 to \$40,000 that
20 it is phased in and then out--or it is phased out from
21 \$30,000 to \$40,000. And at this amount, almost all of
22 the businesses in the one to ten employee category would
23 actually receive the full credit that we have in the
24 underlying bill.

25 I think this amendment will really ensure that we

1 are able to help small businesses that really need the
2 help the most, and I want to say again thanks to the
3 Chairman and to his staff for working with us on getting
4 this into the mark. We are still working on the score
5 with JCT and your staff, and I am grateful, again, for
6 their patience in working with us. And as a result of
7 that, Mr. Chairman, I would just request that you would
8 continue to work with us in the days ahead on this
9 proposal really to truly improve what we have done in
10 this bill for small businesses and for the tax credit
11 that I think will bring them some of the most immediate
12 relief as we work forward with the other components of
13 this bill which will ultimately provide them great relief
14 in the marketplace as well, just as it will to other
15 constituents that we serve.

16 So we would certainly like to ask for the Chairman's
17 assistance and other members of the Committee to work
18 with us on being able to phase it in over a shorter
19 period of time and allowing, again, those businesses with
20 a lower number of employees to be able to get that full
21 credit at the average employee salary of \$30,000 instead
22 of \$20,000 so we do not lose half of them in that smaller
23 category.

24 The Chairman. Senator, you have a great amendment.
25 As you know, we are trying to encourage more small

1 business people to provide coverage for employees. As
2 you also know, we are trying to target it a little bit
3 more toward firms that have--not low-wage--middle-wage
4 employees, not very high-wage employees like law firms,
5 for example, and that is why the \$20,000 limit is there.

6 But, frankly, it has always bothered me a little bit.
7 That seems a little low, frankly. It could be a little
8 higher than \$20,000. So your suggestion of \$30,000 makes
9 sense to me, and also changing the phase-out has an
10 appeal.

11 As you said, I do not have a score, but maybe we can
12 find some way to give more assistance to small business.

13 There is considerable assistance in the bill, but I
14 would like to find a little more.

15 Senator Lincoln. Well, and I appreciate you for
16 that considerable assistance that is there, and I think
17 that we can improve upon it. I again want to thank you
18 and your staff for working with us, and certainly with
19 your interest there, I would withdraw my amendment today
20 and work with the staff so that we could offer it on the
21 floor when we do have a score and an appropriate offset,
22 and I certainly encourage my colleagues to work with me.

23 Senator Snowe. Mr. Chairman?

24 The Chairman. Senator Snowe.

25 Senator Snowe. I want to applaud the Senator from

1 Arkansas for offering this amendment because truly we
2 have to make even a more concerted effort to maximize the
3 benefit for the small business owners in this country. I
4 think that truly is the heart of the problem with respect
5 to the number of uninsured that continues to mount on a
6 yearly basis.

7 In fact, the number of uninsured has increased every
8 year since 1989, and it has been predominantly among
9 small businesses. In just the last decade alone, small
10 businesses have dropped their coverage by more than 10
11 percent. It is projected that small businesses will drop
12 their coverage next year up to 10 percent. You know, 52
13 percent of the uninsured currently are in small
14 businesses, those who have ten or fewer employees. So
15 this really is a tremendous problem for small businesses
16 in having access to affordable coverage.

17 Time and again, when I am talking to small business
18 owners in the State of Maine, they tell me how the growth
19 of their premiums have grown exponentially. In fact, I
20 was talking to a small business owner recently, and he
21 said that 5 years ago his premium costs were \$250 and
22 today they are \$5,000. It has grown by more than 500
23 percent.

24 And so I think that we should do everything we can
25 to devote more resources to the small business owner in

1 this legislation and to increase that wage threshold for
2 the smallest business owners.

3 In fact, if you look at the projections for the
4 future, it truly is going to be even a greater problem,
5 and that is really the essence of the struggle we are
6 having in our economy today. And small businesses
7 deserve to have the same access to quality, affordable
8 coverage as larger employers. And so we really have to
9 figure out a way to fine-tune the provisions in the
10 underlying bill.

11 So I applaud the Senator from Arkansas for bringing
12 this up.

13 Senator Lincoln. Well, Mr. Chairman, I want to
14 thank my colleague from Maine because she has just been
15 tireless in working--and a delight to work with as well--
16 in our efforts on behalf of small businesses and self-
17 employed individuals. The statistics she raises are not
18 just statistics from Maine and Arkansas. Those are
19 statistics nationally. Everybody has got small
20 businesses, whether they are in rural areas or urban
21 areas, and they are seeing the same problem because of
22 the marketplace.

23 So I just want to thank her so much for her hard
24 work and her thoroughness, and I have certainly enjoyed
25 working on behalf of small businesses with Senator Snowe.

1 So thank you, Mr. Chairman.

2 The Chairman. Thank you, Senator.

3 Okay. I have--

4 Senator Stabenow. Mr. Chairman, might I just--

5 The Chairman. Yes, sorry. Senator Stabenow.

6 Senator Stabenow. Thank you. I just wanted to add
7 as well thanking Senator Lincoln for this amendment. We
8 know that 80 percent of the people that are without
9 insurance in this country are working, and the vast
10 majority of them are working for small businesses. And
11 so this is a key goal of this legislation to make sure
12 every small business can not only buy insurance for their
13 workers, but also for their own families. And I look
14 forward to working with you to continue to strengthen
15 this.

16 Thank you.

17 The Chairman. Thank you, Senator.

18 I have a proposed list of amendments here. I will
19 read them to give Senators some sense of some order here.

20 First of Senator Crapo D-1, Senator Wyden next, then I
21 have Senator Grassley. Then I see a side-by-side; I am
22 not quite sure what that means. Senator Cornyn, you
23 would be next. Not right now but a little later. Then
24 Senator Nelson. Those are the five amendments.

25 Senator Crapo, you are recognized.

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

2 This is my amendment number D-1 as modified. We sent
3 around the modification about an hour ago.

4 The amendment, this is a continuation of the
5 discussion in a general sense of the same issue that
6 Senator Hatch has raised, only trying to address the
7 issue from a little different perspective.

8 Senator Hatch raised the perspective of people who
9 would lose their benefits. This amendment would amend
10 the proposed Medicare Advantage cuts in Title III of the
11 Chairman's mark to prohibit the implementation of the
12 changes to the Medicare Advantage program in any bidding
13 area where the proposed changes would result in decreased
14 choice and competition for the seniors in the Medicare
15 program. In other words, the cuts that we see proposed
16 here, I am convinced, and I think many are convinced,
17 will result in providers leaving the marketplace, and
18 this amendment simply says that if providers do leave the
19 marketplace, leaving our seniors with less competition
20 and less choice of options, then we should not implement
21 these proposals.

22 During the question-and-answer walk-through period
23 that we had, Director Elmendorf I think clearly gave the
24 answer to the issue that we have been batting back and
25 forth here yesterday and this morning. He made it very

1 clear that the proposed changes to Medicare Advantage in
2 the mark are going to reduce the benefits provided to
3 those who have Medicare Advantage plans by a little bit
4 less than half of what they are today.

5 Now, it may be true that some will get an increase
6 and some will get a decrease, but the next result is that
7 the benefits to be available under Medicare Advantage
8 will be reduced by about half. That is what the CBO
9 analysis has provided.

10 I know that in the debate already this morning,
11 Senator Conrad has indicated that Medicare Advantage is
12 very expensive and that, in his words, we have a false
13 sense that we can keep on paying for Medicare Advantage,
14 that it is unaffordable, and that at some point we have
15 to look people in the eye and tell them the truth about
16 it.

17 The truth about it is that this mark does seek to
18 take \$113 billion, I think it is now, out of the Medicare
19 Advantage program, and that is going to result in less
20 benefit to the citizens who now have enrollment in the
21 Medicare Advantage program.

22 In my home State of Idaho, there are 60,000 Medicare
23 Advantage beneficiaries, 27 percent of the Medicare
24 beneficiaries in my State. And that is, I think, just a
25 couple percentage points higher than the national

1 average.

2 Since the creation of the Medicare Advantage program
3 in 2003, the overall enrollment in private plans has been
4 steadily increasing, and beneficiaries across the country
5 now have more private plans to choose from than they did
6 10 years ago. And this increased competition is healthy.

7 As I indicated in my discussion yesterday, about 80
8 to 90 percent of the people on Medicare Advantage are
9 very happy with and satisfied with the coverage that they
10 are getting, which is in stark contrast to the attitude
11 that many others who are not on Medicare Advantage have
12 with relationship to the coverage that they are
13 receiving. According to CRS, as of January 2009, all
14 Medicare beneficiaries had access to an MA plan along
15 with traditional Medicare plans.

16 My point is that Medicare Advantage is working. It
17 is moving much more rapidly into the marketplace because
18 of its acceptance among those who are--our seniors who
19 are able to make these choices. As a matter of fact,
20 this choice is particularly crucial in rural areas. In
21 rural areas, between 2003 and 2007 more than 600,000
22 beneficiaries in rural areas joined the Medicare
23 Advantage program, which is a 426-percent increase--
24 again, the point being that the reason that people are
25 moving to this program is because particularly in rural

1 areas they have very little access and little choice, and
2 these plans are providing them with a better set of
3 benefits than they would otherwise have.

4 My amendment simply seeks to preserve that choice
5 for America's seniors. It simply says that if the
6 changes we are proposing in this bill today actually
7 result in fewer providers and less choice and less
8 competition in Medicare Advantage, then we should not
9 implement them. We have not yet tested or seen how the
10 proposals that are in the market today will work, and there
11 is a very big question as to what kind of an impact they
12 will ultimately have.

13 Mr. Chairman, a lot of attack has been made on
14 Medicare Advantage, and certainly we need to address the
15 overall excess costs in Medicare. Republicans have
16 proposed many alternatives and continue to proposed
17 alternatives to deal with both the unfunded mandate in
18 Medicare, the crisis that we expect to face in Medicaid
19 as well in terms of funding, and in terms of overall
20 reform of our health care system. And for anyone to say
21 that there is no a very, very strong engagement in terms
22 of the ideas about how we should reform our health care
23 system is to simply misstate the truth.

24 The bottom line here is we know that you cannot take
25 \$113 billion out of a program after CBO has indicated

1 that that change will result in approximately a little
2 less than a 50-percent reduction in the benefits
3 available and not see a dramatic change in the
4 availability of benefits to those who currently have
5 these plans.

6 If ever the issue of whether a person who likes
7 their health care coverage today gets to keep that health
8 care coverage was on point, this is it. For those
9 Americans who are on Medicare Advantage today, they will
10 not be able to have access to that coverage, to that
11 health care option in the future under this plan, and I
12 simply propose that we provide that if the competitive
13 arena changes, if the number of providers decrease and we
14 have decreased choice and competition for seniors in the
15 Medicare system, we should not implement the provisions
16 of this plan.

17 The Chairman. Is there further debate?

18 Senator Nelson. Would the Senator yield for a
19 question?

20 The Chairman. Senator Stabenow was just
21 recognized.

22 Senator Stabenow. Thank you, Mr. Chairman.

23 We have had a lot of discussion in the last couple
24 of days on Medicare Advantage, and the reality is in
25 broad terms Medicare Advantage was an effort to allow

1 for-profit insurance companies to be able to come in,
2 begin to privatize Medicare. The argument was it would
3 bring costs down. It did not. It brought costs up.

4 And now I find it interesting that there is an
5 objection to have competitive bidding, which in the
6 broader sense we always argue that competitive bidding
7 will actually bring costs down. We were told Medicare
8 Advantage would provide lower costs to be able to
9 strengthen the integrity of Medicare. Instead, the
10 majority of seniors, 80 percent of which aren't on
11 Medicare Advantage, go see their doctor just on
12 traditional Medicare, are paying more--we were told
13 yesterday I believe it was \$90 a year more--in order to
14 be able to subsidize the private for-profit insurance
15 industry to be able to participate with our seniors
16 through Medicare Advantage.

17 I believe that we have been working towards a very
18 important way to resolve this for seniors who are
19 currently on Medicare Advantage to be able to allow them
20 to keep what they have. But going forward, our
21 responsibility, it seems to me, is to all the seniors
22 under Medicare, all 40 million that are in Medicare,
23 those in Medicare who now pay more than they otherwise
24 would if we did not have a program that subsidized for-
25 profit insurance companies.

1 One way to address that, to begin to move this in a
2 direction to protect Medicare for seniors and be able to
3 offer the other great things in this bill on prevention,
4 quality initiatives, be able to do the other things, be
5 able to make medicine more available, affordable, closing
6 the doughnut hole, is to have competitive bidding.

7 And so from my perspective--and though we certainly
8 have a substantial amount of Medicare Advantage in
9 Michigan, and I want to make sure those who have it can
10 keep it. But going forward, I think it is very hard to
11 argue that something that was supposed to lower costs by
12 bringing in more competition with the private sector has
13 raised costs but now we are against competitive bidding
14 to be able to rein in costs and to be able to protect all
15 seniors.

16 Mr. Chairman, I would oppose the amendment.

17 Senator Crapo. Mr. Chairman, could I respond?

18 The Chairman. Yes, Senator Crapo.

19 Senator Crapo. I want to make it very clear. I am
20 not against competitive bidding. I like competition. In
21 fact, what my amendment says is that I like the fact
22 that we should have more competitors. My amendment
23 simply says that if the language in the bill or the
24 concept paper does not result--or if the proposal results
25 in fewer competitors, in other words, if we have a less

1 competitive environment, then we should not implement it.

2 That is all it says.

3 Senator Nelson. Would the Senator yield?

4 Senator Crapo. Yes.

5 Senator Nelson. I would suggest that you are
6 supporting the wrong amendment, that what you ought to
7 consider is not taking the inefficiencies out of Medicare
8 Advantage by competitive bidding, which will take the
9 inefficiencies out. I mean, it gets a cushy 14 percent
10 more than Medicare fee-for-service. What you are trying
11 to do is to protect the existing seniors on Medicare
12 Advantage, and you will have an opportunity to do that,
13 as I bring forth an amendment that will basically
14 grandfather out most of the seniors on Medicare
15 Advantage.

16 Senator Hatch keeps referring to the Nelson
17 amendment. What you are referring to, Senator, is what
18 is already in the mark. This Senator has another one
19 that is coming that is going to grandfather in most of
20 the seniors on Medicare Advantage.

21 Senator Crapo. Well, to respond, first of all, I
22 will carefully review your amendment, Senator, when you
23 bring it. But I need to respond, and, again, to make it
24 very clear.

25 I am not opposed at all to competition in the

1 marketplace. In fact, my amendment says that if we
2 restrict competition in the marketplace, we should not
3 implement the bill, the provisions that are restricting
4 it. And when we hear the discussion about the fact that
5 Medicare Advantage is paying 14 percent more on average
6 than fee-for-service, let us remember fee-for-service on
7 Medicare does not fully compensate the fees for the true
8 services that are provided. We all have discussed the
9 fact that it is below the true cost of the value of the
10 medicine that is being provided.

11 And that 14 percent is not just going to providers.

12 Under the Medicare Advantage system, 75 percent of that
13 excess is returned in additional benefits to Medicare
14 Advantage beneficiaries, which is why they like the
15 program so much. It provides them that extra buffer,
16 that 75 percent of the differential in additional
17 benefits. And it is those additional benefits that are
18 making Medicare Advantage such a popular program in our
19 country and which we should try to salvage rather than to
20 try to eliminate.

21 Senator Nelson. Which is why I want to grandfather
22 it.

23 Senator Crapo. I understand.

24 Senator Schumer. Mr. Chairman?

25 The Chairman. I would like to first ask the

1 Senator, is there a cost to his bill?

2 Senator Crapo. Yes, and it is interesting. The
3 bill, as I understand it, has been scored, my amendment,
4 and it has been scored at something like a \$130 billion
5 price tag, which tells you that CBO thinks that virtually
6 the entire Medicare Advantage segment of the Chairman's
7 mark is going to be knocked out by this amendment, which
8 means they think that most of the Medicare Advantage
9 competition is going to be restricted.

10 So although there is a high price tag, Mr. Chairman,
11 I actually think that the CBO scoring tells you something
12 about how CBO thinks the Chairman's mark is going to
13 impact competition in this arena.

14 The Chairman. So the CBO score is \$130 billion?

15 Senator Crapo. 133.

16 The Chairman. \$133 billion, and how do you propose
17 to--

18 Senator Crapo. And my proposal is to offset that
19 by corresponding reductions in unspent and unallocated
20 spending from the stimulus package, the American Recovery
21 and Reinvestment Act of 2009, although signs we see put
22 up on the highways, we could stop spending money on the
23 signs, and we could start putting money in here.

24 The Chairman. It is with some reluctance and
25 concern and almost sadness that I must inform the Senator

1 that the amendment is not germane. This Committee does
2 not have jurisdiction over appropriations, and because it
3 is not germane, I will have to rule it out of order.

4 Senator Crapo. Mr. Chairman, you mean because--is
5 there no way for this Committee to reach through its
6 jurisdiction the unspent dollars in the ARRA?

7 The Chairman. This is not the Appropriations
8 Committee. This is the Finance Committee. We do not
9 have jurisdiction over appropriations, so it is not
10 germane. Therefore, it is out of order.

11 Senator Crapo. Well, I would like to challenge
12 that ruling and ask for a vote on it.

13 Senator Schumer. Mr. Chairman?

14 The Chairman. Senator Schumer.

15 Senator Schumer. I will be brief. I think now we
16 are trying to move this along. I just want to make a
17 point here on the substance of the amendment. It is not
18 related to the Chairman's point of order, which I will
19 support, and that is this: You know, there are some of
20 us on this side who see Medicare Advantage working in
21 good ways. I have nonprofits who do Medicare Advantage
22 in parts of my State that do a very good service for
23 seniors, and I am working with Senator Nelson to try and
24 keep those people viable.

25 We also know, though, that in some areas the amount

1 of money given to the companies, given the amount of
2 services that are returned, is excessive. It is just too
3 lucrative, almost, when we are short of health care
4 dollars, and we see a lot of that money not go to the
5 individual. And what we are trying to do is thread the
6 needle and garner back some of those excessive profits
7 without hurting the individual on Medicare Advantage who
8 actually gets a good plan and a good service.

9 And competition is--it is sort of strange here. We
10 have our colleagues on that side of the aisle saying
11 let's not have private sector competition, and we are
12 saying let's have it. And it is a little bit ironic
13 because if you believe in the free market, which we all
14 do, you believe in competition. You do not believe in
15 monopoly, you do not believe in oligopoly; you do not
16 believe in 94 percent of the markets being highly
17 concentrated, which is what the insurance markets are,
18 according to the Justice Department.

19 And so I just want to say to my colleague, to say
20 that competition creates less competition, which is in a
21 certain sense what the amendment says, it says by us
22 having competitive bidding, which is a competitive
23 process, there will be less competition, I do not quite
24 get it.

25 I would hope that we could work together. This

1 seems to me to be not an ideological issue. My guess is
2 my colleagues on the other side would like to save money
3 if it is not going to hurt services. We would like to
4 preserve the services to senior citizens. And this one
5 isn't a public versus private, because it is private
6 already, and we--at least some of us--support it in that
7 form when it does a good job.

8 So that is my point here, and the point of order I
9 will support. But it would be good if we could come to
10 some agreement here that gets rid of the excessive
11 profits but preserves the program for seniors who need
12 it.

13 Senator Crapo. Mr. Chairman, could I just--

14 The Chairman. Certainly. You deserve--

15 Senator Crapo. --defend my name in one sense?

16 The Chairman. You deserve a response. Go ahead.

17 Senator Crapo. Let me just say once again read my
18 amendment. It does not say that competition is not going
19 to work because of one thing or another. It simply says--
20 --and, by the way, my understanding is MedPAC has even
21 said they are not quite sure how the provisions on
22 Medicare Advantage are actually going to affect markets.

23 All my amendment says is if the impact of this language
24 is to decrease choice and to decrease competition, then
25 we should not implement them.

1 I believe since there is a serious question about
2 whether the provisions we have proposed before us will do
3 that or not, we simply ought to put a fail-safe in that
4 says this. And so I just wanted to make it clear.
5 Several have indicated now that they interpret this
6 amendment as being against competitive bidding. I am a
7 huge advocate for competitive bidding, and, in fact, the
8 amendment says we want to increase--protect and assure
9 that we do not decrease the available choice and
10 participants in a competitive market.

11 The Chairman. I would like to remind my
12 colleagues, this is an interesting discussion, but it is
13 moot. This amendment is not germane, and I have to rule
14 it out of order. I just urge--strike that. The
15 amendment is out of order. Does the Senator wish a vote?

16 Senator Crapo. Yes, I do.

17 The Chairman. Okay. The clerk will call the roll
18 on the motion to overrule the Chair.

19 The Clerk. Mr. Rockefeller?

20 Senator Rockefeller. No.

21 The Clerk. Mr. Conrad?

22 Senator Conrad. No.

23 The Clerk. Mrs. Lincoln?

24 Senator Lincoln. No.

25 The Clerk. Mr. Schumer?

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

1 The Clerk. Mr. Cornyn?

2 Senator Cornyn. Aye.

3 The Clerk. Mr. Chairman?

4 The Chairman. No.

5 The clerk will tally the vote.

6 The Clerk. Mr. Chairman, the final tally is 9 ayes
7 and 9 nays.

8 The Chairman. Two-thirds of those present not
9 having voted in the affirmative, the--it will not change.
10 Absolutely, it will not change.

11 The Clerk. Mr. Ensign?

12 Senator Ensign. Aye.

13 The Chairman. Two-thirds of the Senators not
14 having voted in the affirmative to overrule the Chair,
15 the ruling stands.

16 Next on the list, Senator Cornyn.

17 Senator Cornyn. Thank you, Mr. Chairman.

18 Mr. Chairman, the two issues which I think we have
19 in common, all of us--

20 The Chairman. Senator, could you maybe speak more
21 into your microphone? You are a little faint there.

22 Senator Cornyn. I will do my best.

23 The Chairman. Thank you.

24 Senator Cornyn. The two issues that I think define
25 the problem the best when it comes to health care reform

1 are lack of coverage and affordability, and my amendment
2 deals with both of those issues.

3 This amendment would amend Title I, Subtitle D of
4 the Chairman's mark and would deem any individual who is
5 currently enrolled in a health plan governed by the
6 Employee Retirement Income Security Act, or ERISA, to
7 have met the personal responsibility requirement.

8 The President has said, first, if you are among the
9 hundreds of millions who already have health insurance
10 through your job or Medicare or Medicaid or the VA,
11 nothing in this plan would require you or your employer
12 to change the coverage or doctor you have. He said:
13 "Let me repeat this. Nothing in our plan requires you to
14 change what you have."

15 Now, Mr. Chairman, I suggest that this amendment is
16 required, is a technical correction to make the mark
17 consistent with what the President has said for those
18 covered by employer-sponsored plans or ERISA plans. The
19 Chairman's mark includes a requirement for individuals to
20 have coverage, but it is not clear that the 160 million
21 people who are covered by employer-based plans would meet
22 that requirement.

23 We all know that 90 percent of American are happy
24 with the coverage they currently have, and we should give
25 them credit for meeting the new mandate requirement by

1 maintaining the coverage they have rather than making the
2 coverage they have more expensive. My amendment simply
3 clarifies that the nearly 90 percent of Americans who are
4 happy with that insurance will not be required to change
5 it.

6 I would suggest that although we are talking in my
7 amendment about ERISA plans or employer-sponsored plans,
8 the same argument pertains to the individual market and
9 the other forms of insurance. As we all know, the
10 Chairman's mark requires a certain minimum level of
11 coverage as part of the mandate, the so-called 65 percent
12 of actuarial value or bronze coverage requirement.

13 I mentioned this in my opening statement, but let me
14 just expand upon this briefly. That means in Arizona
15 that 34 percent of the people covered in Arizona do not
16 have compliant plans, so they are going to have to pay
17 more money to meet this new Government requirement.

18 I am sorry. That is Arkansas, 34 percent. Arizona
19 is actually 61 percent of people covered do not have
20 plans that meet this new 65 percent of actuarial value
21 requirement.

22 In Kansas, it is 76 percent do not have plans that
23 meet this new mandate for 65 percent of actuarial value,
24 so what that means is those individuals and their
25 employers are going to have to pay more money, not less.

1 In other words, we are not making health insurance more
2 affordable. We are making it more expensive by these
3 mandates.

4 In Maine, it is 87.5 percent. In Texas, as I
5 mentioned earlier, it is 91 percent of my constituents
6 are going to have to pay more for health coverage, even
7 though they like what they have now because of this
8 requirement.

9 In the State of Washington, it is even worse. A
10 hundred percent of the plans in the individual market do
11 not meet the 65 percent of actuarial value requirement.
12 In West Virginia, it is 75 percent.

13 So my point is that this--if the President says if
14 you like what you have now you can keep it, that should
15 not include having to pay more. Hopefully we ought to be
16 doing things working together which make insurance more
17 affordable, not less affordable. So I would urge my
18 colleagues to support the amendment.

19 The Chairman. Senator Rockefeller?

20 Senator Rockefeller. Thanks, Mr. Chairman. This
21 is a very, very important amendment, and it is a very,
22 very bad amendment. If there is anything which is clear,
23 it is that the insurance industry is not running this
24 markup but is running certain people in this markup.

25 What you have done through your amendment, Senator

1 Cornyn, is to take the very clear fact that those who are
2 self-insured through their companies, that the insurance
3 companies would be grandfathered from ever accepting any
4 of the disciplines which we are putting on the rest of
5 the non-self-insured population, so that what you are
6 saying is that if almost half of all Americans, because
7 of the grandfathering, will not get the restraints on,
8 you know, the caps, the rescissions, and all of those
9 things, which are standard fare for what we think over
10 here, we think the insurance industries are the major
11 problem. As Maria Cantwell says, this is about giving
12 subsidies to insurance companies to do what--you know,
13 instead of helping people. And this is the grandfather
14 of all grandfathers.

15 Senator Cornyn. With all due respect, Senator, I
16 do not know what amendment you are referring to--

17 Senator Rockefeller. I am referring to your
18 amendment--

19 Senator Cornyn. --you are certainly not referring
20 to my amendment--

21 Senator Rockefeller. I am.

22 Senator Cornyn. --because what you are proposing
23 by imposing new mandates on employer-provided policies--
24 we are not talking about insurance. We are talking about
25 coverage that is provided by an employer that is subject

1 to the Employee Retirement Income Security Act. It is
2 not standard insurance policy. But by imposing new
3 Federal regulations on those, you are making it more
4 expensive for the worker to get coverage and for the
5 employer to provide coverage. And it is consistent in
6 the individual market mandate with providing actuarial
7 value of 65 percent.

8 In other words, if you have a health savings
9 account, let us say you are working at Whole Foods
10 grocery store in Austin, Texas, they have a health
11 savings account which covers catastrophic coverage, and
12 they have wellness accounts which the employees own, and
13 80 percent of the employees pay zero out-of-pocket for
14 their health coverage, and they love it. They vote each
15 year on whether to retain it or not.

16 What you are suggesting is the Federal Government
17 knows better than they do what is good for them, and we
18 are going to make their coverage more expensive and
19 eliminate the possibility that they are going to be able
20 to keep what they have now. And, actually, your proposal
21 and the proposal of increased actuarial value will make
22 insurance companies more money than what I am suggesting.

23 So I would be very careful in suggesting that one
24 side or the other is trying to encourage or grow the
25 profits of the insurance company. I suggest to you that

1 your proposal will make insurance companies a whole lot
2 more money than mine, which will allow people to keep
3 what they have and which your proposal will not.

4 Senator Rockefeller. First of all, I do not have
5 my proposal yet, so it is a little difficult for you to
6 refer to it.

7 My argument is that you are grandfathering in an
8 unfairness in the insurance market where you treat 50
9 percent of the American people in one way, or 56 percent,
10 54 percent of the American people in one way and 46
11 percent in a very favored way without restrictions,
12 without discipline.

13 Yes, there is no question. I believe that insurance
14 companies are the major problem throughout all of this.
15 And yes, there is no question that I think we have to
16 impose and I will have amendments and the Chairman has
17 already put into his mark some restrictions to prevent
18 them from doing some of their current practices.

19 But we really haven't gotten around to the self-
20 insurance thing at all. This is I think the First
21 Amendment. I am certainly going to have one, that deals
22 with it. Most people do not know that they are treated
23 so differently. Most people do not know that they do not
24 have these restrictions on them. Most people do not know
25 that yeah, maybe they vote to get it because there is

1 whatever reason, employees probably do not know that
2 either.

3 They are not under the restrictions being protected
4 the way other Americans are. I think that is a bad bill
5 and --

6 Senator Cornyn. I understand your position and I
7 would say that that is an exceedingly paternalistic view
8 of what the federal government role --

9 Senator Rockefeller. No, no, no. I do not want to
10 hear the federal government is better than --

11 Senator Cornyn. -- President's promise, or is this
12 committee going to break it by not allowing people to
13 keep what they have. If they want to keep it, they are
14 going to make it more expensive, not more affordable.
15 That is the question.

16 Senator Rockefeller. Yes. But see, you always
17 come back to that. Everything is, not just you, but
18 generally with certain exceptions that the federal
19 government knows best. I mean, you love to say that, the
20 federal government knows best. We think the federal
21 government knows best and the heck with the individual.

22 In fact, it is quite the opposite. It is quite the
23 opposite. The point is that you are not protecting
24 people that need protection that have insurance.

25 Senator Cornyn. Against their will and against

1 their desires. But if they have what they like now, you
2 are going to protect them even though they want to be
3 left alone and enjoy what they currently have.

4 The Chairman. Let me see if I can straighten this
5 out a little bit. I may be wrong. Basically under the
6 mark if you work for a larger employer, you could keep
7 what you have. It doesn't make much difference what kind
8 of insurance it is.

9 Most employers provide very good insurance for their
10 employees. We are talking about large group market,
11 ERISA self-insured large employers here. Most of them do
12 a good job. They provide good health insurance for their
13 employees.

14 We are saying here in the mark that if you are an
15 employee that works for one of those large firms, you
16 could keep your health insurance. There is no new
17 standards applied for them. You can keep what you have.
18 You can keep what you have.

19 But the mark goes to the next step and says for new
20 employees that work for large firms, for new coverage
21 that is applied, there are three basic consumer
22 protections. They basically are you have to have first -
23 - coverage for prevention, that is no deductibles for
24 preventive services, a second you have to have a
25 reasonable out of pocket cost limit and that is the HAS

1 limit we are talking about here, and third, you cannot
2 have unreasonable limits on annual or lifetime coverage.

3 That is for new employees. That is for new
4 coverage. Currently if you work for a firm, you can keep
5 what you have today. So the distinction really is
6 between current employees and new employees. New
7 employers. Excuse me. New employers.

8 So again, if you work today, you keep what you have.
9 But if your new employer then was saying okay, there is
10 one of three basic consumer protections which I think
11 most Americans think is more than reasonable, you know,
12 no unreasonable limits in annual lifetime coverage and
13 second, reasonable out of pocket loss limits, not \$6,000
14 per individual. Also you have to have coverage for the -
15 - services. That is all this is.

16 If I read your amendment, you are saying that new
17 employers cannot have those three consumer protections.

18 Senator Cornyn. Mr. Chairman, I am reading on page
19 28 of the Chairman's mark and it says beginning in 2013,
20 all U.S. citizens and legal residents would be required
21 to purchase coverage through either the individual market
22 and other private coverage of it is a large group market
23 that they be required --

24 The Chairman. I am sorry, Senator. I got
25 distracted. Can you say that again please? I'm sorry.

1 Senator Cornyn. I am reading a mark on page 28
2 under the personal responsibility requirement and it says
3 beginning in 2013, all U.S. citizens and legal residents
4 would be required to purchase coverage through number
5 one, the individual markets. In other words, private
6 insurance or in the large group market the kind of plans
7 we are talking about here covered by ERISA with the new
8 mandated requirements which the Chairman just described.

9 My position is that those mandated requirements
10 would make that coverage more expensive for the employee
11 and the employer. If our goal is to make coverage more
12 affordable, it kind of mandates that are both provided
13 for ERISA plans for large group coverage as well as the
14 mandate of a 65 percent actuarial value in the individual
15 market will make it more expensive, not less expensive.

16 So the President cannot keep his promise if we pass
17 this provision.

18 The Chairman. No, no, no. Under the mark, no one
19 will lose any coverage that he or she now has. That is
20 for new employers.

21 Senator Cornyn. Mr. Chairman, that is not what the
22 language says. It says beginning in 2013, all U.S.
23 citizens and legal residents. It does not say just for
24 new employees.

25 So if it is your intention to apply it just to the

1 future, then the plain language is going to have to be --

2 The Chairman. Let us see if we can clear this up.

3 If I am wrong, tell me. We want the facts.

4 Ms. Fontenot. I just want to direct you to page 12
5 of the mark. That is actually the provision that the
6 Chairman is referring to in terms of the grandfathering
7 of plans. So if you look at page 12, it specifies that
8 individuals and groups who wish to renew coverage in an
9 existing policy would be permitted to do so and that that
10 policy would meet minimum credible coverage.

11 Senator Cornyn. Is not it true that after five
12 years even the grandfathered plans, the reforms will
13 apply to all plans offered in a small group employer
14 market, thus after five years Americans will not be able
15 to keep what they have now?

16 Ms. Fontenot. In terms of the small group market,
17 the rating reforms do phase in over five years. But that
18 does not speak to the benefits that the employee is
19 getting. That only speaks to the rules by which their
20 premium will be adjusted.

21 Senator Cornyn. Adjusted upward, right?

22 Ms. Fontenot. Upward for some, downward for others.

23 Senator Cornyn. Are you telling me that increased
24 mandates and requirements will make the coverage cheaper?

25 Ms. Fontenot. I am telling you that the increased

1 benefit mandates to the extent that there are some do not
2 apply in terms of the rating rules.

3 All we are talking about phasing in over five years
4 are the rules by which the premiums are adjusted, not
5 these specific benefit categories.

6 Senator Cornyn. It sounds to me like it is the old
7 story about the frog and the pot of water on the stove
8 that pretty soon the heat is turned up so slowly that the
9 frog does not know it is cooked.

10 I mean, what you are saying is over five years the
11 rules are going to change which is going to mean that you
12 cannot keep what you have now because new additional
13 federal requirements are going to be mandated.

14 Ms. Fontenot. What I am saying in other words is
15 that if you are a small employer and you are currently
16 offering a benefit package that would say is a 60 percent
17 -- value or lower, over five years the premium that your
18 employees pay for that benefit package will change due to
19 the phasing in of the reigning rules.

20 For some employers, those premiums will go down.
21 For some, they will go up. Your benefit package, that 60
22 percent actuarial value can remain the same and still
23 meet the personal responsibility requirement.

24 Senator Cornyn. Specifically to the issue of my
25 amendment, we are talking about large employers in ERISA

1 plans, is not it true on page 16 of the mark that large
2 employers in 2017 the states must develop and submit to
3 the secretary a phase in schedule including applicable
4 rating rules for incorporating firms with 50 or more
5 individuals into the state exchanges.

6 Ms. Fontenot. Again, that speaks to the rules that
7 are used to set the premiums. It does not speak to
8 either the benefit requirements or the level of actuarial
9 value that they have to offer.

10 Senator Cornyn. If I have a business with a lot of
11 young employees, does that mean their premiums will go
12 up?

13 Ms. Fontenot. If you are currently a large
14 employer, your rates are not adjusted due to health
15 status. So the fact that you have younger or older
16 employees really doesn't affect your premium and the new
17 rating rules call for the elimination of health status.

18 So essentially the large group is already complying
19 with the rating rule that we are putting into place which
20 is why we did not specifically apply them to the large
21 group.

22 Senator Cornyn. And how do the rating rules, could
23 you explain how the rating, what the rating rules
24 actually do? What kind of new requirement is being
25 imposed that is not imposed under current law?

1 Ms. Fontenot. Sure. So the rating rules require
2 that insurers not consider preexisting conditions in
3 terms of limiting policies. They cannot consider health
4 status in terms of setting their rates and they can only
5 consider tobacco use, family composition and age to a
6 limited extent.

7 Senator Cornyn. Mr. Chairman, I appreciate the
8 answers to the question. If the goal though is to allow
9 people to keep what they have now, I do not really
10 understand the disagreement with my amendment and I would
11 urge my colleagues to support it.

12 The Chairman. Okay. Senator Stabenow?

13 Senator Stabenow. Thank you. As someone who has a
14 large number of large employers in my state, one of the
15 things I appreciate about the Chairman's mark is the
16 grandfathering provisions, the fact that the people in my
17 state, 60 percent of whom have insurance, are going to be
18 able to keep it.

19 Mr. Chairman, I appreciate that. That is a strong
20 commitment. It is clear in the bill and it is very, very
21 important to me that people be able to keep their
22 insurance.

23 But what I am also hearing is through the
24 discussions we are having is that things are okay the way
25 they are overall for people, that we should just keep the

1 status quo over and over again, that nothing should
2 change when in fact the evidence all around us is that
3 costs are going up for businesses, coverage is being
4 dropped, deductibles, copays, everything changing for
5 people on a daily basis.

6 There are certain basic principles that we know that
7 have been built into this legislation. Many of the areas
8 and the ideas have come from large businesses. We have
9 often heard, I know in a lot of our walk throughs we
10 talked about Safeway and the monies that they have been
11 able to save.

12 I know my friend from Nevada has often talked about
13 that as it relates to focusing on prevention. One of the
14 things in this bill in Senator Cornyn's questioning is
15 the first dollar coverage for prevention. We know that
16 saves money. Businesses tell us it saves money. Those
17 large employers in ERISA plans, many are doing it right
18 now because we know it saves money. That is a change.
19 That is a change going forward that is good for people,
20 saves money for the government, saves money for
21 businesses.

22 The kinds of rating changes that were just talked
23 about to stop people from getting dropped or not being
24 able to get insurance if they have a preexisting
25 condition, that is a change. That is a change. It is a

1 change that helps people in this country who have been
2 paying for insurance to know they are going to keep it or
3 if somebody gets sick in their family, they are going to
4 be able to have insurance.

5 So my concern about this is that we are basically
6 deciding whether or not status quo works for every
7 American in every business. I do not see how the numbers
8 when we are paying twice as much as any other country and
9 people are being dropped and businesses are struggling
10 and we are losing jobs because of high cost, why that
11 works.

12 So this is not about the status quo. So if
13 everything is great right now, that is fine. But it is
14 not great. So from my perspective, Mr. Chairman, I
15 appreciate the strong commitment on your part and the
16 President to make sure that if you have your insurance,
17 you can keep it. That's the bottom line for me. But
18 going forward, I want to make sure that we are allowing
19 people to be able to really get the health care they are
20 paying for as well and that we learn from the things that
21 we know from business actually save money which are in
22 this bill.

23 So I would pose undermining that which after
24 listening to the debate appears to be what the Cornyn
25 amendment does.

1 The Chairman. Senator Kyl?

2 Senator Kyl. Thank you, Mr. Chairman. I just want
3 to correct one thing that the Senator from Michigan said.

4 It may be counterintuitive, but it is not true that
5 first dollar coverage for prevention saves money. Now,
6 it may be good health policy. Obviously the more
7 prevention we can do, the better it is for everybody.
8 But economically it does not work that way and the reason
9 is very simple.

10 If you pay for prevention for everybody, let us say
11 that is five times as many people as are getting
12 prevention today, you will prevent a few people from
13 getting worse in whatever disease or condition you might
14 discover, but you do not do it for everyone or even a
15 majority of the people.

16 That is to say the condition for which you are
17 attesting only exists in a relatively small number of
18 people.

19 Senator Stabenow. Would my colleague allow me just
20 to --

21 Senator Kyl. So let me just conclude this. I have
22 seen absolutely no data and I would be interested if the
23 Staff has any data that would back up the claim that
24 paying first dollar coverage for prevention actually
25 saves money.

1 Senator Stabenow. We have actually, I have heard
2 testimony, we have all had discussions. Colleagues have
3 talked about various experiences with businesses, Safeway
4 being one over and over again where they are focusing on
5 prevention by screenings, getting people in on the front
6 end to focus on wellness and prevention as well as other
7 incentives that in fact they have brought I believe Steve
8 said their cost down by 30 percent.

9 Senator Ensign. If you would yield, I will clarify
10 that because I probably had more discussions with Steve
11 than anybody on the committee save maybe Ron Wyden. I
12 would maybe even say I am probably up there with him as
13 far as the number of hours I have spent studying the
14 Safeway plan and what they have done.

15 He actually emphasizes very strongly, it is not
16 prevention that saved the money. It is incentivizing
17 healthy behavior and that is a huge difference. When you
18 incentivize somebody to quit smoking, that is not a test
19 that is like a colonoscopy. A colonoscopy is a
20 prevention type of a first dollar coverage for
21 prevention.

22 Incentivizing somebody with a lower health care
23 premium to stop smoking or to lose weight or to control
24 their cholesterol or things like that, that is
25 incentivizing healthy behavior and it sounds, people get

1 those two things confused, but it is a fundamental
2 difference because incentivizing healthy behaviors does
3 save money economically and is good health policy.

4 Just to further clarify, hold on.

5 Senator Stabenow. It really is both.

6 Senator Ensign. Hold on. Prevent first dollar
7 coverage and prevention from an economic standpoint, CBO
8 does not even score it. That is the reason we have had
9 trouble over the years with CBO. Incentivizing healthy
10 behavior is actually what will save money. They are both
11 good health policy. One saves money and one does not.

12 Senator Stabenow. I understand having worked
13 extensively in this area myself, I understand exactly
14 what you are saying. But both of those combined are what
15 we are hearing from business.

16 The Chairman. Okay.

17 Senator Wyden. Mr. Chairman?

18 The Chairman. Senator Wyden. And then we are
19 going to have to vote.

20 Senator Wyden. Senator Cornyn in my view is
21 raising a very important issue because there are a lot of
22 very good ERISA plans, the Employee Retirement Income
23 Security Act plans.

24 But the reality is there are also some crummy ones,
25 and that was essentially acknowledged in the earlier kind

1 of discussion. It seems to me that we need to work
2 further to make sure that everybody has these additional
3 choices. Nobody is going to want to wake up in a
4 hospital emergency room or another health care facility
5 and find out that their particular ERISA plan does not
6 cover the services that they need the most.

7 The way to get the most value for Americans whether
8 they are on ERISA plans or other kinds of plans is to
9 empower them to have these choices that allow them to
10 hold insurers accountable.

11 I just want to tell the Senator from Texas that I
12 think where he wants to go in terms of creating a market
13 is the right direction. When we get these additional
14 choices, he and I are going to be together on this ERISA
15 question and a lot of the reforms that he is interested
16 in and we will have a chance to work on it further.

17 Senator Cornyn. Would the Senator yield?

18 Senator Wyden. I would be happy to.

19 Senator Cornyn. I appreciate and understand. I
20 think what the Senator from Oregon said, I would just be
21 curious though how the mandates in the Chairman's mark
22 would address the situation you just described by
23 requiring first dollar coverage for prevention and out of
24 pocket limits greater than those provided standards to
25 establish for HSAs under current law.

1 I agree with you. People out to have catastrophic
2 coverage which will prevent them, which will bankrupt
3 them. But I do not understand how imposing additional
4 regulation on plans which like Safeway's do not require
5 regulation to get employers to do the right thing in what
6 makes sense, how additional regulation by the federal
7 government is going to make the coverage either better or
8 more affordable.

9 The Chairman. Senator Rockefeller?

10 Senator Rockefeller. I believe that Senator Wyden
11 had the floor. He yielded for a question, Mr. Chairman.

12 The Chairman. Okay. Senator Wyden?

13 Senator Wyden. I will be very brief. Mr.
14 Chairman, I think the Senator from Texas is raising a
15 valid point. Everything I want to do in health care
16 reform is to start steering clear from mandates and
17 expanding choices. I think that is how the consumer is
18 going to get the best deal. I think that is how the
19 consumer is going to be able to hold the insurance
20 industry accountable in this country.

21 I just want to indicate to the Senator from Texas, I
22 am going to be working with him further and frankly for
23 me, this is the litmus test of carrying out the
24 President's pledge to get real health care reform in this
25 country. You have got to have more choice, more

1 competition. I think we can do it for ERISA as well and
2 I am going to work further with the Senator from Texas.

3 The Chairman. Senator Rockefeller?

4 Senator Rockefeller. A short close to the
5 argument, I hope. So as I understand it, self-insured
6 plans get to keep operating without any insurance
7 reforms. They are untouched.

8 The argument is that we are saving money for
9 employers but we are not providing employees with a
10 benefit package that protects them or gives them the
11 coverage that they need. I think the amendment is not
12 good.

13 The Chairman. Okay. Ready to vote? Request a
14 role call vote. All those in favor of the amendment
15 offered by the Senator from Texas, vote aye, those
16 opposed, no.

17 The Clerk. Mr. Rockefeller?

18 Senator Rockefeller. No.

19 The Clerk. Mr. Conrad?

20 Senator Conrad. No.

21 The Clerk. Mr. Bingaman?

22 Senator Bingaman. No.

23 The Clerk. Mr. Kerry?

24 The Chairman. No by proxy.

25 The Clerk. Mrs. Lincoln?

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

1 The Clerk. Mr. Crapo?

2 Senator Crapo. Aye.

3 The Clerk. Mr. Roberts?

4 Senator Grassley. Aye by proxy.

5 The Clerk. Mr. Ensign?

6 Senator Ensign. Aye.

7 The Clerk. Mr. Enzi?

8 Senator Enzi. Aye.

9 The Clerk. Mr. Cornyn?

10 Senator Cornyn. Aye.

11 The Clerk. Mr. Chairman?

12 The Chairman. No.

13 Senator Grassley. I have a vote for Senator Hatch.

14 Aye by proxy.

15 The Clerk. Mr. Chairman, the final tally is 10

16 ayes, 13 nays.

17 The Chairman. The amendment fails. The next
18 amendment is offered by Senator Enzi. Mr. Enzi, you are
19 recognized.

20 Senator Enzi. Thank you, Mr. Chairman. I would
21 call up Enzi Amendment C3 as modified. What this says is
22 prior to implementing employer assessments of fees
23 described in Title 1, the Secretary of Labor would have
24 to certify the implementation of such fees and
25 assessments would not result in a reduction in worker's

1 wages.

2 The modification that I did had two requirements.
3 The second one was that they would have to certify that
4 there was no increase in unemployment rates, that this
5 deals strictly with whether it would reduce worker's
6 wages.

7 I believe employer mandates are paid on the backs of
8 workers and they are paid in the form of lower wages.
9 The underlying bill imposes a tax of \$27 billion on
10 employers. If this new employer tax is signed into law,
11 it will have a serious impact on the labor market.

12 What happens when taxes like those proposed in this
13 bill are piled on employers? Well, according to CBO,
14 jobs are lost and wages are slashed. Those fortunate
15 enough to keep their jobs will have their wages reduced
16 to cover the increased cost imposed by the new tax on
17 employers.

18 A study by Harvard Professor Kate Baker found that
19 the low income minority workers would be the most
20 impacted by an employer mandate. To quote Kate Baker,
21 "Workers who would lose their jobs are disproportionately
22 likely to be high school dropouts, minority and female."

23 It is hard for me to believe that while we are
24 facing an unemployment rate of nearly 10 percent, that
25 anyone would consider putting the jobs of low income

1 minorities at risk.

2 I am opposed to the new \$27 billion tax. It would
3 cause workers to lose their jobs and face lower wages.
4 My amendment simply says prior to implementing this
5 section, the Secretary of Labor must certify that it will
6 not cause lower wages.

7 Prior to implementing this new tax, I think it is
8 important that we get a clear report from the Department
9 of Labor that this section will not hurt workers and make
10 a tough economic environment worse. So I would urge my
11 colleagues to accept this amendment.

12 Senator Ensign. Mr. Chairman?

13 The Chairman. Yes? Senator Ensign?

14 Senator Ensign. Mr. Chairman, I think that Senator
15 Enzi is making some very important points that need to be
16 stressed.

17 Over the last many years, we have seen wages not go
18 up nearly as quickly simply because if employers have the
19 higher cost of health care, there is less money for them
20 to be able to pass out as far as higher wages.

21 It is one of the things that I believe is making us
22 less competitive because it is total cost. When an
23 employer looks at how much it costs to employ somebody,
24 they have to look at not only their hourly wage, but they
25 have to look at the total burden.

1 So if they are paying into a 401(k) plan, if they
2 are paying health care costs, whatever it is, that all
3 has to be looked at.

4 I think what Senator Enzi's amendment is talking
5 about is that we do not want, if there is an increased
6 cost to the employer in any way, whether it is a tax or
7 whatever it is, that could result either in lower wages
8 or at least not in maybe a raise that could be had by
9 that employee.

10 The problem is as costs go up to an employer, that
11 then takes away from that ability to give a raise. The
12 worker does not really understand this fact. In other
13 words, if your health care costs go up and you do not get
14 a raise, you do not get any better coverage. You get the
15 same coverage, but you do not get the raise or you do not
16 get as big of a raise as maybe you could have gotten
17 before.

18 So I think it is a very important point that he is
19 raising here and we really need to consider what we are
20 doing to employers out there because in the end it is the
21 employee that is not going to get the benefit of this
22 increased wage in the future that they would like to see.

23 So I appreciate the amendment that Senator Enzi has
24 brought before us.

25 Senator Conrad. Mr. Chairman?

1 The Chairman. Senator Conrad?

2 Senator Conrad. Mr. Chairman, the mark is based on
3 the notion of shared responsibility. If we look around
4 the world at health care systems that are not government
5 run, but do provide for universal coverage, do control
6 costs effectively compared to what we are doing, and do
7 provide high quality outcomes, those systems are based on
8 a shared responsibility model.

9 Again, I want to emphasize, ones that are not
10 government run, Germany, Japan, France, Belgium,
11 Switzerland, all of them based on an employer-based
12 system like we have, one of shared responsibilities where
13 employees pay part, employers pay part, and the
14 government role is to assist those who legitimate cannot
15 afford coverage for themselves. They have a requirement
16 for employees and a requirement for employers, shared
17 responsibility.

18 The Chairman's mark is built on that same model,
19 which is largely our current system. The vast majority
20 of people in this country are covered at their place of
21 employment. In almost all of those circumstances,
22 employees pay something, employers pay something.

23 What Senator Enzi's amendment would do, as I
24 understand it, is to strike out the employer's
25 requirement that if their workers -- if they do not offer

1 insurance and if their workers wind up getting public
2 assistance, that they have some obligation.

3 If you strike that out, CBO tells us that you will
4 have many more people going onto taxpayer assistance.
5 You will increase the cost. You will shift from an
6 employer-based system increasingly to one where
7 government, either through Medicaid or through assistance
8 through the exchange foots the bill. I think that would
9 just be a serious mistake.

10 Senator Kyl. Mr. Chairman?

11 The Chairman. Senator Kyl?

12 Senator Kyl. Mr. Chairman, I just want to remind
13 my colleagues of something that Dr. Elmendorf confirmed
14 during the walk-through. I read something that he had
15 written previously entitled "Effects of Changes to the
16 Health Insurance System on Labor Markets." It is exactly
17 the issue that Senator Ensign's amendment goes to.

18 Here is what he said. "Supporters of such
19 surcharges often refer to them as free rider penalties.
20 Although the surcharges would be imposed on the firms,
21 workers in those firms would ultimately bear the burden
22 of those fees, just as they would with pay-or-play
23 requirements."

24 Then he goes on to make an even more, I think,
25 interesting observation here. "Employer surcharges tend

1 to be more targeted. Many of these workers are more
2 likely to have earnings at or near the minimum wage and
3 the size of such surcharges, if based on actual costs
4 imposed on the government programs, could be larger per
5 affected worker than the assessments being considered in
6 many pay-or-play requirements."

7 I asked him if that was still his opinion and he
8 confirmed that. I said, "Would free rider penalties
9 disproportionately affect low income workers?" And he
10 said yes and he said it depends on what the individuals
11 intend to do and whether they enroll the spouse coverage
12 and the like. But as a general proposition, the
13 phenomenon that Senator Ensign is trying to prevent is
14 precisely what is going to happen here.

15 If we want to help folks, you do not add a charge
16 on their employer that is going to be passed on to the
17 employee.

18 The Chairman. I might say here, and it is
19 underlying this mark, that is, we are all in this
20 together. All of America is in this together in health
21 care reform.

22 It is something I believe in very strongly and I
23 think it is a concept which kind of helps keep it
24 together. It is the whole squared and the sum of the
25 parts. The opposite of that is divide and conquer. But

1 I think we should be in a system where we are all
2 together.

3 Part of that mean employees and employers both are
4 all part of the solution. I think most of us agree that
5 employers should continue to provide health insurance.
6 There is no employer mandate in this bill. There is no
7 employer mandate.

8 But the question is what if we set up an exchange
9 and the exchange gives significant tax credits,
10 reductions to people who buy insurance in the exchange.
11 A lot of employers will say, "Gee, why do I have to
12 provide health insurance for my employees? I will just
13 dump them, I will dump them on the exchange."

14 So to prevent that, we set up a modest penalty and
15 CBO says if there is no penalty on an employer who drops
16 his coverage, then we are going to lose about 10 to 15
17 million people who currently have health insurance.

18 I do not think that is right. I do not think we
19 want the system set up where 10 to 15 million employees
20 will lose their coverage because there is no penalty.
21 Frankly, the penalty is not that high. It is quite low
22 in this bill and I, frankly, do not know if there is
23 going to be much reduction. I think most employers are
24 going to keep what they now have.

25 One question I do have is the author of the

1 amendment. I am not quite sure what he means -- I am
2 asking a question of what he means here. It says, "Prior
3 to implementing the employer assessments or fees
4 described, the secretary must certify that the
5 implementation of such fees will not result in a
6 reduction of workers' wages."

7 Is that wages only of that firm? Is that the wages
8 of industry generally? I just do not know what that
9 refers to.

10 Senator Enzi. That refers to the employees. That
11 is who the Department of Labor is supposed to take care
12 of. You notice I did not say the CBO would say. I said
13 the Department of Labor. This is in their job tasking
14 and it does not strike the section for what the employers
15 have to do.

16 It just requires a certification by the Department
17 of Labor, who is supposed to watch out for employees, to
18 make sure that we are doing here does not result in a
19 reduction of the workers' wages.

20 The Chairman. Now, workers' wages, do you mean
21 workers nation? Do you mean workers, just that one firm?
22 I do not understand what you are talking about here. What
23 wages, nationwide?

24 Senator Enzi. Yes. It would be nationwide. I am
25 not expecting here to go to every employer and figure out

1 whether they are going to reduce the wages for that
2 employer.

3 It ought to be a fairly simple task for the
4 Secretary of Labor. If she does not think that it is
5 going to affect wages, she does not have any problem
6 doing it. He or she would not have any problem doing
7 certification.

8 The Chairman. I was wondering, because it is a
9 one-time certification. I was wondering, because wages
10 go up, wages go down, one part of the economy versus
11 another part of the economy.

12 This does not distinguish between large employers or
13 small employers. I just think it does not really -- let
14 me ask. Let me ask the Senator if he is open to
15 modification.

16 That is, you cut the word "substantial," "does not
17 result in substantial reduction of workers' wages and,
18 also, in the economy generally. I think that is what the
19 Senator said, this applies to the economy generally.

20 Senator Enzi. It applies to the economy generally,
21 but it does not have anything to do with whether it is
22 substantial or not. What would substantial be? If I am
23 a low income worker and I get a \$1 reduction, that might
24 be substantial to me.

25 If I am in a higher wage category -- but I did not

1 try and specify that in here. I did not try and put a
2 whole bunch of requirements on the Secretary of Labor. I
3 just want them watching out for the employees.

4 The Chairman. I just do not know how this works,
5 because some sector of the economy, wages go up; some
6 sector, for whatever reasons, irrespective of this, they
7 go down. It is going to be hard for the Secretary to
8 know exactly why wages went up or down.

9 Are you talking net basis? Is this a gross basis?
10 What is this?

11 Senator Enzi. Wages are based on growth. The
12 Secretary's access to the data to do this would be
13 approximately the same that the CBO would have. They
14 would have to look at the amendment and the specific
15 wording, and that is one of the difficulties of not doing
16 specific wording, which brings us back to not having
17 specific wording in the bill to be able to modify this
18 with.

19 The Chairman. I just do not see how you implement
20 this.

21 Senator Enzi. If you want to work with me to get
22 some more specific language, I would be happy to do that.

23 The Chairman. I am working right now to just cut
24 the word "substantial" and I think that solves it.

25 Senator Enzi. Well, that is a good question. I

1 did not try and put that difficult of a requirement on
2 the Secretary. I think you are putting a much more
3 difficult standard on there than what is in the
4 amendment.

5 The Chairman. I just currently think it is
6 unworkable. Let us try to work this out. So if you
7 could withdraw the amendment, let us try to find some
8 other language.

9 Senator Ensign. Mr. Chairman?

10 The Chairman. Senator Ensign?

11 Senator Ensign. I think that, first of all, there
12 have been a couple of statements, including Senator
13 Conrad and Senator Stabenow and yourself, that have made,
14 over the last discussion of this amendment and the last
15 amendment, it is basically giving us a false choice.

16 Nobody over here believes that the current system is
17 working the way it should be working. The costs are too
18 high. We have all talked about the costs are too high.

19 We do not want the status quo. It is not a question
20 of this bill or the status quo. That is a false choice.
21 There are other things that can be done. That is why we
22 have, myself, in particular, have talked about how do we
23 control costs, how would we lower costs.

24 We tried to offer amendments last night on medical
25 liability reform to get rid of junk lawsuits. I have

1 talked a lot about incentivizing employees with healthy
2 choices, which I think could dramatically lower the cost
3 of health care in this country and not do some of the
4 things that would hurt employee wages, would hurt
5 competitiveness.

6 We tried to do, a few years ago, small business
7 health plans, allowing people to buy across state lines.
8 I have talked about transparency on cost and quality and
9 that is certainly a role that the government can play.

10 So I think that we should at least fairly
11 characterize, when we are going forward, the debate, that
12 we actually want comprehensive health care reform,
13 because we believe that the system is out of control.

14 By the way, Senator Conrad mentioned Japan, Germany,
15 these other countries. Their health care systems are not
16 sustainable the way that they are going. And by the way,
17 they control costs because the government -- it may not
18 be a completely government-run system, but it is a
19 government-controlled system and they control the costs.

20 They control how much they spend per year on that
21 system. So they control how much of their GDP they are
22 going to spend on the system and when you do those kinds
23 of things, yes, you can control costs, but the quality of
24 the outcomes in this country are the best in the world.

25 If you get a serious type of a cancer in the United

1 States versus anywhere in the world, we have the best
2 quality of outcomes. If you have serious heart disease,
3 we have the best quality of outcomes based on your
4 survivability rates when you get a serious disease.

5 So I think we should be fair in how we are
6 characterizing our health care system today and the type
7 of reforms that each side -- I understand. I believe the
8 Chairman very sincerely wants to reform a health care
9 system in a good way. I said that in my very opening
10 statement.

11 I believe both sides want to improve the health care
12 system that we have in this country. We just have
13 different ways of going about it and we should be fair
14 and say that it is not just this bill or nothing or the
15 status quo. It is this bill or there are other ideas out
16 there that may be different than this bill.

17 The Chairman. I would like to turn to the
18 amendment. Senator, I understand that you are willing to
19 work out some language.

20 Senator Enzi. Mr. Chairman, I am not trying to
21 delay things and this just does not seem that difficult.

22 I am leaving a lot of flexibility for the Department of
23 Labor and any changes that we would make would put a lot
24 more requirements on the Department of Labor.

25 They are in charge of knowing whether workers' wages

1 are going to go down as a result of something that we do.
2 I think, so we do not delay, just go ahead and vote.

3 The Chairman. Senator, we do not have a CBO score
4 on this amendment. I do not know what CBO --

5 Senator Enzi. Well, I am not asking for the CBO.
6 I am asking for the Secretary of Labor to make the
7 determination.

8 The Chairman. But I have not seen a score on this
9 amendment, your amendment, by cost. I just do not know.
10 The CBO has not looked at your amendment.

11 Senator Enzi. Why would there be any cost? It
12 would take a few minutes for the Secretary of Labor, I
13 suppose, to do this and that is a cost.

14 The Chairman. If savings are not implemented in
15 the bill, there would be a cost.

16 Senator Enzi. I do not think there would be any
17 cost or any savings.

18 The Chairman. If that is the case, then the
19 amendment is not needed.

20 Senator Enzi. I think that it is needed. It is
21 needed. How can your side not say that the Secretary of
22 Labor ought to have some kind of a voice on this?

23 The Chairman. It is just the implementation of
24 something.

25 Senator Enzi. If it said that it was the CBO that

1 was having to make the decision, I can understand your
2 unwillingness to do this. But where it is the Secretary
3 of Labor, I think it ought to be a fairly easy
4 determination.

5 The Chairman. I just urge the Senator to withdraw
6 his amendment so we can work it out.

7 Senator Snowe. Mr. Chairman?

8 The Chairman. Senator Snowe?

9 Senator Snowe. I hope that we could work it out,
10 because it is a fundamental issue and I think we have to
11 appreciate the correlation between the provisions in this
12 bill and what the net effect will be. Hopefully and
13 ideally, we will create a more competitive insurance
14 market through the exchange.

15 The power of a marketplace ought to produce more
16 cost competitive plans that are going to bring down costs
17 for small businesses, large businesses throughout this
18 country. We have seen 131 percent increase in premiums
19 over the last 10 years and yet, as I said yesterday, that
20 wages have only increased -- it has been three times the
21 size and growth in wages.

22 So we have a serious problem because we do not see
23 wages growing in this country because of the impact of
24 the growth of health insurance costs, and this
25 legislation is designed to, obviously, convert that

1 through the power of a marketplace, through insurance
2 market reforms to create more uniformity across the
3 landscape in terms of those insurance reforms and,
4 ultimately bringing 30 million people into the exchange
5 that is going to lower the prices for competitive plans.

6 So I would hope that we could have some type of
7 estimate of what the impact will be on businesses as a
8 result of the free rider and the other penalties that are
9 included in this legislation.

10 In fact, businesses have said that if the health
11 insurance premiums go up, what is the impact on that
12 increases, and their impact is that they do not have any
13 salary increases. They do not have employee growth
14 strategies. They do not hire individual new employees.

15 So I think there has got to be a way of discerning
16 the effects that this legislation could have on not
17 hiring individuals, but also to see the manifestation in
18 lower salaries for employees. I think that that is
19 information that would be very important and instructive
20 to us to know and the correlation and the net effects
21 between the provisions and what ultimately will affect
22 businesses.

23 The Chairman. Senator, again, I urge you to
24 withdraw it. Senator Snowe has some good points and it
25 just needs a little work.

1 Senator Enzi. I do not know how I can make it any
2 simpler than I have already made it.

3 The Chairman. Well, let our staffs talk and maybe
4 we can find an answer to that question.

5 Senator Enzi. But I was going to vote on this
6 later.

7 The Chairman. So it can be accepted.

8 Senator Enzi. So that I can get a vote later.

9 The Chairman. You will always have your right to
10 bring it up.

11 Senator Enzi. All right.

12 The Chairman. Thank you. The amendment is
13 withdrawn. The Senator has withdrawn his amendment.

14 We can go to the next amendment. I think Senator
15 Nelson is not ready to offer his amendment. Are you
16 ready, Senator? All right. You are on.

17 Senator Nelson. Mr. Chairman, this is an amendment
18 that will produce \$106 billion of revenue. It will allow
19 us to fill the donut hole and it will have, according to
20 CBO's numbers, \$50 billion left over after we fill the
21 donut hole.

22 It is to go back to the previous law, which, six
23 years ago, allowed those who received drugs from Medicaid
24 and had a discount offered on behalf of them by the
25 pharmaceutical companies, that if that Medicaid-eligible

1 person was also a Medicare recipient, that the Federal
2 government would have the advantage of having those drugs
3 under Medicare at the same lower price because of the
4 rebates that they would have as being Medicaid eligible.

5 We got the score from CBO yesterday and,
6 specifically, they said to us it fills the donut hole
7 over and above what the Chairman has already filled the
8 donut hole with his mark. It fills it completely and, by
9 the way, that affects, 17.5 million senior citizens that
10 get their drugs under Part D Medicare.

11 Because the law was changed six years ago in the
12 Medicare prescription drug benefit, the Federal
13 government cannot get those cheap drugs if the
14 beneficiary is getting them under Medicare as opposed to
15 Medicaid. That is wrong.

16 And we know the burden, the financial burden that is
17 put upon senior citizens when they have to pay the higher
18 prices on those drugs.

19 So, Mr. Chairman, we discussed it before. Now, I
20 know that it is going to be a very difficult and close
21 vote in this committee. I have counted noses and I know
22 that this amendment has a chance that it is not going to
23 prevail here.

24 But I also know that, as I have discussed with the
25 majority leader, that he will protect my right to offer

1 this and will support it once we come to the floor if it
2 is not a part of this.

3 All of you have been talking about the desperate
4 needs, that you are looking for revenue. Here is clearly
5 a place. Did the pharmaceutical industry come to the
6 table in the agreement with the White House with enough?
7 There are a number of us who do not feel that that is the
8 case.

9 So for Medicare beneficiaries, this will lower the
10 price of drugs. Because of the revenues it will generate
11 for the total of almost 18 million senior citizens that
12 get their drugs through Medicare Part D, that gap between
13 \$2,600 and \$5,500 called the donut hole that they do not
14 get any support, that they will get that support under
15 the existing law of Medicare prescription drugs, Part D.

16 I will reserve time as we go on into this argument
17 to rebut the arguments that the very distinguished
18 Senator from Iowa is going to make about how he thinks
19 this is going to raise the price of prescription drugs,
20 and I will be happy to rebut that.

21 The Chairman. Senator Grassley?

22 Senator Grassley. Well, first of all, you ought to
23 know pharma well enough that if they are going to be
24 involved in the deal, they are not going to lose any
25 money in that deal. So I am cynical about any deal that

1 has been made working.

2 And as a member of the group of six, I want to make
3 it clear that I was not at any table when any
4 negotiations were made with pharma. I hope you
5 understand that.

6 I would also like to ask people to have a little
7 patience with me, because I did not say much Tuesday
8 night when this was debated and when I did say, I raised
9 my voice. I was not mad at anybody. It is just the way
10 I get sometimes.

11 But I do want to go into some detail and I would ask
12 the Senator from Florida and the Senator from West
13 Virginia to pay some attention to what I have to say.
14 But I am surely glad that we are revisiting this issue,
15 because I think some things need to be cleared up.

16 First, everyone should recognize that political
17 opponents of the drug benefit have tried to tear the
18 benefit apart since day one five or six years ago. These
19 naysayers wanted a government-run benefit, with the
20 federal government dictating drug prices. Thankfully,
21 for the benefit of seniors, the naysayers have lost, but
22 that has not stopped them from constant effort to tear
23 apart and undermine the drug benefit that we did pass.

24 First, they said that there would be no prescription
25 drug plans. Then when that did not happen, they said

1 that there were too many plans. Then they said that it
2 was too confusing, that the seniors would not be able to
3 choose a plan. But seniors have enrolled and surveys
4 show that they are very satisfied.

5 The Part D program is working for seniors and, by
6 the way, working for the federal government and it has
7 probably helped more people in the State of Florida than
8 anywhere else. After four years, 27 million Medicare
9 beneficiaries have joined Medicare Part B.

10 This means over 90 percent of Medicare beneficiaries
11 now have prescription drug coverage, quite a bit
12 different from the period prior to 2004.

13 According to CMS, plan premiums are 36 percent lower
14 than originally estimated and the overall cost of the
15 program is \$237 billion or 37 percent less than CBO
16 originally thought it would be.

17 How many federal programs come in under what they
18 are projected to be? Most every government program
19 always has cost overruns, not cost under-runs. And it
20 seems that seniors are happy. A *Wall Street Journal* on-
21 line Harris interactive poll reported that 87 percent of
22 Part D enrollees are satisfied.

23 Now, Tuesday evening, in debating this amendment, it
24 was asserted repeatedly that the Nelson amendment would
25 return drug coverage for the duals back to the way it was

1 before Part D. The implication was that some injustice
2 was done to dual eligibles by putting their drug coverage
3 in Part D.

4 My purpose, I want to set the record straight, if
5 you do not already know, you might be wondering, how did
6 drug coverage for the duals end up in Part D anyway. In
7 the process of setting the record straight, this is what
8 I would like to relate to you. It is just a little bit
9 of history, background.

10 The dual eligibles, think everybody knows this, but
11 let me repeat it for anybody listening, the dual
12 eligibles are individuals who are dually eligible for
13 both Medicare and Medicaid. The Medicaid covers
14 prescription drugs and before Part D, Medicare did not.

15 So the duals received their drug coverage through
16 state Medicaid programs prior to 2003. In 2003 now, the
17 originally bipartisan Senate bill that created the new
18 benefit was focused on providing drug coverage for people
19 -- can you believe it -- that did not have drug coverage.
20 That is what we ought to be doing.

21 Following that principal, coverage for dual
22 eligibles was kept in Medicaid. It was kept in Medicaid
23 under the bill that came out of this committee. That is
24 when I was chairman.

25 At that time, Senator Baucus and I coauthored the

1 Senate bill and, of course, it passed with strong
2 bipartisan support of 76 votes on June 27, 2003.

3 But during committee debate back in 2003 and, also,
4 on the floor, the Senator from West Virginia was sharply
5 critical of the decision to leave drug coverage for duals
6 where it was, right there where it was in Medicaid.

7 He offered an amendment in committee and on the
8 floor to move their drug coverage to Part D, but that
9 amendment was defeated in committee by a vote of 7-14 and
10 on the floor by a vote of 47-51.

11 Now, there is an important point here. In that
12 amendment championed by the Senator from West Virginia
13 and by so many on that side of the aisle did not call for
14 creating a drug rebate program in Part D, not at all.
15 That amendment called for moving dual eligibles to the
16 Part D program and into the competitive model for drug
17 pricing.

18 And ultimately, Senator Rockefeller prevailed in his
19 argument, because in the final conference report for a
20 Medicare Modernization Act, it included the dual
21 eligibles in the new Medicare drug benefit. So do not
22 give up on Senator Rockefeller. If he loses in a couple
23 of instances ahead of time, he eventually wins out in the
24 end.

25 The argument was that if Medicare did not cover dual

1 eligibles, then low income beneficiaries would not have
2 the same covered options as other beneficiaries. And the
3 Medicare Part D benefit is much better than what the
4 duals were getting in Medicaid, because -- you know why?
5 Many states had strict limits on the number of
6 prescriptions Medicaid recipients could get filled each
7 month.

8 For instance, if they needed the sixth prescription
9 in a state that only covered five, well, that beneficiary
10 was out of luck. But that is not the case in the
11 Medicare drug benefit.

12 There is no limit per month. They can pick the plan
13 that is best for them. And contrary to statements that
14 were made Tuesday night, the dual eligibles are also not
15 subject to the gap in the coverage. In other words, the
16 dual eligibles do not face a donut in their benefit.

17 So the idea that dual eligibles were somehow wronged
18 in the 2003 bill is revisionist history and it is,
19 ironically, humorous, as well, since it was members of
20 this committee that championed moving duals into Part D
21 in the first place.

22 So that is a story about the duals and I am sorry to
23 take up so much of the committee's time, but it is
24 important to set the record straight.

25 Now, on the gap in coverage, we could debate that

1 for days. I am not going to do that. I am not happy
2 with the fact that there is a gap in coverage. We worked
3 to maximize the drug benefit in the Medicare
4 Modernization Act so that it provided the best coverage
5 possible while remaining within the allotted budget of
6 that time.

7 Because the amount of funding available for drug
8 benefit, we were not able to provide uninterrupted
9 coverage for all seniors. However, we did provide
10 substantial targeted financial assistance to those who
11 need it most and we minimized the gap in coverage to the
12 greatest extent possible.

13 And most seniors are not affected by the gap in
14 coverage at all. That is because their drug spending
15 does not reach the limit or they are one of 12.5 million
16 people who qualify for additional assistance to low
17 income benefits or they might be one of eight million who
18 have additional coverage from retiree health plans that
19 were preserved under that act of 2003 or they might be
20 part of the six million that have coverage from another
21 source, like the VA or TRICARE or the Federal Employee
22 Health Benefit Program.

23 The bottom line is that 90 percent of the seniors
24 have some form of drug coverage today. About 27 million
25 are enrolled in Part D and about 3.5 million

1 beneficiaries reach the gap in coverage in 2007.

2 Now, other than the increased federal spending
3 involved, there is nothing wrong with the goal of the
4 Nelson amendment. But eliminating the gap in coverage by
5 implementing government price controls, and this is
6 disguised, I hope you understand, by the word "rebate,"
7 that will undermine the success of the Part D program and
8 I believe that is a very wrong direction to take.

9 But do not take my word for it. I would ask you to
10 listen to some experts. The Congressional Budget Office
11 recent budget book states, quote, "A disadvantage of
12 rebates in Part D is that, over time, manufacturers would
13 partially offset the rebates by charging higher prices
14 for new drugs," end of quote.

15 CBO also said, quote, "Another disadvantage of this
16 option is that premiums could increase as a result of a
17 decrease in rebates negotiated by plans," end of quote.
18 And lastly, CBO said that this policy, quote, "might
19 reduce the amount of funds invested in research and
20 development of new products," end of quote.

21 This was all confirmed in a recent letter to CBO, to
22 Ranking Member Camp of the Ways and Means Committee
23 regarding the Part D changes in a House health reform
24 bill. And I hope you understand around here that CBO is
25 like God. Whatever they say, unless you have got 60

1 votes to override them, is what it is.

2 The letter said that closing the donut hole and
3 instituting Part D rebates would result in a 20 percent
4 increase in premiums. I thought that this whole debate
5 we are having this week about health reform was that we
6 would lower costs for people, but all we seem to be doing
7 is raising prices through new fees, penalties and
8 rebates.

9 But this is not the end of the problem that would be
10 created by instituting a rebate program in Part D. And
11 as I said Tuesday night, Part D beneficiaries are not the
12 only people who will see their drug prices go up even
13 further if a Part D rebate program is created.

14 Adding government price controls in Part D will
15 drive up prices for people with private insurance, early
16 retirees, kids, people with chronic conditions. It will
17 drive up prices for small business. It will even drive
18 up prescription prices for other seniors who are in
19 retiree programs.

20 We had Dr. Fiona Scott Morton, a well respected Yale
21 economist, testify before this committee January 2007 on
22 these very issues. She made some key points that are
23 applicable here.

24 She made the point that Medicare is such a large
25 purchaser of drugs. Now, remember, Medicare is such a

1 large purchaser of drugs that she said, quote, "Its
2 prices are the average prices." Her observation was,
3 again, and I am quoting, that "if you are half the
4 market, you cannot get below average price.

5 She went on to say that, quote, "Seeking low prices
6 is a good deal. But thinking that seniors in America are
7 going to get a discount is not just arithmetically
8 possible," end of quote.

9 But here is the key point when it comes to
10 instituting a rebate program in Part D. Dr. Morton said,
11 quoting, "A drawback to the size of Part D is that
12 reference pricing becomes essentially impossible." That
13 is the end of the quote.

14 Let me say Part D then is such a big purchaser that
15 a reference price scheme does not work, according to the
16 Yale professor. She explained very clearly why this is
17 the case. The reason is that because Part D is so big,
18 if the government requires a fixed discount off the price
19 everyone pays, then manufacturers would prefer to raise
20 prices to everyone else rather than to sell Medicare at a
21 low price, so that is what they will do. It would drive
22 up everybody else's prices.

23 Now, I hope I have a reputation through my oversight
24 of the Food and Drug Administration. You all know that
25 I, as a result, cannot be considered a friend of the

1 pharmaceutical industry. You also know I have been a
2 leading advocate for increasing oversight of drug
3 companies.

4 So I am not trying to do anybody any favors here.
5 In fact, I think what we ought to do is lay out what
6 works -- if it ain't broke, don't fix it -- or the extent
7 to which the Chairman and the White House has been
8 involved in closing donut holes.

9 We are making rapid progress in that direction. We
10 ought to continue down that road. I yield the floor.

11 Senator Nelson. Mr. Chairman, I need to respond.

12 The Chairman. Senator Nelson, and then I am going
13 to -- Senator Baucus always seeks recognition, too.

14 Senator Nelson. And then I want to certainly hear
15 from others. I am not sure I followed Senator Grassley's
16 comments, because in this case, rebates in the Chairman's
17 mark are mandated for Medicaid. Rebates from drug
18 companies are mandated in the Chairman's mark at being
19 increased from 15 to 23 percent.

20 Why there should not be that same rebate and lower
21 the cost of drugs for Medicare recipients just simply
22 does not make sense. Why should not a Medicare recipient
23 get the same drug prices as a Medicaid recipient?

24 Now, that is the philosophical question here. And
25 because Medicaid has had a big bulk purchasing power of

1 almost 49 million American citizens, now the
2 philosophical question is do you want 44 million Medicare
3 recipients to have that bulk purchasing power and,
4 therefore, translated into these 23 percent rates for the
5 drugs.

6 Now, let me just make clear, in case it is
7 confusing, that these rebates, since the Nelson amendment
8 only applies to the dual eligibles, the rebates do not go
9 to the dual eligibles. The rebates go to Medicare and
10 Medicare then can use that money however it wants.

11 I am suggesting that one way they ought to do it is
12 to close the donut hole, which helps everybody in
13 Medicare Part D, 17.5 million senior citizens.

14 The logic of this, overall, is worth \$106 billion.
15 Close the donut hole and have another \$50 billion left
16 over. Now, I am not saying what you do with this. You
17 could take the \$50 billion and lower the whole price of
18 the bill. You could apply it to the deficit of the
19 United States Government. You could apply it to
20 different things that you all have talked about here that
21 you need.

22 I would certainly like to see some of it applied on
23 this amendment that I have coming, which is \$26 billion,
24 on grandfathering all of the Medicare Advantage, the
25 Medicare HMO recipients.

1 So the philosophical question here is very clear. I
2 am not here picking on pharma. I just do not think that
3 philosophically, Medicare recipients ought to be paying
4 more for their drugs than Medicaid recipients.

5 I applaud pharma. What we need is to keep
6 encouraging their research and development. All of us
7 are beneficiaries of these modern miracles of modern
8 medicine.

9 This does not have anything to do with that. This
10 has to do with do we treat senior citizens the same.

11 Thank you, Mr. Chairman.

12 Senator Rockefeller. Mr. Chairman?

13 The Chairman. Senator Rockefeller?

14 Senator Rockefeller. Two segments to this. First
15 of all, I strongly support the Nelson amendment and his
16 expression of rapture as he talks about it. It should
17 lift us all, because the amendment is that good and the
18 \$50 billion Chuck Schumer wants to take and apply to DISH
19 hospitals in New York City. Am I right? And elsewhere.
20 Just a little bit. All right.

21 The rebates that we are talking about, and I am not
22 going to do revisionist history, I am not good at
23 revisionist history, were in place prior to the Part D
24 drug benefit. Am I correct? And I did not vote for that
25 when that came up. I did not vote for that.

1 But your amendment would help precisely what I was
2 trying to do and, as the Ranking Member has so graciously
3 pointed out, prevails in getting done. It would help our
4 most vulnerable dual eligibles, which I have long
5 championed and which are a much forgotten and
6 misunderstood part of our most vulnerable population.

7 I have argued this, as I mentioned earlier at
8 another day here, to President Bush when he was
9 President, because he had promised that Southern Illinois
10 State University or Southern Illinois University,
11 whichever it is, to make sure that dual eligibles would
12 be covered by prescription drugs. They were not, one of
13 the reasons I voted against it.

14 What the Senator's amendment would do would be to
15 help this most vulnerable part of our population. I have
16 to say that the Part D program, as it is, is not working
17 for dual eligibles, one of the reasons for the Senator's
18 amendments is that.

19 I have a bill, too, that fixes that program, but we
20 will see. The Senator, if he prevails, would make that
21 unnecessary. It is basically kind of a sucker punch. It
22 is a one-two punch on dual eligibles. I resent it. I do
23 not like it. People can worry that they do not -- those
24 people do not have their own lobbies and all the rest of
25 it.

1 Now, I have a section here which I may decline to
2 do, because the Chairman is obviously getting antsy. It
3 is titled "Revised Talking Points in Response to Senator
4 Grassley" and it goes on for several pages.

5 The Chairman. Senator, you go right ahead, you do
6 what you want to do.

7 Senator Rockefeller. No. Senator Grassley is a
8 good friend of mine. He is just on the wrong side of
9 this issue.

10 The Chairman. I would like to have a vote on this
11 before we break up for our caucus lunches. It is about
12 12:30 now.

13 Senator Ensign. Mr. Chairman, could we ask the
14 staff or somebody? I am told that there is no donut hole
15 for dual eligibles. I have been told that by multiple
16 people. Can we have an expert answer that question
17 whether dual eligibles face a donut hole?

18 The Chairman. Ms. Bishop?

19 Senator Ensign. And if they do, could you describe
20 it?

21 The Chairman. All our staffs are pointing to you.
22 You are the person.

23 Ms. Bishop. The way the benefit is structured is
24 that the folks who are eligible for Medicare and
25 Medicaid, their costs are covered in the donut hole.

1 They have to pay a copayment, a flat copayment of \$1 for
2 generics and \$3 for brand name drugs.

3 Senator Ensign. So they do not face a donut hole.

4 Ms. Bishop. They do not effectively have a donut
5 hole in here.

6 Senator Ensign. So the fact is dual eligibles do
7 not have a donut hole.

8 Senator Stabenow. Would my colleague yield? Would
9 my colleague yield on that one point?

10 The Chairman. Senator Ensign is still recognized.

11 Senator Ensign. I will yield for a question.

12 Senator Stabenow. Thank you. Is it not also true
13 that those on Medicare and Medicaid, low income seniors,
14 did not have a donut hole before? They did not have a
15 donut hole before. This is not about whether or not they
16 have a donut hole.

17 Senator Ensign. Reclaiming my time. The point
18 that Senator Nelson was making is that dual eligibles
19 face a donut hole.

20 Senator Nelson. No, no.

21 Senator Ensign. All right. Now we are at that
22 point. I just wanted to make sure of that point, because
23 maybe I misheard that. Let me make my points then. As
24 long as we agree that dual eligibles -- the lowest income
25 seniors do not face a donut hole. We have established

1 that. We all agree. Good.

2 Senator Nelson. The question is --

3 Senator Ensign. No, no. Let me make my point.

4 Senator Nelson. -- do you get a rebate in Medicare
5 like you get in Medicaid.

6 The Chairman. Senator Ensign has the floor.

7 Senator Ensign. Let me make my points. My point
8 is here -- several. One is that if you require now
9 through Medicaid or whatever this, quote, "rebate," which
10 is basically a tax on the pharmaceutical companies, there
11 are a couple of things that are going to happen there.

12 One is they can shift costs to non-Medicare
13 recipients, the rest of America, the younger people. By
14 the way, the younger people today who are paying taxes
15 are paying for the benefit, prescription drug benefit
16 that seniors are receiving today that they never paid
17 for. It was an additional benefit that young people are
18 currently paying.

19 This was a wealth transfer payment to senior
20 citizens. I believe we should have taken care of senior
21 citizens, but that is a fact. We should have taken care
22 of senior citizens, though, who only truly needed it and
23 not done it for all seniors.

24 The reason I object, actually, to closing the donut
25 hole is this is more of a wealth transfer. This is from

1 younger generations to older generations who will either,
2 one, pay higher taxes in the future because of deficits;
3 two, will pay higher drug prices; or, three, not have the
4 drugs available because that money has got to come from
5 someplace.

6 If they are going to take it out of R&D, they are
7 going to transfer it in cost to younger people who have
8 private plans and through higher drug costs for them or,
9 three, they are going to have to pay higher taxes because
10 of the fact that Medicare will have to pay more in the
11 future.

12 So I think it is an important point to make now that
13 we have established the dual eligibles. I understand now
14 what you are trying to do and I think that we at least
15 need to be fair.

16 If you are going to be talking about giving an extra
17 benefit here by charging the drug companies, we have to
18 be fair on what that extra charge is going to do.

19 The Chairman. Senator Menendez?

20 Senator Menendez. Thank you, Mr. Chairman. Mr.
21 Chairman, I appreciate and understand what Senator Nelson
22 is trying to accomplish and I do not think that any one
23 of us wants a hole in the Medicare drug benefit.

24 However, as has been said here, just to focus,
25 because I know that while he said that is not his

1 purpose, there is a lot of talk and it would seem to be a
2 purpose. I acknowledge that, but he said it is not his
3 purpose.

4 But it is worth noting, again, that dual eligible
5 beneficiaries and other low income beneficiaries have no
6 coverage gap, no coverage gap, and very small copayments.

7 So in essence, what we are doing is talking about
8 taking that universe and particularly as it relates to
9 when we moved them into Part D and gave them the full
10 benefits so that they, in fact, have no gap, that we
11 moved them out of Medicaid, moved them into Medicare Part
12 D, gave them the full benefits so that they have no gap,
13 going back and saying we should also now charge the drug
14 companies for what was previously that Medicaid rebate
15 and add that to the equation -- and certainly Medicaid
16 has a much more strict formulary than what those are
17 enjoying right now under the Medicare Part D.

18 So this amendment, while it is well intentioned,
19 would do nothing to improve the drug coverage for
20 certainly those dual eligible Medicare beneficiaries.
21 They have no donut hole. It would do nothing for other
22 low income beneficiaries, those with incomes who are
23 below 150 percent of the federal poverty level. They
24 have no donut hole.

25 Yet, the amendment proposes to have the drug

1 companies pay rebates on sales to dual eligible
2 beneficiaries that will not help dual eligible
3 beneficiaries.

4 The companies are already paying rebates on sales to
5 dual eligibles. The companies are already paying rebates
6 on sales to all Medicare beneficiaries. They are paid
7 directly to the Medicare prescription drug plans.

8 And under the law that created the Medicare drug
9 benefit, these rebates can be greater than the rebate
10 that companies pay under Medicaid and the result of that,
11 according to CBO and CMS, these rebates have exceeded
12 what was expected when the drug benefit was created and
13 that is a big reason that the drug benefit has costs
14 billions of dollars less than projected and beneficiary
15 premiums have also been dramatically lower than expected.

16 So I look at the Chairman's mark and I see good
17 progress being made on closing the donut hole. It
18 requires, it does not ask, it requires the pharmaceutical
19 companies to pay 50 percent of the drug costs in the
20 donut hole.

21 That is not insignificant. In fact, it has more
22 than doubled the level of the Medicaid rebates that this
23 amendment seeks to impose. If the amendment passes,
24 however, it would add another 23 percent or more rebates
25 to the 50 percent that the Chairman's mark already

1 mandates. So we are talking about almost a 75 percent
2 increase.

3 So like others, I would like to see the donut hole
4 closed completely. However, to pile one mandatory rebate
5 on another mandatory discount is, well, to say the least,
6 piling on.

7 Finally, let me just say, under this amendment,
8 manufacturers pay once by lowering the prices they charge
9 to Part D insurers and twice to the federal government
10 through a mandated Medicaid price control. And on top of
11 that, this amendment does not strip away the significant
12 increases to the Medicaid rebate that were included as
13 part of the Chairman's mark.

14 This means manufacturers would pay billions of
15 dollars more to the federal government for Medicaid
16 beneficiaries who are not also in the Medicare program.

17 I am concerned, I think Senator Grassley may have
18 mentioned it, but I am concerned about the letter that
19 the CBO sent over in the House that said that another
20 result of this is that premiums could very well increase
21 by 20 percent or more for all Medicare Part D
22 beneficiaries, except dual eligibles.

23 So at the end of the day, I think this, while well
24 intentioned, very well may undermine the very essence of
25 this agreement and may very well put us in a position

1 that makes it very difficult to move forward.

2 I would love to work with the gentleman on the floor
3 to try to achieve what he wants, but I think this is both
4 -- the way in which he seeks to achieve his goal is not
5 one that I certainly can support and one that I think is
6 dangerous to the overall goals.

7 Senator Stabenow. Mr. Chairman?

8 The Chairman. Senator Stabenow?

9 Senator Stabenow. Mr. Chairman, we have talked
10 both about the Senator's amendment from Florida, but also
11 about the prescription drug program overall.

12 I am not going to get into the prescription drug
13 plan overall. I think people of goodwill worked on that.
14 I had a different perspective on the outcome of that.
15 But I do want to talk about the Senator's amendment and
16 also to say, from my perspective, this is not about a
17 deal or an agreement made with the White House, because I
18 believe this is separate from that. This is simply
19 trying to fix a problem and address what is excessive
20 cost, which is what we are trying to do through the whole
21 bill.

22 This whole health reform is about looking at ways to
23 be able to create more efficiencies and to be able to cut
24 excess cost out so that we can put it towards increased
25 services for people.

1 So when we look at that, people who are low income
2 seniors, most of them in nursing homes, prior to the
3 prescription drug bill, had prescription drug coverage
4 under Medicaid, with no gap in service. They got the
5 drugs that they needed. They were able to get what they
6 needed with low co-pays or no co-pays, no gap in service.

7 The prescription drug bill passes. They are moved
8 over. They continue, in many cases -- some may have had
9 some increases in co-pays, but in general, it is about
10 the same. But one thing is different. The entire system
11 is now paying over \$100 billion, if the Senator from
12 Florida is correct, over \$100 billion more in cost.

13 So it is not that seniors got a better deal. Low
14 income seniors in nursing homes went from Medicaid to
15 Medicare. It is not that their coverage changed. It is
16 that the cost of the taxpayer in the system changed and
17 that is my concern.

18 When we look at the fact that all of the other
19 seniors under the prescription drug bill see a gap in
20 their coverage, for many, a tremendous concern -- we know
21 from the Kaiser foundation about 15 percent of the people
22 with chronic conditions stop taking their drugs
23 completely when they are in that gap in coverage, and
24 there are all kinds of another analyses that have been
25 done.

1 But because the decision was made to pay more for
2 folks who were getting the same coverage, the same help,
3 all of the other seniors have to pay more, because they
4 cannot have their medicines covered and there is a gap in
5 coverage that we have now all called the donut hole.

6 That is my concern. That is fundamentally what this
7 is about. It is not about the broader questions around
8 Medicare prescription drugs. It is about whether or not
9 a group of people, in my judgment, who should have been
10 kept in their former system should go back to that
11 because we now know it is costing more.

12 At a time when the Medicare trust fund has great
13 strains on it, we have heard people talking about it
14 going broke; at a time when we cannot provide complete
15 coverage for people who are under the traditional
16 Medicare prescription drug program, why in the world
17 would we not we save the dollars when, for those seniors,
18 it is the same? It is, in fact, the same. Now it just
19 costs over \$100 billion more.

20 So I think the Senator's amendment is the right one
21 and I strongly support it.

22 Senator Schumer. Mr. Chairman?

23 The Chairman. Senator Schumer?

24 Senator Schumer. Thank you, Mr. Chairman. And I
25 thank all my colleagues for the argument here, which I

1 think is a good argument.

2 Two arguments that I would like to just touch on
3 that have been made by those on the other side. First is
4 that the present system works, because the competitive
5 model works. I would certainly concede it worked better
6 than most people thought.

7 And the fact, as you say Senator Grassley, that it
8 is \$230 billion or whatever the number was, some large
9 number, less than the projection shows it is working
10 better than people thought. There is no question about
11 it.

12 But there is also no question about it that it still
13 brings in a higher price to the taxpayers, to the U.S.
14 Government, than the proposal made by Senator Nelson,
15 because CBO says even with the \$237 billion of savings,
16 if you did it his way, it would be \$106 billion lower.

17 The fact of the matter is that in some drugs, the
18 competitive model produces competition. In many drugs,
19 it does not.

20 First, there are many drugs that are patented. So
21 you have no competition, by definition. Second, for
22 others that are not patented, they are unique usages. If
23 it is a drug that only affects a small number of people,
24 there are not many drugs out there, perhaps one, perhaps
25 two. There is not much competition. The economics tell

1 us when there is oligopoly, one-two-three producers, you
2 do not get much price competition.

3 And, third, people have unique needs. I take
4 Lipitor. They put me on the generic, Zocor, my
5 cholesterol went up. They put me back on Lipitor, my
6 cholesterol went down. I am taking Lipitor, even though
7 it is more expensive.

8 So the bottom line is in lots of places, the pure
9 competitive model does not work in the pharmaceutical
10 industry. But the bottom line is very simple. We are a
11 purchaser, Uncle Sam. And who is Uncle Sam? The
12 taxpayers.

13 There is a chance here to save \$106 billion as we
14 scrounge to find \$0.5 billion here, \$1 billion here, \$2
15 billion here, and for some ideological reason, we are
16 saying no.

17 Now, people say, "Well, it will stop drug research,"
18 and that is a great thing and we should have it and we do
19 a good amount of it in my state.

20 But every dollar we save here, we do not know how
21 much will go to medical research. Maybe it will mostly
22 go to advertising. I do not know. There is no direct
23 link. There is no even certain link.

24 So I do not really buy that argument. If
25 competition produced lower prices, pharma would be for

1 changing it. Their job is to get as good a price as they
2 can. That is how they represent their stockholders.

3 I do not begrudge them for it, but we do not
4 represent their stockholders. We represent our
5 stockholders, the taxpayers who save \$106 billion here.

6 And if you are a fiscal conservative, what you
7 should do is vote for this and then say we will take the
8 106 and put it to deficit reduction. And if you believe
9 in a more robust bill, we could take the \$106 billion and
10 use it for affordability or donut hole.

11 Second argument, my good friend from New Jersey has
12 said this does not affect the dual eligibles. Correct.
13 It does not benefit them. It is not supposed to. The
14 dual eligibles do fine under the Medicaid reimbursement.
15 And by the way, we are not saying that Medicaid
16 recipients below 65, the system is broken. That is the
17 system that they would all go back to.

18 So it is not broken. It is working. The
19 pharmaceutical industry gets paid \$106 billion less to do
20 it, but it is not depriving people of their drugs nor, I
21 would say, is this amendment intended to deal with the
22 dual eligibles. They are doing fine. They do very well,
23 as they should.

24 But I have always believed that our politics, and
25 particularly on the Democratic side, frankly, should not

1 divide the poor from the middle class. And it is the
2 middle class who has trouble right now. They have the
3 donut hole. They do not get paid all the way the way the
4 dual eligibles do.

5 So why not take this money and do that? If you do
6 not believe in doing that, and I think we all would like
7 to fill the donut hole, use something else.

8 So two arguments. One, this saves the government a
9 whole lot of money, and that is the taxpayers, by doing
10 it this way and if you do not do it, the benefits --
11 probably there are some, I would not deny that, but they
12 are not as direct. We do not know how much would go into
13 pharmaceutical research.

14 Second, yes, this amendment is aimed not at
15 benefitting the poor, the dual eligibles who have a good
16 program in Medicaid. It is aimed at helping middle class
17 seniors and then, with whatever is left over, which seems
18 to be growing every day, CBO estimates, we could use for
19 other things, as well.

20 So I am in strong support of the amendment. I thank
21 my colleague from Florida for introducing it. I hope it
22 will pass either here or on the floor.

23 The Chairman. Senator Carper?

24 Senator Carper. Thank you, Mr. Chairman. Let me
25 make three points. I believe we have had a robust debate

1 here and I do not want us to belabor it.

2 First of all, like most people on this panel, I want
3 to close the donut hole sooner rather than later. I do
4 not know how many of us voted for the Part D program four
5 or five years ago. I voted for it. And as Senator
6 Schumer suggested, I think it has exceeded its
7 expectations.

8 For the most part, 85 to 90 percent of the people
9 who participate in it like the program. It has been
10 under budget for four years in a row. We use private
11 providers. Competition works. We have multiple
12 opportunities, multiple choices for prescription plans
13 literally in every state.

14 I want to ask a question, if I could, of Ms. Bishop.
15 The question is I want to come back to the issue of
16 whether or not dual eligibles, people who are eligible
17 for Medicaid and Medicare, did the dual eligibles see an
18 increase in the prescription drug costs when they moved
19 from Medicaid to the Medicare Part D plan?

20 Ms. Bishop. No, not generally. The Medicaid
21 coverage that they had -- and, David, please chime in --
22 some states had minimal cost sharing of \$1 per
23 prescription.

24 When they moved to the Medicare Part D program,
25 which has \$1 for brand name and \$3 for generic, it is

1 pretty much, on average -- their cost sharing is about
2 the same as what they had under Medicaid. So to them, it
3 was similar.

4 Senator Carper. Similar. Thank you. The other
5 point, I do not know if this has been made, Mr. Chairman,
6 in the discussion on this point thus far. But as I
7 understand it, there are, in some states, Medicaid
8 programs where they provide a prescription benefit for
9 somebody where they limit the number of prescriptions,
10 maybe like three, four, five prescriptions that they
11 could actually get.

12 My mom lived in Florida until shortly before her
13 death and I think there was a limitation there. She was
14 not on Medicaid, but I think the folks limited it on the
15 Medicaid program. They had maybe four different
16 prescriptions. Does that sound about right?

17 Ms. Bishop. That is true -- and, David, chime in
18 -- that before the drug benefit, there was a trend that
19 had started in the Medicaid program to start to limit the
20 number of prescriptions that those folks receive. But
21 David knows more about that.

22 Senator Carper. And I think, my colleagues, it is
23 not uncommon for people -- my mom died when she was in
24 her early 1980s. It is not uncommon for people, when
25 they reach those ages, they are using more than four

1 different prescriptions. I think my mom, in the latter
2 years of her life, was using a dozen or so different
3 prescriptions.

4 Unfortunately, some of them worked against each
5 other. None of the doctors knew what the others were
6 prescribing and that is something that hopefully we will
7 address in this legislation.

8 But the first point, Part D works well. It works
9 well for people who happen to be low income and,
10 obviously, old.

11 The second question is sort of equity question.
12 What is a fair contribution for the pharmaceutical
13 industry to make to the passage of this legislation, to
14 the enactment of this health reform legislation?

15 I mentioned this the other night, I just want to
16 mention it again. As I understand, hospitals, and
17 correct me if I am wrong, I would say to Ms. Bishop or
18 others on the panel. My understanding is that a
19 hospital's costs make up roughly 30 to 40 percent of
20 medical costs. Is that about right? Nodding of the
21 heads.

22 My understanding is that pharmaceutical costs make
23 up roughly 10 percent of medical costs, maybe even a
24 little bit less. Is that about right? About 10 or 12,
25 all right.

1 I realize that some of the hospitals are nonprofit,
2 some of the hospitals are for profit. But if you think
3 about hospitals comprising 30 to 40 percent of the cost
4 of medical care in this country, pharma about 12 percent,
5 that is a difference of about 3-to-1.

6 And let us just say that even if half of the
7 hospitals were nonprofit, we will say a half are and half
8 are not, I think that is roughly right, then it would be
9 like -- if we were only looking at for profit hospitals,
10 it would be 1.5-to-1, 1.5 for the hospitals and one to
11 pharma.

12 The deal that the administration negotiated, the \$80
13 billion for pharma, which is less than \$150 billion for
14 hospitals, frankly, as an equity matter, I do not think
15 they are far off the mark.

16 I was not part of the negotiation, but if you
17 actually do the math and you wanted to run out the
18 numbers, in terms of equity to pharma, in terms of equity
19 to the hospitals, it is not far off the mark.

20 Let me just talk, the last point, on unintended
21 consequences. Some would say that this is like a
22 balloon. If you squeeze pharmacy to get them to pay more
23 money here, they will make up for it someplace else. It
24 could be retained earnings, shareholders, a variety of
25 places. It could also be in terms of their ability to

1 invest in R&D, and that is what we will hear from them.

2 Let me just mention I think there is another
3 unintended consequences. If this amendment is adopted,
4 one of the unintended consequences, I think this may well
5 undermine our ability to pass comprehensive health care
6 reform in this Congress, through this committee and in
7 this Congress, and at a time when there is an historic
8 opportunity to do three things that we desperately need
9 to do.

10 One, reduce the deficit; two, reduce the growth in
11 health care costs; and, three, extend coverage to more
12 people who do not have it. I think we undermine our
13 ability to do that at this time and that would be a great
14 tragedy.

15 Thank you.

16 The Chairman. We are about ready to vote. Senator
17 Menendez?

18 Senator Menendez. Mr. Chairman, very briefly here.
19 I think most of the arguments have been made. But I
20 listen to my colleagues, whom I have a great deal of
21 respect for, and just a couple of points.

22 First of all, I would like to ask the staff. My
23 understanding, I know Senator Stabenow talked about this
24 shift in how that created a consequence, there was no
25 mandatory drug coverage under Medicaid. Is that correct?

1 Mr. Schwartz. That is correct.

2 Senator Menendez. So, in essence, those who were
3 moved into Medicare Part D got a very significant benefit
4 because there was a determined coverage.

5 Mr. Schwartz. Senator Menendez, prescription drug
6 coverage is optional under Medicaid and it has been since
7 before Part D. But every state provided drug coverage to
8 the categorically needy, which is the bulk of these dual
9 eligibles. So I am not sure if there was an actual net
10 increase.

11 Senator Menendez. But was there not, in many
12 cases, very restrictive formularies?

13 Mr. Schwartz. Yes. That varies by state. States
14 have the ability to set their own formularies.

15 Senator Menendez. And, hence, when I go to Senator
16 Schumer's comments, yes, we are the purchasers. But if
17 we looked at the Medicaid process that we have with very
18 restrictive formularies, in which I could list a series
19 of states of what those were listed and the limitations
20 in those states of what number of prescriptions you could
21 have, it is like talking between a Porsche and a Ford,
22 fundamentally different.

23 So at the end of the day, I think they are very
24 different. We had no mandatory coverage under Medicaid
25 and we had very prescriptive formularies, and that makes

1 a fundamental difference in what we are looking at here
2 and what the Chairman is pursuing by making it very
3 significant coverage of the gap that has existed.

4 The Chairman. Are we about ready to vote here?

5 Senator Nelson. No. I would like to --

6 The Chairman. Most Senators are about ready to
7 vote. Go ahead.

8 Senator Nelson. Well, I agree, but you are going
9 to let me close on my amendment, are you not, Mr.
10 Chairman?

11 The Chairman. I will certainly recognizes.

12 Senator Grassley. Let me say something before he
13 closes. Can I say something before he closes?

14 The Chairman. Senator Grassley?

15 Senator Grassley. First of all, for the Senator
16 from New York, I am not a pharmacist or a doctor, but 10
17 years ago, they wanted me to take one of those drugs you
18 had and I was not going to do it. And you will find out
19 that red yeast rice and omega pills, and they are a lot
20 cheaper, will do the same good. My cholesterol came way
21 down. So if you want me to, I will bring the pills for
22 you tomorrow.

23 Senator Nelson. Grapefruit might do the same thing
24 for you.

25 [Laughter.]

1 The Chairman. How about a Pastrami sandwich, how
2 would that do?

3 [Laughter.]

4 Senator Grassley. I would just say I suppose I am
5 just pointing to Senator Schumer, but several other
6 people have made the same point. That is, the \$106
7 billion, I think Senators Menendez and Carper made the
8 same view, there is \$106 billion of cost shifting to
9 small business and middle class people, Senator Schumer.

10 Middle class people are going to end up paying for
11 this. If you want to save the middle class, do not load
12 these sorts of things that are cost shifting onto them.

13 Then, lastly, I would ask that now that we have got
14 dual eligibles settled, I hope that Senator Rockefeller
15 will say that they are not getting a sucker punch
16 anymore.

17 The Chairman. I think we are about ready to vote.

18 Before I turn to Senator Nelson, let me say I want to
19 close the donut hole just as much as everybody here, but
20 I think that the way that it is being closed here is
21 inappropriate and we have to find, at some other time,
22 some other way to close the donut hole.

23 I, frankly, wish the Senator had not pushed this
24 amendment, because it is not going to pass, which would
25 give us some time to figure out a way to appropriately

1 close the donut hole.

2 I am a little concerned about some additional costs
3 that are passed on. The White House did reach an
4 agreement, as Senator Carper has pointed out, with a
5 proportionate amount of that agreement.

6 In addition to that, the industry is required to pay
7 50 percent of the donut hole. That is progress. But I
8 am going to have to not vote for this, because I think
9 while the goal is good, that the way of closing it is
10 inappropriate.

11 Ready for a vote?

12 Senator Nelson. May I close on my amendment?

13 The Chairman. Absolutely.

14 Senator Nelson. Well, I could rebut each one of
15 these arguments and I will not go into with great detail.
16 When you are comparing the profit margin of hospitals to
17 those of pharmaceutical companies, there is no
18 comparison. So I would say that the comparison that the
19 good Senator from Delaware had offered is not a
20 legitimate one.

21 And when you start getting into the details of the
22 dual eligibles, I could have offered an amendment that
23 would have come from requiring the 23 percent rebate on
24 all Medicare Part D beneficiaries, 17.5 million. And
25 guess what the revenue would have been from that? That

1 would have been well over \$250 billion.

2 But I did not. I wanted to go with the theory that
3 we would go back to the law that it was previously so
4 that we are just dealing with the universe of 7.5 million
5 dual eligibles.

6 And do not let that get confused about the rebates,
7 23 percent rebate would be symmetrical with the existing
8 law in the Chairman's mark on the rebates for Medicaid.

9 Now, that is not the only place that the government
10 gets discounts or rebates. Look at the drugs in the
11 Veterans' Administration. Look at the drugs in the
12 Department of Defense.

13 Do you not think that bulk purchasing power has
14 something to do with this? But we precluded ourselves
15 from that with regard to Medicare beneficiaries when it
16 came to the passage of the prescription drug bill six
17 years ago.

18 I just simply do not think that is right. I think
19 that this is an opportunity to bring some of that revenue
20 back to the taxpayer in the form of Medicare.

21 Thank you, Mr. Chairman.

22 The Chairman. All right. The Clerk will call the
23 roll on the Nelson amendment.

24 The Clerk. Mr. Rockefeller?

25 Senator Rockefeller. Aye.

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

1 Senator Hatch. No.

2 The Clerk. Ms. Snowe?

3 Senator Snowe. No.

4 The Clerk. Mr. Kyl?

5 The Chairman. No by proxy.

6 The Clerk. Mr. Bunning?

7 Senator Bunning. No.

8 The Clerk. Mr. Crapo?

9 Senator Crapo. No.

10 The Clerk. Mr. Roberts?

11 The Chairman. No by proxy.

12 The Clerk. Mr. Ensign?

13 Senator Ensign. No.

14 The Clerk. Mr. Enzi?

15 The Chairman. No by proxy.

16 The Clerk. Mr. Cornyn?

17 Senator Cornyn. No.

18 The Clerk. Mr. Chairman?

19 The Chairman. No. Senator Lincoln?

20 The Clerk. Mrs. Lincoln?

21 Senator Lincoln. Aye.

22 The Chairman. I would like to vote Mr. Conrad aye

23 by proxy.

24 The Clerk. Mr. Chairman, the final tally is 10

25 ayes, 13 nays.

1 The Chairman. The amendment does not pass. I have
2 one piece of housekeeping, frankly. Last night, the
3 committee adopted the Wyden amendment numbered D-15,
4 subject to modification. The language of that
5 modification was not yet available.

6 I understand that copies of that modification
7 entitled "Correction" have been distributed to all
8 Senators and I ask consent that the language distributed
9 be considered as the text adopted by the committee.

10 Without objection, so ordered.

11 We will recess. The Committee will recess until
12 2:15.

13 [Whereupon, at 1:04 p.m., the Committee was
14 recessed.]

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1 AFTER RECESS

2 [2:40 p.m.]

3 The Chairman. The committee will come to order.
4 All right. It's my understanding the next amendment
5 order is the amendment by the Senator from Michigan,
6 Senator Stabenow. It's C-7. Is that correct? Okay, C-7.

7 Senator Stabenow.

8 Senator Stabenow. Thank you very much, Mr.
9 Chairman. Senator Lincoln and I have this amendment, and
10 as I indicated briefly last night, this basically
11 modifies language that was put in the modified Chairman's
12 mark. We had asked that dental- and vision-only
13 insurance plans be able to participate in the exchange.

14 And we have two issues that came up with our
15 language. One, there are concerns in the vision
16 community on how to do this, and that's not worked out.
17 So we're just simply removing the vision and only talking
18 about dental.

19 And then we want to make it clear that dental plans
20 can partner with insurance companies in the exchange to
21 offer comprehensive care.

22 So we are not talking about any more cost. It's a
23 question of just providing options and choice for people
24 within the exchange to be able to receive dental care.

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

1 of Senator Stabenow?

2 The Chairman. Certainly.

3 Senator Kyle. So this would allow dental-plans-
4 only and/or partnering with other plans? Is that
5 correct?

6 Senator Stabenow. That is correct.

7 Senator Kyl. Mr. President, I might just say that
8 I think that's a good idea. And it plays into something
9 that I had said earlier which was to limit the plans to
10 no more than four and in a minimum of two having to meet
11 certain requirements precluded the kind of niche
12 marketing, the kind of gap-filling, the kind of specific
13 offerings to clientele that really needed a particular
14 kind of coverage and that it would otherwise reduce the
15 kind of competition that can make for a more healthy
16 marketplace.

17 So I have always thought that the mark erred in not
18 allowing enough flexibility. And all I would suggest is
19 that if this is adopted we probably should look at some
20 other opportunities that companies want to present
21 different kinds of plans. Senator Hatch in particular
22 had talked about some somewhat different catastrophic
23 coverage plans that would not have been permitted under
24 the mark.

25 The Chairman. Senator Grassley.

1 Senator Grassley. Senator, a friendly question.

2 Obviously you said you could not do vision plans. I
3 just was wondering if you wanted to continue down that
4 road to see how you can get them continued because they
5 would have the same problems as dental plans, as an
6 example. And let me say that I support your amendment
7 because we have plans in Iowa that have come to me and
8 wanted to know where they fit in.

9 Senator Stabenow. Good. And Mr. Chairman, if I
10 might just say that the intent is not to exclude vision,
11 but there are some technical questions, and at this point
12 we've been asked to pull that out until they can resolve
13 the language.

14 The Chairman. Thank you, Senator. As you know, we
15 had a version of your amendment in the mark. We worked
16 with you making this addition, this change, this
17 improvement. And I think that's what it is; it's an
18 improvement. So I'm prepared to accept it.

19 Senator Stabenow. Thank you.

20 The Chairman. Without objection, the amendment is
21 accepted.

22 Senator Stabenow. Thank you.

23 The Chairman. Senator Grassley, are you ready for
24 the amendment?

25 Senator Grassley. I hope this one doesn't take as

1 long as most.

2 The Chairman. The last one?

3 Senator Grassley. Most of what I have up it seems
4 like. This is C-15. Ever since Congress began debating
5 health reform a year ago, I've had concerns about
6 requiring people to buy insurance. And this is something
7 that the Group of Six probably did not talk about enough
8 because it was one of the things that was left to the
9 tail end of our discussions in the Group of Six. And
10 Senator Baucus had to move ahead before we got all those
11 things resolved.

12 But I do want to say that it was something that was
13 brought up, and at one point I had indicated to Senator
14 Baucus that I wanted to discuss an alternative. And this
15 isn't exactly the only alternative that could have been
16 discussed--in other words, meaning the contents of C-15.

17 But I just thought to give that sort of background
18 to where we are coming from.

19 It happens with the individual mandate that the more
20 details that came to light about it, especially about how
21 it would be enforced or the levels of benefit people
22 would be required to buy and the huge subsidies that
23 would be necessary to make the whole thing workable, I
24 became convinced that this was not exactly the right
25 approach.

1 As I said in my opening statement Tuesday morning,
2 the Federal mandate requires an extensive set of new
3 enforcement tools housed at the Internal Revenue Service
4 and backed by the full force of the Federal Government's
5 enforcement powers.

6 Prior to the August recess I was worried that this
7 represented too much of an intrusion into private lives
8 of our citizens. I came back from the August break
9 convinced that Iowans don't want the government telling
10 them that they have to buy insurance and what that
11 insurance has to look like.

12 I recognize why the Chairman included a mandate in
13 the bill. There is of course a principle of personal
14 responsibility that applies. We all in one way or
15 another pay for health care for the uninsured, and a
16 mandate helps stabilize premiums mostly by requiring
17 younger people to buy insurance.

18 The Chairman's mark creates a Federal requirement
19 that everyone has to buy a federally mandated set of
20 benefits. And then of course for enforcement purposes it
21 penalizes families who don't purchase coverage, in some
22 instances as much as \$1,900 in new taxes.

23 The size of the tax penalties, combined with an
24 intrusive federal enforcement regime, is cause for
25 serious concern. The requirement that people need to buy

1 coverage that covers an extensive list of benefits and
2 meets a federally mandated actuarial value is also a
3 worrisome aspect. And the need to subsidize families
4 with incomes up to \$88,000 just does not seem like
5 something that we can afford when we are facing a \$9
6 trillion deficit.

7 All of these concerns put together are why my
8 amendment now, C-15, is being offered. It gives the
9 states the opportunity to pursue alternatives to the
10 individual mandate.

11 Senator Wyden had an amendment accepted in
12 modification that would allow states to opt out of the
13 requirements in the Chairman's mark and pursue
14 alternatives that would still expand coverage, at the
15 same time improving quality and, we think, would lower
16 costs.

17 My amendment would make it explicit that states
18 could opt out of the individual mandate and choose an
19 alternative mechanism to improve coverage. An alternative
20 would need to be certified by the state insurance
21 commissioner for actuarial soundness.

22 Instead of imposing this mandate, the states could
23 incentivize purchasing insurance with subsidies. They
24 could do an open enrollment period similar to Part D.
25 They could do reinsurance, or they could do some other

1 policy that we haven't thought of yet.

2 And I say that sincerely in the sense that a lot of
3 things that come up here in Washington have been
4 experimented in one way or another or found to be working
5 or in any one of our 50 states that we consider
6 laboratories of our political system.

7 So I don't say that nonchalant, "other policy that
8 we haven't thought of yet."

9 It's a mistake to believe that Washington has all
10 the answers. My amendment would give states the
11 flexibility to innovate rather than force them to adopt a
12 federal individual mandate with harsh penalties.

13 As I said before, I understand and appreciate why
14 some support this individual mandate, and it is easy to
15 see why the health insurer industry wants the mandate.
16 It is going to make them a heck of a lot of money, so it
17 doesn't take a rocket scientist to see why the industry
18 insists upon an individual mandate.

19 But as we consider all of the unintended
20 consequences, it is important that we rethink this
21 policy. And I'm asking you to rethink it.

22 Those of you that are sold very definitely upon only
23 one Federal approach, a Federal mandate, you probably
24 aren't going to like my amendment. There may be people
25 on the right that don't want any mandate whatsoever that

1 might not think that this amendment is the right way to
2 go because there is still a mandate and there is a state
3 opt-out.

4 But I hope that you would think that this would give
5 a great deal of flexibility for a Nation that's as
6 geographically vast as our country is and as
7 heterogeneous as our population is that we ought to maybe
8 not think in regard to an individual mandate that a mold
9 poured here in Washington, you know one size fits all, is
10 going to work in New York City like it might work in New
11 Hartford, Iowa.

12 So I offer my amendment, Mr. Chairman.

13 The Chairman. Good. Is there further discussion?

14 Let me check this side first.

15 Senator Bingaman.

16 Senator Bingaman. Mr. Chairman, I guess one part
17 of the amendment that I'm just not clear with--maybe
18 staff could help with this--it would seem to me that if
19 you took away the requirement of an individual mandate,
20 the expectation would have to be that a lot fewer people
21 would wind up getting coverage, I mean if you gave states
22 the ability to opt out of this requirement.

23 And that would reduce the cost of this bill rather
24 than add to it, as I'm thinking about it. I may be
25 confused, but I don't know why you'd have to offset it.

1 I think that this is a gainer in the sense that a lot
2 fewer people get coverage, there is a lot less required
3 in the way of subsidy in states that show this option.

4 Maybe some staff--could I ask Ms. Fontenot to please
5 give me her views on that? Am I confused about how this
6 might affect things?

7 Ms. Fontenot. No. I think that's exactly right.
8 If you have a number of states who opt out of the
9 personal responsibility requirement, you will obtain
10 lower coverage numbers, fewer tax credits will go out the
11 door, and the spending will decrease.

12 Senator Bingaman. So there really is no need to
13 offset this. I mean, if the committee or if the Congress
14 wanted to just say that the issue of whether to have an
15 individual mandate is going to be left up to each state,
16 then we wouldn't have to change anything else in the
17 bill, I mean in order to offset it.

18 Ms. Fontenot. Well, I think what we know from CBO
19 is that if you contemplate some other structure that gets
20 you to the same coverage levels, then there is likely to
21 be no impact of this. If you allow every state an option
22 to do as they choose to opt out of this requirement and
23 maybe not replace it but not necessarily meet the
24 coverage levels, then there would be fewer tax credits
25 taken off because fewer people would get coverage.

1 I would say that the mandate is necessary for the
2 younger. It is the young invincibles who are less likely
3 to come in without the requirements, not older and sicker
4 individuals. So for those who do end up coming in, the
5 premiums will be higher for them.

6 Senator Bingaman. So the ultimate effect of this
7 would be that in states that took this option you would
8 have to expect insurance premium rates to be higher than
9 in states that did not?

10 Ms. Fontenot. For those who ultimately purchase
11 insurance in the state.

12 Senator Bingaman. All right.

13 Ms. Fontenot. But to be clear, we don't have a
14 score on this amendment from CBO, so.

15 Senator Kyl. Mr. Chairman?

16 The Chairman. Senator Kyl.

17 Senator Kyl. Mr. Chairman, I think first of all
18 that Senator Grassley's amendment illustrates an
19 important principle that some of us have been trying to
20 establish, which is that there are some very good
21 alternative ideas on the Republican side to solve
22 problems that we all agree exist. We all would like to
23 get more people covered, and there are a lot of different
24 ways to do that.

25 Senator Grassley has a way to do that that would

1 preserve a great deal of individual liberty, it would
2 preserve state choices, and it would probably end up in
3 getting most of the people covered who really need to be
4 covered and who want to be covered certainly, even in
5 Massachusetts as we know where there is a mandate for
6 full coverage. It is something on the order of 95
7 percent as I understand it. It is certainly not full
8 coverage.

9 I understand the insurance companies demand that we
10 impose a mandate because this helps them, but obviously
11 we are not here to do the bidding of the insurance
12 companies. In fact, I would submit that as Senator
13 Grassley noted in talking to his Iowa constituents, they
14 are more interested in their own individual freedom and
15 choice to do what they think is best for themselves and
16 their families than trying to do the bidding of the
17 insurance companies.

18 So my own view is that, while there might not be
19 quite as many people covered if you have a state option
20 with the kind of alternatives that Senator Grassley has
21 proposed, the net value of doing it this way is far
22 superior.

23 And the final point I would make is, as he said, you
24 have a very high degree of control over what people get
25 as soon as you have a mandate that they must purchase

1 insurance, because the first thing you have to do is
2 define what it is that they have to purchase. And as we
3 know from the various requirements in the market, there are
4 a whole series of requirements about what you can and
5 cannot purchase and what the insurance companies can and
6 cannot provide for you, and the like.

7 So it seems to me that this is a very important
8 proposition for us to consider here as a way to
9 accomplish virtually all of the goal, maybe not quite,
10 but to do so in a way that significantly preserves both
11 state and individual choices.

12 I would also just note with respect to the last
13 question, it is always true that if you remove somebody
14 from the market that would have lower premiums, then the
15 people who end up getting the insurance might pay higher
16 premiums. The converse is also true: if you force the
17 younger people in, they are going to pay higher premiums
18 than they would have paid otherwise.

19 So to some extent it is a matter of who ends up
20 paying the higher premiums, and I think when you preserve
21 matters of choice you do the American families a lot more
22 good than if you mandate something on them.

23 Senator Wyden. Mr. Chairman.

24 The Chairman. Senator Wyden.

25 Senator Wyden. Thank you, Mr. Chairman. Mr.

1 Chairman and colleagues, the reason that I authored the
2 Waiver Amendment that is now in the mark is to give
3 states room to innovate--my state has a long history of
4 innovative approaches in health reform. I wanted to give
5 them the maximum amount of flexibility.

6 Now my reading of what we now have in the mark
7 indicates that if a state can demonstrate that they can
8 meet the stipulations of that amendment--lower health
9 care spending growth, improve the delivery system,
10 provide choices for their citizens--they can do it
11 without an individual mandate. That is in the text of
12 what we got adopted earlier.

13 So I want to work with the Senator from Iowa because
14 I think he and I want to go in the same direction. I
15 think it is absolutely key to making health care reform
16 work to get the flexibility, the running room for the
17 states so that what works in Iowa and what works in
18 Oregon is tailored to the needs of our people rather than
19 something that comes out of a Federal cookie cutter that
20 was put together in the Beltway.

21 So let us review how the waiver language works now,
22 because my reading of what we have in the bill now is, if
23 a state can demonstrate that they can meet the criteria--
24 particularly on cost containment, improving the delivery
25 system--they can do it without an individual mandate.

1 And can I ask Counsel, is that a correct reading of
2 the Waiver Amendment that I offered the Chairman has
3 accepted at this point?

4 Ms. Fontenot. Yes.

5 Senator Grassley. Well, could I enter in --

6 The Chairman. Senator Grassley.

7 Senator Grassley. -- with the Senator from Oregon?

8 You know, if that is your intent, then there is no
9 reason for my amendment. But I read your amendment to
10 have the state have a complete rewrite of what the
11 Federal law requires, a whole program; whereas, I am just
12 going at the narrow part of the individual mandate. But
13 if your amendment allows in the case of just the
14 individual mandate a state to do something different,
15 then I don't see how I need my amendment.

16 But I haven't read your approach that way.

17 Senator Wyden. I think that is why it is helpful
18 that the counsel clarified it. And I just think as we
19 get down to some of the fundamental principles of what is
20 really going to fix American health care, one of the most
21 obvious is that creativity in this area has consistently
22 come from the states. We have got to give them a lot of
23 running room, we have got to give them a lot of
24 flexibility.

25 Counsel has just responded in a way that is

1 consistent with what I thought we had drafted. And now
2 with that answer, that if you can achieve the
3 stipulations of the waiver in the mark--particularly
4 holding down spending growth, improving the delivery
5 system--you can do it without an individual mandate.

6 Individual mandate has always been one of the most
7 contentious aspects of health reform. I think every
8 United States Senator believes that citizens should show
9 some personal responsibility. That's something that is
10 widely accepted. Unfortunately, an individual mandate
11 can mean something different, and that's why the issue
12 has been so contentious.

13 But Counsel has now indicated--and it was in line
14 with what I thought we had drafted--if you can meet the
15 requirements of the waiver in the mark you can do it
16 without an individual mandate.

17 Senator Grassley. Let me ask Counsel. The part of
18 his amendment that says "provide coverage to the same
19 number of uninsured" seems to me that it does not have
20 the flexibility to include to do what I want to do. But
21 if it does have that sort of flexibility, then I'll ask
22 my staff but I don't think my amendment is needed.

23 Ms. Fontenot. Senator, I believe your amendment
24 just specifies the way in which you have to obtain that
25 coverage level. Senator Wyden's amendment simply

1 specifies that you have to get to the equal coverage
2 level. The manner in which the state chooses to do that
3 is not specified in the amendment. So if the state
4 obtains the waiver, they could achieve that coverage
5 level in whatever mechanism they want.

6 Senator Grassley. Well, I would like to have it be
7 a little more specific. If that's the Senator's intent,
8 I don't have any trouble with what he's just now said,
9 but I don't know whether it does that. I would like to
10 lay this amendment aside and have our staffs talk about
11 it, bring it up later. And if it doesn't, if they can't
12 convince me, then we'll have a vote on it.

13 Is that all right, Mr. Chairman?

14 The Chairman. Fine with me. All right. The
15 amendment is withdrawn temporarily. Lay it aside.

16 Senator Grassley. Yes.

17 The Chairman. All right. Do we have other
18 amendments?

19 Senator Grassley. Do we have amendments on our
20 side that people are ready to bring up? Senator Kyl, do
21 you have an amendment to bring up?

22 Senator Kyl. No.

23 Senator Grassley. Not now. Do you have one on your
24 side?

25 The Chairman. I'm trying to find one.

1 Senator. Senator Cornyn seems to have one.

2 The Chairman. Senator Cornyn? All right. You are
3 always helpful.

4 Senator Cornyn. Thank you, Mr. Chairman. I have
5 my amendment to C-7.

6 The Chairman. C-7.

7 Senator Cornyn. C-7. This is an amendment that
8 would change Title I(D) of the Chairman's mark on
9 required payments for employees receiving premium
10 credits. This amendment would require the secretary of
11 Health and Human Services to --

12 Senator Conrad. Senator Cornyn, could you pull one
13 of those microphones closer to you, because over here I
14 don't know what it is about the acoustics but --

15 Senator Cornyn. It is rare for somebody to tell me
16 they can't hear me but let me try.

17 Senator Conrad. All right. Now I hear you better.

18 Senator Cornyn. All right, you hear me better.
19 This is amendment would require the Secretary of Health
20 and Human Services to annually submit to Congress for
21 consideration the flat dollar amount required of
22 employers under subtitle (D).

23 In order to take effect, Congress must enact and the
24 President must sign the penalty into law. If Congress
25 fails to enact the penalty by September 30 of each

1 calendar year, the penalty shall not take effect January
2 1 of the following year.

3 To put this in context, the proposal before us
4 includes required payments for employees receiving
5 premium credits, what many have referred to as the
6 "employer free rider" provision. This free rider has
7 very similar effects to the employer pay or play mandate,
8 which we all know will have a negative effect on job
9 creation and retention and reduce wages for hard-working
10 Americans.

11 The mark would require employers to pay the average
12 tax credit in the state exchanges for every employee in
13 the exchange or an amount equal to \$400 multiplied by
14 their total number of employees. To me that just sounds
15 like another way to enact the pay or play employer
16 mandate.

17 The CBO previously reported that employees, not
18 employers, would actually pay the cost of this mandate,
19 and the pay or play mandate in the House bill, whether
20 it's the free rider penalty or pay or play mandate.

21 The CBO said this. They said, "If employers who did
22 not offer insurance were required to pay the fee,
23 employees wages and other forms of compensation would
24 generally decline by the amount of that fee from what
25 they would otherwise have been, just as wages are

1 generally lower, all else being equal, to offset
2 employers' contributions toward health insurance."

3 Again, because of the nature of how health care is
4 paid for, ultimately it comes out of the hide of the
5 worker. It is not absorbed by the employer; it is just
6 like higher taxes are not absorbed by insurance
7 companies, and they will be passed down to the policy
8 holders.

9 The CBO also reported that the impact of the
10 employer mandate would be "concentrated
11 disproportionately among low-income workers," close
12 quote. They went on to say, "The employment loss would
13 be concentrated disproportionately among low-income
14 workers whose employers would be more likely to obtain
15 subsidies from the government, for example unmarried
16 individuals who did not receive family coverage through a
17 spouse's job."

18 Moreover, a study by a Harvard professor, Kate
19 Baker, who has testified as an expert before this
20 committee on numerous occasions, found that low-income
21 minority workers would be most impacted by a pay or play
22 mandate.

23 Specifically she said, "Workers who would lose their
24 jobs are disproportionately likely to be high school
25 dropouts, minority and female; thus, among the insured

1 those with the least education face the highest risk of
2 losing their jobs under employer mandates.”

3 My amendment is straightforward. It would simply
4 have Congress vote on the amount of the tax on American
5 businesses each year. I think this would encourage
6 transparency and accountability and I think put the
7 responsibility squarely where it sits, and that’s with
8 members of Congress, as to whether we are going to impose
9 a penalty on employers that will be passed down and
10 disproportionately affect low-income workers.

11 The Chairman. Senator, I want to ask first, has
12 CBO scored your amendment?

13 Senator Cornyn. We don’t have a CBO score. Mr.
14 Chairman, I understand that’s the challenge we’ve had and
15 that they’ve had that Dr. Elmendorf testified about.

16 They haven’t been able to get to all of the
17 amendments, including this one. But I would suggest to
18 you, it would be revenue-neutral because it doesn’t
19 change the free rider position. All it says is that
20 before the penalty could be imposed, Congress would have
21 to vote on it for it to go into effect.

22 The Chairman. Well, I would think it would have a
23 negative effect because it calls into doubt whether or
24 not those penalties go into effect because it requires a
25 vote by Congress after certification, which is a

1 significant impediment as to whether there would be any
2 penalties. Clearly this does have a cost. Just the
3 question is how much cost. Do you have a revenue offset?

4 Senator Cornyn. Mr. Chairman, as I said, there is
5 no CBO score, so we have not calculated an offset. But I
6 would suggest to you this is no different than the
7 projected savings from dealing with the SGR fix for one
8 year. I mean, the point I tried to make yesterday is
9 that Congress can always come back and change policy and
10 negate any cost savings that are projected in legislation
11 like this. I think that's a given.

12 No Congress can bind a future Congress, and so this
13 is really no different from the provisions of the
14 Chairman's mark.

15 The Chairman. In the mark there is certainty that
16 the penalties will be paid where the employer does not
17 provide coverage. There is certainty. It's in the mark.

18 I would suggest there is almost near certainty that
19 it would not be paid because of the impediment that
20 you've placed here by, first, certification, then a vote
21 by Congress. My gosh, anybody could filibuster, hold it
22 up.

23 It is very, very easy to prevent Congress from
24 passing something, and therefore I logically conclude
25 there's going to be a significant revenue loss here even

1 though you don't have a score. Until you have an offset,
2 I'm constrained to rule this not germane and out of
3 order.

4 Senator Cornyn. Well, Mr. Chairman, if I could
5 briefly respond, what you might call an impediment I
6 would say is, respectfully, accountability for this job-
7 killing tax on low-income workers. And may I ask, Mr.
8 Chairman, how can you rule it non-germane and out of
9 order when you don't know how much this is going to cost,
10 and neither do I, because CBO had not given us a score?

11 The Chairman. The logic of your amendment
12 irrefutably concludes that there is going to be a
13 significant revenue loss.

14 Senator Cornyn. With respect, Mr. Chairman, I
15 would not say it is irrefutable because I will refute it.

16 [Laughter]

17 I would say with just as much certainty as you are
18 that it will result in a loss of income, that I will say
19 that it will not.

20 The Chairman. I say this with tongue in cheek, but
21 you're not the Chairman.

22 Senator Cornyn. That's true.

23 The Chairman. It is clear there would be a revenue
24 loss here. It is totally clear there would be a revenue
25 loss here, and so I'm assuming the Rules Committee, and

1 because it's not germane I'll rule the amendment out of
2 order.

3 Senator Grassley. Before we vote on that, if he
4 appeals it, there is a question on administration of this
5 I think we ought to bring out at this point, if I could
6 Mr. Chairman. I'd like to ask the tax people, in order
7 to ---

8 The Chairman. First just vote on the amendment,
9 and then we can always ask your question later. Let's
10 just vote on the -- call the roll.

11 The Clerk. Mr. Rockefeller?

12 Senator Rockefeller. No.

13 The Clerk. Mr. Conrad?

14 Senator Conrad. No.

15 The Clerk. Mr. Bingaman?

16 Senator Bingaman. No.

17 The Clerk. Ms. Stabenow?

18 Senator Stabenow. No.

19 The Clerk. Ms. Cantwell?

20 Senator Cantwell. No.

21 The Clerk. Mr. Nelson?

22 Senator Nelson. No.

23 The Clerk. Mr. Carper?

24 Senator Carper. No.

25 The Clerk. Mr. Grassley?

1 Senator Grassley. Aye.
2 The Clerk. Mr. Hatch?
3 Senator Hatch. Aye.
4 The Clerk. Ms. Snowe?
5 Senator Snowe. Aye.
6 The Clerk. Mr. Kyl?
7 Senator Kyl. Aye.
8 The Clerk. Mr. Bunning?
9 Senator Bunning. Aye.
10 The Clerk. Mr. Crapo?
11 Senator Crapo. Aye.
12 The Clerk. Mr. Ensign?
13 Senator Ensign. Aye.
14 The Clerk. Mr. Cornyn?
15 Senator Cornyn. Aye.
16 The Clerk. Mr. Chairman?
17 The Chairman. No.
18 The Clerk. Mr. Chairman, the final tally is 8 ayes
19 and 8 nays.
20 The Chairman. Two-thirds of the members present
21 and voting, having not voted in the affirmative, the
22 ruling of the chair is sustained.
23 Senator Grassley, you have a question.
24 Senator Grassley. Yes. On the administration of
25 this, I'd like to get ---

1 The Chairman. Senator Crapo votes aye and Senator
2 Cantwell votes no. It does not change the result.

3 Senator Grassley. I don't know whether this would
4 be joint tax or just anybody on the staff that does
5 taxes, but in order to accurately calculate and pay this
6 penalty, it appears that an employer will have to ask
7 each and every employee whether that employee has
8 purchased insurance through an exchange and then
9 separately ask whether the employee was eligible for a
10 premium credit, and if they were eligible the amount of
11 the credit.

12 Would this require the employer to collect and
13 maintain tax information on employees?

14 The Chairman. Mr. Barthold.

15 Mr. Barthold. Well, the mark envisions information
16 exchange between the IRS and the exchanges. The employer
17 himself would not have to keep records related to the
18 personal information, and would not be permitted to keep
19 records related to the personal information of the
20 employees. That would be run through the exchange, and
21 the exchanges would be notifying the employers.

22 Mr. Grassley. All right. I accept that answer.
23 But then that brings up another question. If the IRS is
24 responsible for calculating the tax, would not the
25 employer still have to collect and retain employee tax

1 information to verify or to challenge the IRS
2 calculations?

3 And then if the IRS is involved, what privacy and
4 safeguard requirements would apply to employers to ensure
5 that employee tax information is protected?

6 Mr. Barthold. With respect to information that
7 goes from the IRS to the exchanges for the purpose of
8 determining whether an individual is eligible for
9 subsidies, that remains protected tax return information.

10 With respect to other information that the exchanges may
11 collect, confidentiality safeguards are provided under
12 the mark, although it is not tax return information
13 itself. So it is not the same as the 6103 standards.

14 You had a second part to your question?

15 Senator Grassley. Well, I think in regard to the
16 first part that you answered about IRS and privacy and
17 things of that nature, but would not the employer still
18 have to collect and retain employee tax information to
19 verify or to challenge IRS calculations?

20 Mr. Reeder. Can I answer part of that? The
21 exemption, or in order for the employer to, the exemption
22 comes from the IRS, and this person just shows a
23 certificate to the employer. The employer doesn't have
24 to do the calculation.

25 Mr. Barthold. I think the Senator's question was

1 slightly different. The exchange would say seven of your
2 employees are buying insurance through the exchange, and
3 you do not offer employer-provided insurance. And I
4 think, Senator, your question was, does the employer have
5 a way by which he can say, I don't believe it was seven?
6 Is that the question?

7 Senator Grassley. Yes.

8 Mr. Barthold. I believe the mark is unclear, but
9 maybe Mr. Reeder has it different.

10 Senator Grassley. Well, isn't it something that
11 has to be made clear?

12 Mr. Barthold. I wouldn't disagree with that
13 statement, Senator.

14 Senator Grassley. Well, let me ask staff. What's
15 the intent here?

16 Ms. Fontenot. Well, let me just add in terms of
17 the way the process works, we made it clear that the
18 employee who is not being---this would only apply to
19 employees who are not being offered affordable coverage
20 because they are the only ones at the tax credit. So
21 that employee would go to the exchange and seek a waiver
22 from the exchange much in the way they would do the same
23 thing to get out of the personal responsibility
24 requirement assessment.

25 The exchange would then send to the employer, based

1 on the amendment that was accepted from Senator Bingaman
2 yesterday I believe, that information; and that is what
3 would inform the employer that that employee is actually
4 receiving a tax credit.

5 So the employer would be getting that information
6 directly from the exchange who would be administering the
7 tax credit and would have the information in terms of how
8 many of the employees are getting that tax credit.

9 Senator Grassley. Oh. Basically what you are
10 saying is, the employer can't ask any questions about
11 that. They just end up paying the penalty.

12 Ms. Fontenot. Well, I think--I mean, we can
13 certainly clarify that the employer has a right to appeal
14 that credit. But I think it would be pretty clear to the
15 exchange whether the employee got the credit or did not
16 get the credit. I think what the employer would appeal
17 the determination of whether the coverage they are
18 offering is affordable or not.

19 The Chairman. All right. I wonder if Senator
20 Nelson is ready to offer your amendment.

21 Senator Conrad. Mr. Chairman, just on this point,
22 because I think Senator Grassley raised an interesting
23 question here, how would an employer contest that issue?

24 Ms. Fontenot. Well, I think it would have to be
25 similar to what an employee would have to do to get out

1 of the personal responsibility requirement. The exchange
2 is going to have to verify based on income that they
3 check with the IRS that the premium actually exceeds 10
4 percent of their income. So they would have to take into
5 the exchange the bill from what their employer sends them
6 in terms of what they pay for their health insurance.
7 And that would be compared with the verification from the
8 IRS of their actual income. If it exceeded 10 percent,
9 then they can leave and get the tax credit.

10 Senator Conrad. But for the employer--because
11 Senator Grassley as I heard him is raising the question
12 of whether or not an employer would be able to appeal
13 what could be considered to be an adverse determination.

14 And explain to me again, how would an employer be able
15 to appeal what they might see as an adverse
16 determination?

17 Ms. Fontenot. Right. And I think that's the point
18 Mr. Barthold was making, that the mark is not specific in
19 terms of establishing an appeals process. But we can
20 certainly do that.

21 Senator Conrad. I do think Senator Grassley raised
22 the point there that needs to be addressed because there
23 will be circumstances where mistakes are made, and
24 people's income is not calculated correctly. You know,
25 the premium cost is not calculated correctly. So there

1 needs to be an appeal for an employer.

2 The Chairman. Good point.

3 Senator Conrad. Mr. Chairman?

4 The Chairman. Yes.

5 Senator Ensign. On this, just for those who have--

6 I don't know how many folks on the committee have ever
7 been in the private sector and actually been in business.

8 Let us even say an appeals process, let us say you
9 set up this appeals process and you are dealing with a
10 government bureaucrat that is having a bad day. Talk to
11 real people out there that have ever dealt with the
12 government, whether it is local, state or federal. You
13 are at the mercy of a bureaucrat. If they want to turn
14 you down, even in an appeals process, then you've got to
15 put up money to be able to fight it legally and things
16 like that.

17 I just think it points out some of the further
18 problems that the more government gets involved, the more
19 burden it does put on the private sector. And when you
20 are out there trying to make a living and pay bills or be
21 innovative in your business and now you have all these
22 other things over here, and especially if you are not
23 that big of a business, you don't have the resources to
24 be able to fight these kind of things and --

25 The Chairman. All right. This is an interesting

1 discussion. We are going to have to find an amendment, a
2 way to deal with this issue. I want to tee up for an
3 amendment before our next vote.

4 Senator Conrad. Mr. Chairman, should not we also
5 indicate that if you have below 50 employees, you are
6 exempt?

7 The Chairman. That is right.

8 Senator Conrad. Below 50 employees and you are out
9 of this.

10 Senator Ensign. Well, if you have 52 employees,
11 you are still not a big business.

12 Senator Conrad. No, you are not, but I do think it
13 is important that we have people understand how this
14 really works. And 50 and below you are exempt.

15 The Chairman. All right. Senator Nelson, where
16 are you? You're not here.

17 Senator Stabenow.

18 Senator Stabenow. Mr. Chairman, I am going to
19 change our discussion. It is important to be talking
20 about from business and so on on coverage, very important
21 issues. I am going to move this around back to talking
22 about --

23 The Chairman. Do you have an amendment, Senator?

24 Senator Stabenow. Yes. I'm sorry.

25 The Chairman. All right. Senator Nelson just came

1 back.

2 Senator Stabenow. It's fine with me either way.

3 The Chairman. All right. Senator, I would like to
4 tee up your amendment and get it started.

5 Senator Stabenow. That is fine.

6 The Chairman. Thank you. Thank you, Senator. I
7 deeply appreciate it. Thank you.

8 This is the Medicare Advantage Amendment?

9 Senator Nelson. Thank you, Mr. Chairman.

10 The Chairman. After all this build-up.

11 Senator Nelson. Well, we certainly had a lot of
12 conversation about it.

13 The Chairman. Yes. You are a very good marketer.

14 The build-up is just --

15 Senator Nelson. Well, everybody else has brought up
16 the amendment except they have been talking about my
17 amendment when they think they have been talking about
18 their amendment. So now here we have an opportunity.

19 All right. This is to further grandfather Medicare
20 advantage more--Mr. Chairman, I'm about to say some nice
21 things about you, and I'd like you to hear it.

22 The Chairman. Go ahead.

23 Senator Nelson. I want to say some nice things
24 about you.

25 The Chairman. Oh, well. I want to listen.

1 Senator Nelson. That is why I wanted to get your
2 attention.

3 The Chairman. Thank you.

4 Senator Nelson. The Chairman has gone a mile. We
5 now need to go two miles. And what he has done is, in
6 his mark he has created a partial grandfather. And what
7 this grandfather at the end of the day we are trying to
8 do is Medicare Advantage, which is a program through a
9 Medicare HMO.

10 A Medicare HMO is an insurance company. Under the
11 prescription drug bill that passed six years ago Medicare
12 Advantage was given a 14 percent bump on its
13 reimbursement from Medicare as an inducement to go out
14 and to give good service to senior citizens as an
15 alternative to Medicare fee-for-service.

16 And what has happened in the intervening time is
17 that where fee-for-service in an area is high these
18 Medicare HMOs have been able to come in and bid
19 underneath fee-for-service pursuant to the law what they
20 bid underneath the difference. They could not keep the
21 whole difference, but they could keep 75 percent of the
22 difference, and 25 percent of it they had to turn back to
23 Medicare. So 75 percent the insurance company could
24 keep.

25 But that 75 percent they have turned around other

1 than utilizing it for their own profit. They have given
2 it in extra goodies to senior citizens, their
3 beneficiaries of the Medicare Advantage plan.

4 Now sometimes that is like hearing aids, sometimes
5 it is eyeglasses, and sometimes it is a membership in a
6 fitness club or it may be that they reduce the premium
7 for the senior citizen, or maybe that is that they don't
8 pay a co-pay.

9 Now what I am saying is, that I support the
10 Chairman's approach that we have got to squeeze the
11 inefficiencies out of this Medicare Advantage program
12 where the original idea of Medicare HMOs was that they
13 were going to bid lower than fee-for-service and it was
14 going to cost Medicare only 95 percent of fee-for-
15 service.

16 But that is not what happened in the Prescription
17 Drug Bill. It got reversed. Fee-for-service is here,
18 and they are compensated on average 14 percent more, or
19 114 percent of fee for service.

20 So what the Chairman wants to do is to squeeze that
21 out over time through competition. I think that is a
22 good thing.

23 But I do not think it is a good thing to go in and
24 to tell these senior citizens what you have now you have
25 got to give up. That is a nonstarter, and it is

1 particularly a nonstarter to any senior citizen that is
2 having difficulty making financial ends meet.

3 So what I want to do is to say, "Those senior
4 citizens that have it, you are not going to lose it."

5 All right. Now that for the entire program would
6 cost about \$80 billion, and that is just not realistic to
7 come up with \$80 billion. The Chairman was gracious
8 enough to say, "Well, we are going to get the first
9 step," and he put in his mark \$10 billion. And that will
10 accommodate some of the senior citizens in the areas
11 where the differential is the greatest. And that affects
12 a lot of our states.

13 What I want to do is to expand that another \$26
14 billion so that in effect it will grandfather in all of
15 the senior citizens on Medicare Advantage whose plan has
16 bid at or below fee-for-service.

17 Now that is a technical term, but in effect what it
18 does is it gets most of the Medicare Advantage folks.
19 And in my state which has more Medicare Advantage folks
20 than any other state, we have about 900,000, it would
21 encompass about 800,000 of those 900,000.

22 And that replicates itself out through the other
23 states.

24 My offset is a fee on health insurance companies and
25 a fee on brand drug companies. So Mr. Chairman, I offer

1 the amendment.

2 Senator Bingaman. Mr. Chairman.

3 The Chairman. Senator Bingaman.

4 Senator Bingaman. Could I ask the staff? I'm not
5 as familiar as I should be with all of the Medicare
6 Advantage plans around the country. Senator Nelson has
7 just said that to deal with this problem with regard to
8 all of the folks on Medicare Advantage would cost \$80
9 billion. I think that was what he said. And the
10 Chairman has agreed to deal with \$10 billion of that, and
11 this amendment would deal with another \$26 billion.

12 I would be interested to know whether the Medicare
13 Advantage plans in New Mexico are in the \$26 billion that
14 he is dealing with, or are in the remaining \$44 billion
15 that he is not dealing with.

16 Could someone enlighten me about that?

17 Ms. Bishop. Well, in New Mexico my thinking is
18 that the payment levels are above fee-for-service so that
19 --

20 Senator Bingaman. So we would not be eligible.

21 Ms. Bishop. That is right. The preponderance of
22 the plans in your states are paid above fee-for-service
23 and this amendment would not affect --

24 Senator Ensign. If the Senator would yield for all
25 of us? Is it possible that we would get a table that

1 would tell us which ones in the Chairman's mark were
2 fixed and which one in Senator Nelson's were fixed?

3 Senator Nelson. I think that is a reasonable
4 request. I can just tell you, in Nevada, Nye, Clark
5 Pershing, Esmeralda --

6 Senator Ensign. Who produced that chart you have?

7 Senator Nelson. The staff did.

8 Senator Ensign. So can we have access --

9 The Chairman. There is no reason that should not
10 be amendable.

11 Senator Ensign. We should be able to look at the
12 numbers. We should be able to see what percentages are
13 fixed in what counties and all that.

14 Ms. Bishop. I think there is a clarification. Can
15 you clarify? I don't think we have produced that chart.

16 Senator Nelson. Where did it come from?

17 Ms. Bishop. We did not produce that information.

18 Senator Ensign. Do you have that information?

19 Ms. Bishop. So here is the dilemma that we faced
20 with this, with Medicare Advantage. The bid information
21 from the plan is considered proprietary, and that is
22 because it really reveals sort of their competitive edge
23 which is how, the rates with which they contract with
24 hospitals and doctors. It would reveal the cost of
25 providing their benefits, and it reveals their profit

1 levels and all that. So the bids are considered
2 proprietary.

3 We do know however that the benchmark rates that are
4 set by statute today under current law, we do know what
5 those are because those are set by law. And we do know
6 what those look like relative to fee-for-service because
7 that is public information. CMS provides the benchmarks
8 and it provides fee-for-service.

9 So we know where the benchmarks are in everybody's
10 state relative to fee-for-service. And MedPAC has
11 provided an analysis of that in past years, and we could
12 send that around.

13 What that would indicate is where the benchmarks on
14 average by state are above fee-for-service generally
15 speaking the plan bids will be above fee-for-service.
16 They will be between fee-for-service and those
17 benchmarks. The plans are bidding below fee-for-service.

18 Senator Ensign. Do you have that down? The
19 amendment says "metropolitan areas." Do you have it down
20 as metropolitan areas?

21 Ms. Bishop. No. No, I do not.

22 Senator Ensign. So how would we determine? Mr.
23 Chairman, what I do not understand then is how this --
24 you have ruled out of order amendments that were not
25 workable, or whatever. How would this amendment even

1 apply then if we do not know, if we do not have that
2 information? If it is proprietary information, how would
3 you apply this? How would this ever even work?

4 Ms. Bishop. We do not know, we as Congress, we as
5 part of the general public. CMS has access to the
6 bidding information. They would, if this amendment were
7 adopted and signed into law, look at the bids as
8 specified in the amendments. They would take the average
9 of the bids in each metropolitan statistical area. If
10 the bids are below fee-for-service and efficient then
11 they would designate that area as available for
12 grandfathering, and they would have to do that a year or
13 two in advance.

14 Senator Ensign. But the bottom line is, we will
15 not know what the effect of this amendment is. CMS will
16 know after this bill is put into law, but we want to know
17 the effect of whether it is New Mexico, North Dakota,
18 Nevada, Montana or whatever. We might guess whether it
19 is affecting our states, but we really will not know
20 whether it affects our states.

21 Ms. Bishop. We will have an informed guess, but it
22 will not be--none of us have access to the bid
23 information, so we will not know exactly what it is until
24 CMS would be directed to use the bid information to
25 identify the areas. So you are correct. We would have

1 an educated guess, but it would not be --

2 Senator Conrad. Would the Senator yield on that
3 point? You know, I have looked at it for our state.
4 There is no way we are going to be affected by it because
5 we are not in that category. The states that are in that
6 category that would be eligible I think pretty much jump
7 out at you.

8 But my state is not going to get anything out of
9 that.

10 Senator Ensign. I am just looking at my state, and
11 in Clark County which is where Las Vegas is I have one
12 zip code that will be affected, at least according to the
13 numbers that were talked about.

14 Senator Schumer. Would my colleague yield?

15 Senator Ensign. Yes.

16 Senator Schumer. The numbers I have here which are
17 not from CBO but from the plans is that Clark County
18 81,000 seniors would be affected. And then in Nye County.

19 Senator Ensign. Well, Clark County has 2 million
20 people in it.

21 Senator Bingaman. Maybe the Senator could give us
22 all copies of what the plans are saying would be
23 affected. That would be very useful.

24 Senator Schumer. New Mexico does not do so well.

25 Senator Bingaman. That is what I thought. That is

1 why I asked my earlier question, Mr. Chairman.

2 [Laughter]

3 Senator Ensign. Senator Nelson, whose numbers are
4 you using? We got some numbers from -- but who produced
5 your numbers?

6 Senator Nelson. We got this information from the
7 insurance plans. Now if your insurance plans are bidding
8 over fee-for-service, they are not included in this
9 amendment. If they are bidding under fee-for-service,
10 they are. The cost of that is a total of \$36 billion,
11 which is when you take out the Chairman's \$10 billion is
12 \$26 billion net.

13 If you wanted to do every county including the ones
14 that are bidding over fee-for-service, Senator Ensign, it
15 is going to cost \$80 billion.

16 Senator Schumer. It is 63,000 people. That is a
17 lot.

18 Senator Nelson. So that is the cut-off here. I am
19 trying to find the balance, and it will get most of the
20 plans in the country. I cannot help it that all but six
21 counties in Nevada including your largest county in fact
22 would be eligible under this.

23 Senator Ensign. Well, parts of it. But the other
24 point to make is, because we do not know, and we have
25 established we do not know exactly and it will be an

1 educated guess on what is affected. But the other part
2 of the amendment is, and we talked about this before,
3 there is cost-shifting that is going to go on.

4 Remember, not all insurance companies cover Medicare
5 Advantage. They don't all participate. So they are
6 going to be, if you tax an insurance company, the people
7 they provide coverage for, they will pass that on. And
8 so you are going to cost-shift because of your amendment
9 more money. That is just reality. This cost-shifting
10 already goes on, and more cost-shifting is going to do
11 that. So younger people, people in the private sector,
12 are going to pay higher costs. So we do have to
13 understand that.

14 By the way, this is what CBO says about the Nelson
15 offset.

16 Senator Nelson. By the way, you will have 90,000
17 people approximately in Nevada according to this
18 insurance plan run that are eligible under this
19 amendment.

20 Senator Ensign. Right. But CBO's general
21 observation of the bill, when you have the fees these
22 fees increase costs for affected firms which would be
23 passed on to purchasers and would ultimately raise
24 insurance premium by a corresponding amount. That is the
25 cost shift. That is the point of taxing other people's

1 plans is that you are taking money away. This is part of
2 that cost-shifting that went on. You are even going to
3 cost-shift more.

4 Senator Nelson. I can tell you this senator does
5 not want to be in a position that I am taking away
6 benefits from existing senior citizens.

7 Senator Ensign. Well, since you don't fix them
8 all, if you vote for this bill you are going to be taking
9 away benefits from senior citizens because in this bill
10 it takes away benefits from senior citizens on Medicare
11 Advantage plans. We have established that very clearly
12 throughout this debate.

13 Senator Nelson. Not in Florida.

14 [Laughter]

15 Senator Bingaman. Mr. Chairman.

16 The Chairman. Senator Bingaman.

17 Senator Bingaman. I just wanted to ask staff just
18 to be clear in my own mind on this. The Senator's
19 amendment targets those areas where the Medicare
20 Advantage is bidding less than fee-for-service. But
21 there is no uniformity in what fee-for-service is getting
22 paid around the country. In fact I think we have seen
23 the charts where fee-for-service ranges from \$5,000-and-
24 some-odd-dollars per beneficiary up to \$15,000 per
25 beneficiary.

1 So the real determination here is that whether or
2 not the people affected are living in areas with very
3 high fee-for-service. And if you are living in an area
4 with very, very high fee-for-service then you probably
5 qualify for this \$26 billion amendment.

6 Ms. Bishop. Correct.

7 Senator Bingaman. And if you live in an area that
8 does not have that very high fee-for-service where people
9 are getting paid less, providers are getting paid less to
10 provide Medicare services, then your Medicare Advantage
11 gets no benefit.

12 Ms. Bishop. That's correct.

13 Senator Bingaman. Thank you.

14 Senator Nelson. Mr. Chairman, may we temporarily
15 pass this measure and see if we can work out something?

16 The Chairman. Well, we have been temporarily
17 passing so many amendments that we are going to be here a
18 long time. I'd like to dispose of the amendments. But
19 you want to pass this. Why do you want to pass this one?

20 Senator Nelson. I want to temporarily pass it so I
21 can work out with some of my colleagues their problem.

22 The Chairman. All right. We will set it aside.

23 I want the staff to give us a list of all the
24 amendments we have temporarily laid aside. I'd like that
25 when we come back after the vote. There's a bunch.

1 Okay, Senator Stabenow.

2 Senator Stabenow. I can proceed? Mr. Chairman,
3 this is Amendment C-6.

4 The Chairman. C-6.

5 Senator Stabenow. Yes, thank you. And moving to a
6 different part of coverage which is refocusing us on
7 children and the most vulnerable children in our system,
8 children in foster care, abused and neglected children
9 who have received help, been able to receive medical
10 assistance and mental health assistance through what is
11 called "therapeutic foster care."

12 My amendment simply clarifies for the future in
13 health care that states will be able to continue to use
14 Medicaid for this purpose.

15 We want to create a definition making it clear that
16 states can continue to provide specialized and high
17 quality care for foster care children that are in out-of-
18 home placements. As I indicated, it is called
19 "therapeutic foster care."

20 We know that children enter the foster care system
21 and they are extremely high risk both in terms of
22 physical and mental health issues because not only of
23 their biological factors but because of abuse and neglect
24 that they have received at home. And this would not be
25 an issue except that back in August 2007 the previous

1 administration did attempt to stop children in foster
2 care from being able to receive health care services
3 under Medicaid.

4 The Congress interceded, and we were able to
5 continue to provide services to children in foster care.

6 But I think it is appropriate to ask that a clear
7 definition be there so that we know going forward that
8 children in foster care are part of this health care
9 system that we are creating.

10 Mr. Chairman, we have some questions. CBO is not
11 ready to say it does not score. Technically CMS had
12 started a rulemaking to stop this particular funding. It
13 never completed it, and so there is some question or
14 debate about whether or not it was in the Medicaid
15 baseline.

16 Mr. Schwartz. I am sorry, Mr. Chairman, Senator
17 Stabenow. CBO has confirmed that there is no score for
18 this amendment.

19 Senator Stabenow. Thank you. That is good news.
20 I was not aware of that, Mr. Chairman.

21 So given that, hopefully this is just clarifying,
22 but we certainly do not want to, down the road, be
23 debating whether or not foster children have the
24 opportunity.

25 The Chairman. Is there further discussion on

1 Senator Stabenow's amendment?

2 Senator, I think you have a good idea. This is an
3 important clarification. I strongly support it. In
4 fact, I was thinking of putting it in the mark but was
5 waiting for a CBO score. We have it now, and I think we
6 should accept the amendment.

7 Senator Stabenow. Thank you.

8 The Chairman. If there is no further discussion, no
9 further debate, without objection the amendment is
10 included.

11 Senator Stabenow. Thank you.

12 The Chairman. All right. Other amendments?

13 Senator Bunning has an amendment.

14 Senator Bunning. Thank you, Mr. Chairman. My
15 amendment is C-3 to subtitle (D) of Title I, just in case
16 anybody is interested.

17 The Chairman. Is it in legislative language?

18 Senator Bunning. It is. No, it is not. Thank you
19 for bringing that up. I just wanted you to know that the
20 House of Representatives under the leadership of Speaker
21 Pelosi just passed what my amendment is here.

22 The Chairman. Hey, how about that.

23 [Laughter]

24 Senator Bunning. I just wanted you to know that.
25 It's kind of funny, interesting.

1 Let us get back to the amendment. This amendment
2 amends the Chairman's mark to require that any taxpayer
3 who requests an exemption on their tax return from the
4 personal responsibility excise tax be granted an
5 exemption.

6 I have made no bones about believing the individual
7 mandate in this bill is un-American. As Senator Hatch
8 has pointed out, it may even be unconstitutional. For
9 those listening or watching, the individual mandate in
10 case they do not understand what it is, is the part of
11 the bill that requires you to pay a tax if you do not
12 have health care. In other words, it requires you if you
13 don't have health care, to pay a tax.

14 Some people do not like to call it an individual
15 mandate or a tax. Instead, they say it's your "shared
16 responsibility." I don't know if it will make you feel
17 any better when you are sending more money to Washington,
18 but that seems to be the attempt.

19 Anyway, the bill will require most people to pay a
20 tax between \$750 and \$1,900 a year if they do not have
21 health insurance. The tax will be assessed through the
22 tax code.

23 This means that when you do your taxes you will have
24 to say whether you have health insurance for the past
25 year. If not, then most people will have to add the

1 penalty tax between \$750 and \$1,900 a year to the tax
2 bill they already are sending the IRS on April 15. As if
3 doing your taxes was not complicated and expensive
4 enough, and I want you to know that for the last 25 years
5 I have sat on one committee of jurisdiction in the House
6 and one here in the Senate, and it's the Tax Writing
7 Committee. And I would not dare do my own taxes.

8 There is only one person I know on these committees
9 that does their own taxes, and that was Chairman Archer.

10 And we all thought he was a little --

11 [Laughter]

12 -- brave to do it.

13 There will be more lines on your tax forms, and
14 likely an extremely complicated schedule that every
15 American will have to fill out. Under the Chairman's
16 mark there are some folks who will get exemption to this
17 new tax, including and not all people without insurance
18 for less than three months a year, native Americans,
19 Indians, individuals below certain income levels.
20 Exceptions will be made for religious reasons and
21 hardships and illegal immigrants.

22 Some might think the IRS will not collect much
23 through this mandate, but they are wrong. The government
24 will confiscate \$20 billion. That's a "B." I know we
25 are getting used to "Ts," but this is "B," \$20 billion

1 over the ten years, according to CBO and the Joint
2 Committee on Taxation.

3 That is \$20 billion from the pockets of hard-earned
4 Americans.

5 So my amendment says just this, that "Any American
6 who requests an exemption on their tax form will be
7 granted an exemption for any reason."

8 That means if you are filing out your tax returns
9 and did not want to send \$750 or \$1,900 additional to
10 Uncle Sam, you could check a box to request an exemption
11 and get one. It's that simple.

12 Some will likely argue that if this amendment passes
13 it will undermine the shared responsibility section and
14 some of the other insurance reforms as well. Well, I
15 don't think the Federal Government should be in the
16 business of taxing Americans just because they are
17 uninsured. Some will say the individual mandate is like
18 the requirement that drivers have car insurance. Well,
19 if you don't want to pay car insurance, you don't have to
20 drive or own your own car. In fact, many Americans don't
21 own their own cars and don't pay car insurance.

22 But you don't have a choice under this bill. The
23 only way to avoid being forced to buy insurance is to
24 stop breathing. Instead of the goal of health reform, I
25 think it should be to make more insurance more affordable

1 so people have it, like seriously looking at ways to help
2 people buy insurance across state lines, reforming our
3 medical malpractice which we have talked about numerous
4 times here, and taking more aggressive steps to help
5 people enroll in public programs like Medicare and CHIP
6 if they are eligible.

7 This bill certainly gets people covered, but at what
8 cost. It is an invasion by the Federal Government into
9 another element of our private life. We already have
10 seen so much of that this past year.

11 My amendment makes sense, and it is the right thing
12 to do.

13 The offset in my amendment would reduce the
14 threshold for premiums credits, but I doubt that this
15 will be necessary. In fact, I am told that CBO told
16 another member of this committee that the individual
17 mandate actually adds well over \$200 billion in cost to
18 this bill, largely because of the increased premium
19 subsidies that result from forcing Americans to buy
20 insurance.

21 Therefore, I expect this amendment will actually
22 save the government billions of dollars.

23 I urge my colleagues to defend their personal
24 liberties of this Nation, which is part of, one of the
25 main things that this Nation was founded upon, and

1 support my amendment.

2 Thank you.

3 Senator Kyl. Mr. Chairman, might I ask staff,
4 whoever could answer this question, the exemptions that
5 Senator Bunning referred to, it does not include, for
6 example, veterans or active duty military. It does
7 include Native Americans. I presume the reason the
8 exemption does not include groups like veterans or active
9 duty military is that they have separate insurance
10 coverage and health care that qualifies under the at
11 least minimum terms of the legislation. Is that correct?

12 Ms. Fontenot. That is right. They are considered
13 already meeting the requirements.

14 Senator Kyl. Right. But Native Americans are
15 specifically named as being excluded. And yet they have
16 Indian Health Service. So why are they explicitly
17 exempted?

18 Mr. Schwartz. There are two reasons for that,
19 Senator Kyl. The first is because Indian tribes are
20 sovereign.

21 Senator Kyl. Yes, but the rule, the laws of the
22 United States of America apply to Native American
23 communities. So I understand the aspects of Native
24 American sovereignty, and I cannot think of a reason why
25 it would preclude an American citizen, Native American

1 Navajo Indian, for example, from being exempted simply
2 because he happens to an enrolled member of the tribe.

3 Mr. Schwartz. All right, let us try the second
4 reason.

5 Senator Kyl. Yes. I think maybe the second reason
6 is the real one.

7 Mr. Schwartz. The Indian Health Service provides
8 access to care but it is not health coverage. And given
9 the lack of funding and difficulty that people who are
10 eligible to receive services at IHS experience on a sort
11 of yearly basis, CBO's conclusion is that having access
12 to IHS is actually not and should not be considered
13 creditable coverage.

14 Senator Kyl. Right. Thank you. I think that is
15 accurate, and I think the legislation is properly
16 therefore excludes Native Americans from having to comply
17 with the mandate.

18 But I would make the point that, and I see a couple
19 of my colleagues nodding with me here, that this also
20 illustrates something else. The government care for
21 Native Americans is abominable. It is inadequate. It is
22 to me a good example of what happens when you have the
23 government run a health care system. And it is something
24 that the American people, frankly, have a big trust
25 responsibility to correct. And for years we have not

1 corrected it.

2 We got some funding that is supposed to go in a
3 special trust account this last year from the PEPFAR
4 funding to try to help improve their health care. We
5 have not even been able to get from the appropriators the
6 funding into that trust fund to accomplish this even
7 though we got an authorization for a portion of a billion
8 dollars.

9 And so the mark I think is correct in what it does,
10 but the reason is because we are not in our government-
11 funded health care for the Native Americans doing what we
12 are supposed to do. And I suggest that we could have
13 problems similar to that when we apply that to the rest
14 of the American people.

15 May I ask a question?

16 The Chairman. Mr. Grassley.

17 Senator Grassley. First a statement and I have a
18 question.

19 The Chairman. Sure. Senator Grassley.

20 Senator Grassley. I am going to vote for the
21 Bunning Amendment. I have already expressed some strong
22 concerns about some heavy-handedness that is connected
23 with the enforcement of the individual mandate. And I
24 said before, recognize the need for more people to
25 purchase coverage, and I have an amendment pending on

1 that that has been deferred.

2 But the levels of penalties and the new IRS
3 enforcement tools represent kind of a disconcerting
4 intrusion into the lives of private citizens. The mark
5 does allow for some exemptions. People would be able to
6 apply for a hardship exemption that would be determined
7 by the Secretary, but even with the exceptions detailed
8 in the Chairman's mark, and I will not go into those, I
9 have this question for staff.

10 Can staff tell me if a family of four at 134 percent
11 of poverty, and that is about \$25,000 today, could still
12 be subject to an almost \$2,000 penalty?

13 Ms. Fontenot. The 134 percent poverty?

14 Senator Grassley. Yes.

15 Ms. Fontenot. So for those, it would be a \$1,500
16 penalty if the premium did not exceed 10 percent of their
17 income, or they could not get a hardship waiver.

18 Senator Grassley. All right. So the answer is
19 yes. So it is a pretty heavy burden for low-income
20 families, and I think Senator Bunning's amendment will
21 make the process of receiving an exception much easier
22 for people struggling to meet the new Federal
23 requirement.

24 I yield.

25 Senator Ensign. Mr. Chairman.

1 The Chairman. All right. Senator Ensign.

2 Senator Ensign. Mr. Chairman, thank you. The
3 first thing I want, just for joint tax, Mr. Barthold, if
4 you could just clarify what the penalties are if somebody
5 decides--first of all, is it the IRS will enforce the
6 penalties?

7 Mr. Barthold. These are penalties under the
8 Internal Revenue Code is what the mark contemplates.

9 Senator Ensign. And if somebody doesn't pay it,
10 they object to it, let us say they object to it and they
11 do not pay it, what are the penalties? Up to what?

12 Mr. Barthold. It would be the usual penalties for
13 failure to meet your tax obligation.

14 Senator Ensign. Up to what?

15 Mr. Barthold. Willful. This is willful evasion,
16 right? It could be prison. It could be willful. It
17 could be you just were late filing and forgot.

18 Senator Ensign. I am saying the maximum penalty.
19 In other words, if they are willful, is it possible that
20 somebody could go to jail over this?

21 Mr. Barthold. It could be. That would be
22 criminal. If it were considered an attempt to defraud.

23 Senator Ensign. What if it is just willful
24 evasion? They do not believe in it, they are saying I
25 don't believe that this is right.

1 In other words, what I am trying to get at ---

2 Mr. Barthold. Generally the IRS would take you to
3 court and undertake normal collection procedures.

4 Senator Ensign. So they could have their wages
5 garnished, various other things they could do at that
6 point.

7 Mr. Barthold. Yes.

8 Senator Ensign. Let me ask. The reason I am going
9 down this line of questioning is, we have heard from a
10 lot of people--and I bet your office, most of our offices
11 have as well, Senator Hatch mentioned this--that a lot of
12 people do not believe that this is constitutional, that
13 this is not in the enumerated powers of the U.S.
14 government to mandate purchase of health insurance or
15 penalize somebody.

16 We have allowed exceptions for religious and various
17 other reasons. But some people hold the Constitution
18 pretty high in their lives, and if they believe that this
19 thing is unconstitutional and they then say, "I choose
20 not to have health insurance and I am not going to buy
21 it," we could be subjecting those very people who
22 conscientiously because they believe in the U.S.
23 Constitution, subjecting them to fines or the
24 interpretation of a judge potentially all the way up even
25 to imprisonment. That seems to me to be a problem.

1 I understand the idea of this shared responsibility.

2 And the insurance companies want everybody to have this
3 mandate. That is how they say they can get rid of
4 preexisting conditions. I understand all of that.

5 But there are a lot of Americans who hold that
6 Constitution of the United States very dearly. And if
7 you look at the enumerated powers, I have trouble
8 understanding how we are mandating the purchase of health
9 insurance other than the broad interpretation of the
10 "general welfare" clause, which by the way Madison who
11 wrote the Constitution certainly according to the
12 *Federalist Papers Number 10* certainly did not envision
13 that. As a matter of fact, he was a huge critic of the
14 general expansion of the General Welfare Clause.

15 So I would think that we should take this thing
16 very, very seriously and consider what we are doing to
17 the American people who are going to be protesting. Some
18 people may even do this just out of conscience, drop
19 their health insurance and then want to take this thing
20 on, because there is an outrage amongst the American
21 people over this.

22 The Chairman. All right. I think we can vote.

23 Senator Stabenow.

24 Senator Stabenow. I appreciate a chance.

25 The Chairman. All right, go ahead. Senator

1 Stabenow.

2 Senator Stabenow. Thank you. I just think that as
3 we hear that we should talk a little bit more about the
4 other piece of this. And I have to say when we look at
5 affordability I am torn, because if we cannot get this to
6 be affordable, if we cannot address the right level of
7 tax credits for middle class people and the hardship
8 waiver, it becomes harder and harder then to do the
9 requirement. And that is something I am weighing all the
10 way through this process, frankly.

11 But I also think it is important to just say a word
12 about the other side, which is the fact that the
13 challenge for us around health insurance and health care
14 in this country is that we are all paying for people that
15 do not have health insurance and are using emergency
16 rooms inappropriately every single day. There is at
17 least a \$1,000 hidden cost on every single one of us
18 every single person in the country if you have insurance
19 like a lot of people in my state and somebody goes in and
20 uses the emergency room, rather than seeing a primary
21 care doctor, all those costs get rolled on to my
22 employers, to the workers, the people who have insurance.

23 And they see their rates go up. It is another reason
24 you see \$800 aspirin. I mean, the reality is that we are
25 all paying for this, and that is the real challenge of

1 all of this on health care is that we are all paying for
2 this one way or the other.

3 And so the question is, do we pay for it through the
4 back door and pretend it does not happen and end up
5 paying twice as much as any other country for health
6 care, or do we try to rationally figure out how to do
7 this so that we are paying for it through the front door,
8 and we are bringing down the costs over time, we are
9 tackling tough decisions about how to do that, but we are
10 all together trying to figure out how we make sure that
11 we are able to have everyone have health insurance and at
12 the same time not be paying for all of these extra costs
13 that every single American one way or the other is paying
14 for.

15 So I am sympathetic. I understand the concerns, and
16 I appreciate all that as well, the political volatility
17 around the question of mandating or requiring coverage.
18 But we have a real challenge on our hands. Unless we
19 want to do what we did with Medicare, quite frankly,
20 where everybody is in and if a single-payer, government-
21 run health care system which Medicare is, that makes sure
22 everybody participates and everybody is in and chooses
23 their own doctor and gets the health care they need---
24 unless we want to do that, the big question we've all
25 grappled with is, how do you make sure everybody is in?

1 And I think that is a tough one. It is a tough one,
2 and for me it comes down to whether or not ultimately in
3 this bill we can say this is affordable for people,
4 affordable for businesses and affordable for people.

5 And that is what I know that we are working very
6 hard to do. But this is a broad, basic discussion that
7 goes to the heart of what we are trying to do here. And
8 I think it is important to talk about the fact that we
9 are paying one way or the other for this.

10 And Mr. Chairman, I finally would just say that
11 again the offset of going to middle-class people--that is
12 what this offset is--raises great concern for me, taking
13 away tax credits from middle income people to pay for
14 this. And I even question, I would ask the staff whether
15 or not the offset even pays for this because I know the
16 Chairman has asked that things be paid for, and I
17 question whether or not removing the middle class tax cut
18 actually would pay for what is being done in this
19 amendment.

20 I don't know if staff might respond to that.

21 x. The basic question, the penalty itself raises
22 \$20 billion, so the question is whether you can raise,
23 whether the tax reduction and tax credits are such that
24 \$20 billion ---

25 Mr. Barthold. Mr. Chairman, it is actually more

1 complicated than that because --

2 The Chairman. I'm sure it is.

3 [Laughter]

4 Mr. Barthold. As was pointed out in the debate,
5 the decision to carry insurance or not to carry insurance
6 will affect who participates in the exchanges and might
7 be eligible for subsidies as well as sort of overall
8 premium costs. So we can't just look at the one as the
9 CBO and we did in the letter that was presented said
10 there would be this much money in terms of penalties.
11 There are other secondary effects that go into the
12 overall cost of the bill.

13 So if you were to exempt a large number of people
14 under the amendment, it would not be as simple as just
15 looking at the \$20 billion figure on that one line.
16 Since he is not here, I cannot speak for Doug Elmendorf,
17 but it has been sort of a complex interaction of those
18 different factors that I identified.

19 The Chairman. The basic question Senator Stabenow
20 asked, is there enough in the tax credits to pay for the
21 subsidies?

22 Mr. Barthold. Well, I was going through the
23 complex calculations I said have begun. There is
24 certainly a good amount of dollars under the mark in the
25 subsidies.

1 The Chairman. All right. I think we should vote.

2 Senator Bunning. Mr. Chairman, may I just - very
3 short.

4 The Chairman. Very quickly.

5 Senator Bunning. All right. I would like to
6 respond to Senator Stabenow. How many of your
7 constituents think that you do not pay for your health
8 care? Do you have any idea from your town meetings and
9 things like that?

10 Senator Stabenow. If I might just respond to my
11 colleague. I think there is a difference between
12 understanding when you pay a premium and understand at
13 this point the general costs that come from emergency
14 room care and other kinds of care, and it is not
15 obviously I have very intelligent constituents, and so I
16 am not suggesting people ignore it, and I am hoping you
17 are not suggesting that people in Michigan are not
18 intelligent.

19 Senator Bunning. No, I am not. I lived in
20 Michigan 14 years. I am very familiar.

21 Senator Stabenow. I know. But there certainly is
22 a difference between the awareness of paying it out-of-
23 pocket for premium and what happens indirectly all the
24 time.

25 Senator Bunning. All right. Let me just make this

1 point. We will still be paying for the emergency room
2 visits of the uninsured, Native Americans, people with
3 religious objections, and illegal immigrants. Why is it
4 okay for some and not others?

5 Senator Stabenow. Well, if I might, since that was
6 directed to me, Mr. Chairman, I would just say, you raise
7 very important pieces of this. This is a tough issue. I
8 guess the question is, if you cannot solve all of it, do
9 you not try to solve any of it? And that is really what
10 we are here all about too.

11 It goes back to my basic question of, is the status
12 quo okay? I do not think it is okay.

13 Senator Bunning. No, no, no. The status quo is
14 not what is in the mark, and that is why I was trying to
15 amend it. Thank you.

16 The Chairman. All right. I just have a couple of
17 comments. This is not really a killer amendment. I
18 would say it is a mortally wounding amendment, because it
19 basically says no more personal requirements, no shared
20 responsibility for individuals. Obviously individuals
21 will just opt themselves out, and that is going to
22 undermine this whole system here. It clearly is going to
23 undermine the system. The system won't work if this
24 amendment passes.

25 Second, as Senator Stabenow is pointing out, it

1 makes the insurance even less affordable in the exchange,
2 and that is not right. If we want this to work, not to
3 make things more difficult. And I just strongly urge
4 everyone to not support the amendment.

5 All those in favor of the Bunning Amendment? Roll
6 call vote? All those in favor of the Bunning Amendment,
7 please signify by voting. The clerk will call the roll.

8 The Clerk. Mr. Rockefeller?

9 Senator Rockefeller. No.

10 The Clerk. Mr. Conrad?

11 The Chairman. No by proxy.

12 The Clerk. Mr. Bingaman?

13 The Chairman. No by proxy.

14 The Clerk. Mr. Kerry?

15 Senator Kerry. No.

16 The Clerk. Mrs. Lincoln?

17 Senator Lincoln. No.

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 Grassley. Aye.
9 The Clerk. Mr. Hatch?
10 Senator Grassley. Aye by proxy.
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 Grassley. Aye by proxy.
21 The Clerk. Mr. Ensign?
22 Senator Ensign. Aye.
23 The Clerk. Mr. Enzi?
24 Senator Grassley. Aye by proxy.
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. Mr. Chairman, the final tally is 9 ayes
6 and 14 nays.

7 The Chairman. The amendment fails.

8 The next amendment is Senator Rockefeller.

9 Senator Rockefeller. Thank you, Mr. Chairman. I
10 want to first of all thank the Chairman for working with
11 me on this so that we could, as members will remember I
12 made it fairly lengthy heartfelt statement yesterday
13 about the way Medicare reimbursements are done to
14 providers, to hospitals, etcetera, etcetera.

15 And I suggested it was kind of a frivolous exercise
16 and that there were too many lobbyists involved and that
17 it was very, very difficult if you have a lobbyist that
18 comes in--shouldn't be--but a lobbyist comes in and
19 represents an industry in your state which could gain
20 enormous advantage by having an increase in the
21 reimbursement rates for oxygen or for something else.

22 I said I think the Congress has made an earnest
23 effort to try and do Medicare reimbursement correctly,
24 but I don't think it's been a successful effort in view
25 of the overall purposes of trying to make Medicare

1 reimbursements done more intelligently, maybe reduce
2 costs by doing it more intelligently through more
3 accountability, through more outcomes-based research and
4 application, judgments made therefrom.

5 And I think overall these are decisions that should
6 be made by a professional, people who are public policy
7 professionals that are not lobbyists and they are not
8 necessarily sitting Congressmen or Senators.

9 My original approach I modified through working with
10 the Chairman of this committee. As I indicated, Senator
11 Carper made a large impression on me yesterday when he
12 said the only reason he could vote on something because
13 it wasn't going to be government. Obviously on the other
14 side of the aisle there is a lot of talk about government
15 involvement.

16 Well, this will not be without government
17 involvement, but it will be--and this is where I made a
18 compromise and I think it is a good compromise because I
19 think I was wrong before and I was being in a sense too
20 purist about it--Congress should be involved. Congress
21 should be involved, and so I have made that modification
22 which the Chairman has graciously accepted.

23 And this would be the way it would be done. There
24 would be 11, could be 15 and that is not yet decided.
25 This no cost. It is budget neutral, no offset needed.

1 Who would be picked by the Speaker of the House and the
2 Majority Leader of the Senate, ideas coming from all of
3 us and from others to them. They would present those
4 ideas; that is, the names of those people, their
5 credentials, something about them. Obviously they would
6 have to be carefully vetted. And they would be then put
7 before the President of the United States. He would make
8 a selection, and then I believe, Mr. Chairman, that they
9 would have to be approved by the United States Senate.

10 The Chairman. That is true.

11 Senator Rockefeller. Which means by us in this
12 committee.

13 The Chairman. Yes. That is correct.

14 Senator Rockefeller. So that is legislative
15 involvement. I like that. Actually I feel better about
16 doing it that way. It is a smarter way to do it, it is a
17 better way to do it, it is a more legislative-friendly
18 way to do it, and I think it has a better chance also of
19 passing thereby. That thought did occur to me.

20 Now the purpose obviously would be to make wise
21 decisions. As I indicated yesterday this so-called
22 MedPAC---and we don't even have to call it that; we can
23 make up another name, whatever---was put before us in
24 1997 by the Republicans and it was accepted. And MedPAC
25 has been dutifully putting out every year, but knowing

1 that they have no authority and no power to do anything
2 about it they have been putting out suggestions about how
3 reimbursement should work, who should get what, what
4 geographic factors, what income factors, what urban and
5 rural factors, what MSA factors, all of these things are
6 involved.

7 It is a very difficult decision for individual
8 Congressmen and Senators to make because it is a constant
9 study. Nobody would be able to serve on this group who
10 was not fully involved.

11 There are three ex officio positions: HHS, CMS and
12 HRSA. They would be on that if approved by us.

13 But Medicare is too important to let it be done, I
14 won't say frivolously but in an ad hoc manner, depending
15 upon who has a particular interest in this or that. It
16 should be done from a distance of let us say 10,000 feet
17 by professionals, men and women who know the business.

18 I put out the name of Gail Wilensky yesterday, and I
19 have not actually heard from her. But that as an example
20 she is a very strong Republican but she also knows health
21 care like the back of her hand. It has been her life. I
22 have no idea whether she would be interested or whether
23 anybody would interested in suggesting her.

24 But the point is, a professional in health care
25 public policy who knows the problems of the country, who

1 has been all over the country in many capacities, the
2 study what the needs of Medicare might be for
3 reimbursement purposes, hospitals, providers, etcetera.
4 It's very, very important. It's very, very important
5 that hospitals and doctors and nurses and other providers
6 really feel that they are being treated fairly with an
7 even hand.

8 I think this amendment, thanks to the cooperation of
9 the Chairman of this committee, is a very fair way to do
10 this. I think it is bipartisan, it has the Executive
11 Branch involved. I don't think they are going to be
12 entirely happy with this because I think they wanted it
13 all to be a branch of the Executive government or some
14 agency related to that. And I do not think that is
15 necessarily the case here.

16 We make the decisions on these things, and I think
17 what the Chairman and I are suggesting is the right way
18 to go.

19 I will just end by saying, it is enormously
20 important. I cannot think of anything that is more
21 important than what we will do for the long-term history.

22 The Chairman was also good enough to remove the three-
23 year or four-year or five-year sunset period so that the
24 MedPAC or whatever we decide to call it will stop at that
25 point. And that means that people will have confidence

1 in it. It is not a temporary event. It is a long-term
2 thing they will be living with.

3 That is not to say that the terms have not been
4 fixed yet. That can be done. But they have confidence
5 in an ongoing process.

6 And then it comes, they make their decision, and
7 then their decision come before the Congress, both
8 houses, and the houses have a chance to review. This was
9 already in the Chairman's mark before. I saw this
10 already. They have a chance to review for 30 days the
11 product of these commissioners working long and hard for
12 the full period of a year from year to year to each year.

13 They would have a chance to review that, and that
14 would be a 30 day period which is a good amount of time.
15 Senators, Congressmen, their staffs could over that, and
16 then they would have a chance if they were displeased to
17 override the suggestions with a two-thirds vote. That
18 provides some discipline on the legislature, but it also
19 provides the legislature an opportunity, the Congress a
20 chance to really make a difference.

21 So I think this is a game changer. I think it is a
22 large idea with large consequences for the future because
23 they will not just be looking at paying people, but they
24 will be looking at the quality of the work,
25 accountability and outcomes and recidivism and all the

1 rest of it which are so, so important.

2 So I would put that before my colleagues with the
3 hope that they would find it important and satisfactory.

4 I thank you.

5 The Chairman. Senator, I very much thank you. You
6 have been in the forefront, really the champion of this
7 concept very early. You talked to many of us about it
8 some time ago, talked to the White House about it some
9 time ago. The President refers to this concept many
10 times, including when he spoke to the Congress not too
11 many weeks ago. And I think it is a great idea.

12 The CBO also gives it a very positive score. That
13 is, it is going to save about \$23 billion in this budget
14 window which is not a bad thing, and even more in the
15 subsequent 10 years. This is one of the major cost-
16 benders we have in this legislation. We all talk about
17 bending the cost curve, and there is a lot of talk about
18 it, but there are not many provisions which actually do
19 it.

20 There are several I can think of three or four right
21 now, but this is one of them that definitely does bend
22 the cost curve. And you are making, frankly, a very
23 valuable contribution to the country with this concept,
24 this procedure. We may not see the benefits of it for
25 quite a few years--but as I hear little comments from the

1 peanut gallery, "maybe not in our lifetime"--but I do
2 think we will see it in our lifetime. I think we will
3 definitely see it in not too many years beneficial
4 results here.

5 But thank you very much, Senator, for what you're
6 doing.

7 Senator Rockefeller. Thank you, Mr. Chairman.

8 The Chairman. Senator Cornyn.

9 Senator Cornyn. May I just ask a question? I
10 heard the distinguished Senator from West Virginia talk
11 about how the commissioners will be selected, but I don't
12 see that in the amendment itself. Maybe I missed it.

13 Senator Rockefeller. It is in the mark. Yes. The
14 Chairman has predicted a lot of this, and put it in the
15 mark.

16 The Chairman. This amendment is basic improvements
17 upon the provisions that are in the mark.

18 Senator Snowe. I'd like to ask the sponsor a
19 question regarding the congressional procedure. Exactly
20 what has been removed from the Chairman's mark? Is it
21 the entire process where the bill is reported to the
22 Finance Committee to be considered and voted out by
23 April? And if not, then it would be reported to the
24 Floor and the Senate would have the opportunity to
25 develop an alternative plan by August 15? Is that entire

1 process removed from congressional oversight?

2 The Chairman. No. No. It is all part of it.

3 Senator Snowe. It is all part of it? So what has
4 changed in terms of the congressional process?

5 The Chairman. Well, the only change -

6 Senator Rockefeller. We enlarged the role of the
7 Congress.

8 Senator Snowe. In what way?

9 Senator Rockefeller. Well, originally the way I
10 was thinking of it, Senator Snowe, was to have it an
11 exercise of the Executive Branch of government. And
12 there are still parts of me which think that makes sense,
13 but there are more parts of me which thinks that—actually
14 I believe this was a concern that you had—was that the
15 legislature would be let off or kept out of the process.

16 And in my original proposal, the Legislature would
17 not even get to vote on it at all. And so this gives the
18 Congress much more power and we have the power of
19 approving the people who are presented to us by the
20 President after the Speaker and Majority Leader and maybe
21 more have made their suggestions.

22 Senator Snowe. So it would be the same time frame
23 by which a report would have to be approved by Congress?

24 Senator Rockefeller. Yes. And let me say, and the
25 Chairman hinted at this, this will not take effect until

1 the year 2014. And that is important, because it will
2 take that kind of time to prepare. They are going to
3 need to have somewhat more staff, going to have amore
4 resources. They have been doing this for 12 years but
5 knowing that what they say is not necessarily going to
6 have any effect. Now they will know that it will be more
7 likely to have effect.

8 The Chairman. My understanding, Senator, is this
9 is basically what the Group of Six was discussing and
10 Senator Rockefeller has helped expand powers, add a few
11 provisions to help, like the commission has to look at
12 beneficiary quality care for example, the effects on the
13 private sector and some other, and a GAO review,
14 revolving door provisions, things like that.

15 Senator Snowe. And no sunset? Modify the
16 Chairman's marks, the modifications, modifies the
17 modification?

18 The Chairman. My understanding is there is no
19 sunset.

20 Senator Rockefeller. That is correct. But people
21 can do that work for so long, and then they may do
22 something else. But the point is, you put in place an
23 institution which will be there in the future, and of
24 high quality individuals who may change from time to
25 time, and who will change from time to time.

1 Senator Kyl. Senator Rockefeller?

2 Senator Rockefeller. Yes.

3 Senator Kyl. Other than the addition of the three
4 ex officio members, has the membership of the commission
5 changed in any way from the mark?

6 The Chairman. No.

7 Senator Rockefeller. No. It has not. Those three
8 named people are for --

9 Senator Kyl. Are added on as ex officio members.
10 I had forgotten. So the --

11 Senator Rockefeller. HRSA, CMS and HHS.

12 Senator Kyl. Right. And the other members are
13 selected how again? I've forgotten.

14 Senator Rockefeller. By the Majority Leader and
15 the Speaker, but not by them alone, I mean by them being
16 flooded with suggestions by us and others.

17 The Chairman. But appointed by the President.

18 Senator Ensign. Mr. Chairman, may I ask a
19 question?

20 The Chairman. Certainly.

21 Senator Ensign. I heard you describe I think when
22 we were doing the walk-through about this commission.
23 You compared it to the BRAC process. The BRAC process
24 was bringing in experts, a lot of it because we did not
25 have the political will to close bases.

1 The Chairman. Correct.

2 Senator Ensign. In the BRAC process though the
3 commission got set up, did its work, and then was over.

4 The Chairman. Correct.

5 Senator Ensign. Why would we need in this case to
6 continue it? Once they made the recommendations then if
7 we either decided to vote them down why would it need--I
8 guess I don't understand it is not being sunsetted.

9 Senator Rockefeller. Senator, it is because the
10 requirements of being able to reimburse people in a fair
11 and proper manner based upon a whole variety of criteria
12 continues.

13 Senator Ensign. No. I know.

14 Senator Rockefeller. But the BRAC Commission,
15 there has always been a false comparison, and the
16 Chairman made this point yesterday, that the BRAC
17 Commission they have one set of bases they are going to
18 close. It does not affect most states. Those that it
19 does affect fight mightily against it, but then we make a
20 vote, and that is that.

21 Senator Ensign: Right. The comparison I thought
22 was a fair comparison in that it was created because the
23 Congress did not have the political will because these
24 were difficult political votes. And as these would be
25 very difficult political votes, but if they came

1 basically for up or down type of votes it may be easier
2 to get a bipartisan agreement to where we say, you know
3 what, it is for the good of the country and let us do it.

4 The concept is --

5 Senator Rockefeller. That does not change.

6 Senator Ensign. Right. What I am saying, I guess
7 my question about eliminating the sunset here is that in
8 the BRAC process we had round one and we decided, you
9 know what, we need a second round. So we passed BRAC II.
10 Would it not be reasonable to do this, have this
11 commission, say, "It did work." And if it worked the
12 first time, we decided five years from now we needed to
13 do it again, why would you not just - instead of creating
14 another permanent bureaucracy, why would you not do that?

15 Senator Rockefeller. Well, we have that
16 bureaucracy. It is just that it has no authority.

17 The Chairman. I might say, you raise good
18 questions, Senator. As I heard you, it was my impression
19 that we did not know that we needed a second BRAC round.

20 But we did after we had the first round. We set it up
21 again.

22 Senator Ensign. Right.

23 The Chairman. Here we can avoid having this
24 commission make any recommendations to the Congress,
25 frankly, if we do our work.

1 Senator Ensign. I agree to that, but we know we are
2 not going to ---

3 The Chairman. Well, you know, it is up to us. It
4 is like that Pogo cartoon, look in the mirror and who do
5 you see? So we have it within our power in Congress.

6 Senator Ensign. We all understand that, but the
7 reason for the Commission is, we all understand who we
8 are.

9 [Laughter]

10 The Chairman. I don't want to go down that road,
11 but I think I understand.

12 Senator Rockefeller. In the Saint Matthew's
13 Passion Jesus said, Thou sayest.

14 The Chairman. Right. Senator Cantwell.

15 Senator Cantwell. Mr. Chairman, yes. I would like
16 to ask staff a question as it relates to the modification
17 and the language that is in the modification on a value
18 index so we are making a big change in Medicare in the
19 formula process, the calculating position of payment. Is
20 there anything in this amendment that would affect that?

21 Mr. Dawe. There is not, Senator. Under the
22 Rockefeller Amendment the Commission would still have
23 wide latitude in the types of payment reforms it could
24 recommend to Congress. Though I think you would have
25 little incentive to suggest a repeal of the Cantwell

1 Amendment because that amendment is consistent with the
2 purposes of the Commission which is to promote high
3 quality care and efficiency.

4 Senator Cantwell. So your first statement was, it
5 has no impact?

6 Mr. Dawe. That is right.

7 Senator Cantwell. Thank you.

8 The Chairman. Senator Kyl.

9 Senator Kyl. I have a question too. The
10 Chairman's mark says, and I will quote it here, "The
11 Senate Majority Leader, Speaker of the House, Senate
12 Minority Leader and House Minority Leader would each
13 present three recommendations for appointees to the
14 President; however, these recommendations in no way would
15 limit the President's ultimate responsibility to present
16 Congress with qualified nominees."

17 Does the staff read that as entitling the President
18 to ignore the recommendations made by the members of
19 Congress?

20 The Chairman. Yes. The answer is yes.

21 Senator Rockefeller. But he would be a fool to do
22 so.

23 Senator Kyl. So the President could ignore the
24 recommendations of the members of Congress, the
25 leadership of Congress, and present totally different

1 names.

2 The Chairman. Let me just jump in here. This is a
3 constitutional requirement under the charter decision.
4 The President has to make the appointments, and we really
5 in this committee have the authority to confirm, not
6 confirm, what not, the appointments. But it is true, but
7 the minority makes recommendations to the President. I
8 don't know very many Presidents who do not accept the
9 recommendation. It sometimes happens, but it is very
10 rare.

11 Senator Kyl. No, but let me be real clear. I do
12 not believe the charter decision or anything else
13 prohibits the Congress from legislating along the
14 following lines. The XYZ Commission shall be comprised
15 of 15 members, three members appointed by the Speaker of
16 the House, three members appointed by the Minority
17 Leader, two members appointed by the President of the
18 United States, etcetera. In other words, we can create
19 commissions with membership that we create or membership
20 that the President creates or combinations.

21 That is why I asked Senator Rockefeller the question
22 because --

23 The Chairman. I want to clear this point up. It
24 is a constitutional requirement because this is an
25 executive decision. These are executive branch cuts, and

1 to do that there has to be a presidential appointment.
2 That is, your commission hypothetical is fine, except
3 that would not be fine under CHOTA if that commission
4 made executive decisions.

5 Like for example, cutting Medicare reimbursements,
6 that is an Executive Branch decision.

7 Senator Kyl. Mr. Chairman, that is only true if
8 one situation pertains, and maybe the staff can respond
9 to this. The power of the purse is in the United States
10 Congress, not only is it a legislative function, it is
11 the House of Representatives that starts and then the
12 Senate and then we pass the bill on to the President. He
13 signs the bill, or he can veto it. But we appropriate
14 the money. And if you are going to cut that, that is not
15 an executive decision.

16 The Congress is the one that decides how much money
17 to spend on things. We decide each year are we going to
18 give the docs a half a percent increase or not do it or
19 whatever. That is not an executive decision. So you
20 don't need to have the President appointing with an
21 unlimited Executive power members of the commission to
22 make recommendations about what Congress ought to
23 legislate.

24 Senator Rockefeller. But it is the President
25 making appointments subject to the advice and consent of

1 the Senate.

2 Senator Kyl. You can do that, of course. But I
3 guess what I am questioning here --

4 Senator Rockefeller. No, we are doing it.

5 The Chairman. There is a vote on the floor.

6 Senator Ensign. Yes, but this needs to be cleared
7 up because we have commissions. We have all kinds of
8 commissions where we--look at the National Gaming
9 Commission that was set up. I know they did not have
10 rescission power, but --

11 The Chairman. Which has no Executive authority.

12 Senator Ensign. But what he is saying is, we have
13 the power of the purse.

14 Senator Kyl. Let me just ask this question. A
15 majority of this Congress can create a commission which
16 says that the president can individually nominate all of
17 the members of the commission. Yes, we can do that. And
18 I gather that is what Senator Rockefeller is saying we
19 are doing here.

20 The Chairman. No.

21 Senator Rockefeller. No.

22 The Chairman. No. With the advice of Congress.

23 Senator Kyl. Congress eventually will either
24 approve or disapprove the nominees, but it is the
25 President alone who has the authority to present the

1 names to Congress.

2 The Chairman. Correct.

3 Senator Ensign. By the way, it does not say advise
4 and consent in this. Advise and consent, if we decide
5 not to approve the Secretary of State --

6 The Chairman. I will underline the mark. I am
7 sorry I am being a little quick, underline it.

8 Senator Ensign. I know. But if the Secretary of
9 State, if the Congress says, We do not approve him, that
10 person does not get approved. That is advise and
11 consent.

12 In this case, the President can ignore our
13 recommendation. It was just cleared up.

14 The Chairman. Still have to confirm.

15 Senator Rockefeller. You have the order reversed.
16 We confirm after he appoints.

17 Senator Kyl. Understood. By Mr. Chairman, you were
18 saying that the law or the CHOTA decision required us to
19 structure it this way. I am saying that is not correct,
20 that you --

21 The Chairman. No, I do not think you are accurate.

22 Senator Kyl. Well, are there any lawyers on the
23 staff who can verify that this is the only way we can do
24 it?

25 The Chairman. Yes. There are lawyers on the staff

1 that can verify that.

2 Senator Kyl. Would any of them like to volunteer
3 an answer to the question?

4 The Chairman. If you will just wait one minute we
5 will get the lawyer who will verify that.

6 [Laughter]

7 Senator Rockefeller. I can read it to you.

8 The Chairman. All right. Mr. Dauster, can you
9 explain the requirements under Trotta.

10 Mr. Dauster. In the decision of Bowsher versus
11 Synar. I have never been on this side. In the decision
12 of Bowsher versus Synar the Supreme Court held that the
13 comptroller general could not make the automatic, across-
14 the-board cuts in the Gramm-Rudman Law because Congress
15 had the ability to remove the comptroller general from
16 office.

17 This is an analogous situation because this
18 commission will have the authority to make cuts unless
19 Congress passes a law to stop those cuts from going into
20 effect. So for this commission to be constitutional the
21 President has to have the authority to appoint.

22 Now this mark will also involve Congress both in the
23 suggestion of nominees to the Commission as well as in
24 the confirmation process thereafter.

25 Senator Kyl. Might I just? The comptroller could

1 not do it because Congress could remove him?

2 Mr. Dauster. That is right.

3 Senator Kyl. All right. And so what you are
4 saying here is that even though the individuals on this
5 commission would be appointed by the President, how is
6 the comptroller of the currency put into office?

7 Mr. Dauster. He is also appointed by the
8 President, removable by Congress.

9 Senator Kyl. All right. So the difference is that
10 he is removable by Congress; these individuals would not
11 be?

12 Mr. Dauster. That is right. It is a fortiori, a
13 lesser included case.

14 Senator Kyl. I know what a fortiori means. But
15 what I don't understand is why, whether they are
16 removable or not that that affects whether or not the
17 President has to appoint all members of the commission
18 and none can be appointed by the Congress.

19 Mr. Dauster. The Supreme Court in Bowsher versus
20 Synar, which followed in the wake of --

21 Senator Kyl. But that is not a case where the
22 members of -- see, the Congress is not making
23 appointments in that case.

24 Mr. Dauster. The objection in Bowsher versus Synar
25 that the Supreme Court had under the Separation of Powers

1 doctrine was that Congress was too involved in Executive
2 Branch decision of how to make these across-the-board
3 cuts. And that is why they ruled the first Gramm-Rudman-
4 Hollings unconstitutional. We responded in Congress in
5 1987 by granting power to OMB to make those cuts, and we
6 have done an analogous --

7 The Chairman. All right. I think that clears it
8 up.

9 Senator Kyl. Yes, right.

10 The Chairman. We are going to vote. We are going
11 to vote. All those in favor --

12 Senator Kyl. Whoa, Mr. Chairman. I had one other
13 thing.

14 The Chairman. I'm sorry, but we are going to vote.
15 I am going to call a vote. All those in favor -

16 Senator Kyl. Mr. Chairman, I object to the calling
17 of the vote on this.

18 The Chairman. All those in favor of the
19 modification --

20 Senator Kyl. Mr. Chairman, I ask for a roll call
21 vote.

22 The Chairman. Roll call vote is requested. Okay.
23 We'll call the roll.

24 The Clerk. Mr. Rockefeller?

25 Senator Rockefeller. Aye.

1 The Clerk. Mr. Conrad?
2 The Chairman. Aye by proxy.
3 The Clerk. Mr. Bingaman?
4 Senator Bingaman. Aye.
5 The Clerk. Mr. Kerry?
6 Senator Kerry. Aye.
7 The Clerk. Mrs. Lincoln?
8 Senator Lincoln. Pass.
9 The Clerk. Mr. Wyden?
10 Senator Wyden. Aye.
11 The Clerk. Mr. Schumer?
12 Senator Schumer. Aye.
13 The Clerk. Ms. Stabenow?
14 Senator Stabenow. Aye.
15 The Clerk. Ms. Cantwell?
16 Senator Cantwell. Aye.
17 The Clerk. Mr. Nelson?
18 Senator Nelson. Aye.
19 The Clerk. Mr. Menendez?
20 The Chairman. Aye by proxy.
21 The Clerk. Mr. Carper?
22 The Chairman. Aye by proxy.
23 The Clerk. Mr. Grassley?
24 Senator Grassley. Pass.
25 The Clerk. Mr. Hatch?

1 Senator Hatch. No.

2 The Clerk. Ms. Snowe?

3 The Chairman. Aye by proxy.

4 The Clerk. Mr. Kyl?

5 Senator Kyl. Pass.

6 The Clerk. Mr. Bunning?

7 Senator Bunning. No.

8 The Clerk. Mr. Crapo?

9 Senator Crapo. Pass.

10 The Clerk. Mr. Roberts?

11 Senator Roberts. Pass.

12 The Clerk. Mr. Ensign?

13 Senator Ensign. Aye.

14 The Clerk. Mr. Enzi?

15 Senator Enzi. Pass.

16 The Clerk. Mr. Cornyn?

17 Senator Cornyn. No.

18 The Clerk. Mr. Chairman?

19 The Chairman. Aye. Senator Lincoln?

20 Senator Lincoln. Aye.

21 The Chairman. The clerk will tally the vote.

22 The Clerk. Mr. Chairman, the final tally is 15

23 ayes, three nays and five passes.

24 The Chairman. The amendment passes. I apologize

25 to the committee. Look at the clock back there. I

1 thought I saw five lights. I thought they were in the
2 middle of a vote. But we are not. The vote has not been
3 called.

4 Who seeks recognition?

5 Senator Grassley. Do you want me to do my
6 modification?

7 The Chairman. All right. Why don't you go ahead.
8 Fine.

9 Senator Grassley. Mr. Chairman, remember last
10 night in regard to Amendment C-9 I asked to put it off to
11 see if we could work out something because it was
12 creating mixed emotions on both sides of the aisle, and
13 so I put it off with hopes that we could work out a
14 compromise.

15 We have not worked out a compromise, but I am going
16 to offer a modification of C-9. In other words, less
17 money from people who are helped above 300 percent of
18 poverty and then there would obviously be less resources
19 to help in the case of pediatricians and children's
20 hospital, etcetera, under the program.

21 So I will go through and explain it. It provides
22 the original amendment provided an additional 40 billion
23 dollars in payments to providers. It was paid for by
24 reducing the subsidy in the bill by a little less than 10
25 percent. My amendment was supported by the American

1 Academy of Pediatrics, the National Association of
2 Children Hospitals, and other pediatric groups. The
3 debate ended last night with a suggestion of working it
4 out.

5 Some time after midnight I had my staff make a
6 compromise offer with which I am modifying my amendment.
7 We can provide \$10 billion in grants to states to provide
8 additional payments to pediatric providers and in return
9 all we have to do is reduce subsidies to people above 300
10 percent of poverty. That \$40 billion now becomes \$10
11 billion and almost 10 percent, a little less than 10
12 percent now becomes 2 percent.

13 I know it is still a tough choice for some people,
14 but this bill is of course about making tough choices.
15 We all know there are limited resources. We have to pay
16 for the bill. We have to bend the growth curve. When
17 you write a bill like this the trade-offs lead to some
18 tough choices. Our Group of Six was not able to reach an
19 agreement on all these tough choices. And I know some of
20 you were extremely critical of Chairman Baucus for tough
21 choices he made in the bill up to this point. It is easy
22 to sit outside and criticize when you do not have to make
23 tough choices.

24 So this amendment gives us all an opportunity to
25 make tough choices on the record. There are 30 million

1 kids who could benefit from improved Medicaid access.
2 There are only 1.5 million people who would benefit from
3 subsidies above 300 percent of poverty. But to remind my
4 colleagues, that is \$66,000 a year for a family of four
5 all the way up to \$88,000 a year.

6 So the question kind of comes that is before us with
7 my amendment as modified. Do you vote so that kids of a
8 single mom making minimum wage can see a doctor, or do
9 you vote to provide subsidies to a family of four making
10 anywhere from \$66,000 to \$88,000 a year?

11 So 30 million or more kids in poverty getting access
12 versus 1.5 million people with income above the national
13 median getting a subsidy.

14 So that is my amendment. I hoped that it would be
15 considered a good faith effort by reducing to 25 percent
16 what I was originally attempting to accomplish.

17 The Chairman. Senator Stabenow.

18 Senator Stabenow. Thank you, Mr. Chairman. As I
19 indicated when the distinguished Ranking Member brought
20 this up before, I am very sympathetic to what he is
21 trying to do, and I am very supportive of what you are
22 trying to do. My concern is once again we are going
23 after middle income families that in this economy are
24 having a hard time making it, and this takes away tax
25 credits for middle income families.

1 And so I would love to work with you to find another
2 way to be able to do this because I absolutely agree with
3 what is being proposed and appreciate the hard work of
4 the ranking member. But at the same time for a me again
5 we are going right to middle income families, and I think
6 we should also be concerned about what is happening for
7 them across the country.

8 And so this is not a paid-for that I can support.

9 The Chairman. Any further discussion?

10 Senator Grassley. I would ask for a roll call vote.

11 The Chairman. Okay. As Senator Grassley said,
12 this is a touch choice. This is a very, very, very tough
13 choice. I mean, do we give a little more to kids--the
14 kids are doing pretty well--and take it away from middle
15 income folks, middle income kids, or not? I certainly
16 want to help kids even more than we are, but I don't want
17 to take it away from middle income families. So I very
18 reluctantly have to oppose the amendment. The Senator is
19 requesting a roll call vote. Go ahead and call the roll.

20 Senator Grassley. Please.

21 The Clerk. Mr. Rockefeller?

22 Senator Rockefeller. No.

23 The Clerk. Mr. Conrad?

24 Senator Conrad. Pass.

25 The Clerk. Mr. Bingaman?

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

1 The Clerk. Mr. Kyl?
2 Senator Grassley. Aye by proxy.
3 The Clerk. Mr. Bunning?
4 Senator Bunning. Aye.
5 The Clerk. Mr. Crapo?
6 Senator Grassley. Aye by proxy.
7 The Clerk. Mr. Roberts?
8 Senator Grassley. Aye by proxy.
9 The Clerk. Mr. Ensign?
10 Senator Grassley. Aye by proxy.
11 The Clerk. Mr. Enzi?
12 Senator Grassley. Aye by proxy.
13 The Clerk. Mr. Cornyn?
14 Senator Grassley. Aye by proxy.
15 The Clerk. Mr. Chairman?
16 The Chairman. No.
17 The Clerk. Mrs. Lincoln?
18 Senator Lincoln. No.
19 The Chairman. Senator Wyden is no by proxy.
20 The Clerk. Mr. Conrad?
21 Senator Conrad. No
22 The Chairman. The clerk will tally the vote.
23 The Clerk. Mr. Chairman, the final tally is 10
24 ayes and 13 nays.
25 The Chairman. The amendment fails.

1 Next amendment. Who would like to offer an
2 amendment?

3 Senator Grassley. Can I ask a question of the
4 Chairman on procedure? We have a lot of votes coming up
5 here. I assume he wants the committee working today. Is
6 he going to work Friday, Saturday, Sunday? Or when are
7 we going to--I go to Iowa every weekend. If I don't have
8 a weekend obviously I can't go to Iowa.

9 [Laughter]

10 Senator Stabenow. Mr. Chairman, that sounds like a
11 country song.

12 [Laughter]

13 The Chairman. We are going to work after these
14 votes late into the evening and tomorrow. We will recess
15 where we are.

16 Senator Grassley. Well, it is pretty hard to make
17 plane reservations if you --

18 The Chairman. You could make them.

19 [Laughter]

20 Senator Grassley. They have a limit of two you can
21 make on each airline.

22 The Chairman. All right. Who would like to offer
23 an amendment?

24 Senator Grassley. Are you leaving at 2:00
25 tomorrow?

1 [Laughter]

2 The Chairman. No. Reminds me of a good Russell
3 Long story which I will not repeat.

4 All right. Other amendments?

5 Senator Kerry. Mr. Chairman, I have an amendment,
6 but I can't do it quite yet because I am waiting for some
7 additional data on it. I'm happy to do it later in the
8 evening if that is helpful to you.

9 The Chairman. We have two amendments, but
10 unfortunately the sponsors are not present. Do we have
11 others that have sponsors present? We are working on it.

12 Here is a good chance to --

13 Senator Lincoln. Mr. Chairman.

14 The Chairman. Yes, Senator Lincoln.

15 Senator Lincoln. May I ask, I guess you know that
16 Senator Cantwell be added to my amendment C-3.

17 The Chairman. Without objection.

18 Senator Lincoln. Thank you.

19 Senator Kerry. How many amendments do we have
20 left, Mr. Chairman?

21 The Chairman. Apparently not very many. Nobody
22 wants to offer any.

23 Senator Grassley. Well, can I take it? If you are
24 not going to offer an amendment, can I take an
25 opportunity to ask, I'm really asking the Chairman a

1 question, but I don't expect him to answer without some
2 clarification from staff on this. So could I proceed?

3 The Chairman. Sure. Why don't you ask staff?

4 Senator Grassley. Well, but I would like to have
5 you join in this.

6 The Chairman. All right.

7 Senator Grassley. I seek a clarification with
8 respect to the intent of one particular portion of the
9 mark before us. As I understand it the bill would allow
10 for insurance plans called National Plans in the mark to
11 be established. These national plans would be insurance
12 plans established by private insurance companies, and
13 these plans would be allowed to be sold across state
14 lines in all 50 states. These plans would preempt state-
15 enacted benefit mandate laws and related consumer and
16 provider protections.

17 However, as I understand it with respect to the
18 minimum set of uniform benefits and services to be
19 included in these plans, these plans would have to meet a
20 new set of federal standards that would be determined by
21 the National Association of Insurance Commissioners.

22 Again as I understand it, the National Association
23 of Insurance Commissioners develop standards in terms of
24 what services and benefits are to be included in the
25 National Plans and are supposed to reflect whether a

1 particular service or benefit is available in a majority
2 of states. Like in other words, there has to be 26
3 states.

4 In other words, if a particular provider's service
5 or benefit is available to consumers in 26 or more
6 states, by virtue of some forms of state enacted mandates
7 or consumers or provider protection, then those benefits
8 and services are supposed to be covered and available as
9 part of a minimum benefit package in all of the national
10 plans established under the bill.

11 Is this the clear intent of the Chairman's mark?
12 And let me say why I am asking, because it is a national
13 issue. But one of these professions that some states
14 mandate, and I think 46 states do, was started in my
15 state and very much a concern of people in my state.

16 So who can answer that?

17 The Chairman. Yvette?

18 Ms. Fontenot. Yes, sir.

19 Senator Grassley. I hope it is as simple as yes or
20 no.

21 Ms. Fontenot. Well, the marks of taking into
22 consideration how each benefit is offered in a majority
23 of states. So is your question whether anything mandated
24 in more than 26 states would be mandated on the national
25 plan?

1 Senator Grassley. Yes.

2 Ms. Fontenot. I don't think it specifically says
3 that it would be mandated in the national plan because it
4 says "develop standards as to how the benefit category
5 should be implemented, taking into consideration how each
6 benefit is offered in a majority of states." But it does
7 not necessarily mandate them to include that as part of
8 their model for benefit coverage.

9 Senator Grassley. Well, then are you telling me
10 that in for instance the case of chiropractors that if
11 they are mandated in 46 states that they are not
12 necessarily assured of being included assuming the
13 National Association of Insurance Commissioners include
14 them? They would not be automatically included then in
15 the national plans?

16 Ms. Fontenot. Yes. I believe that is correct. It
17 leads to the discretion of the NAIC that definition,
18 taking into consideration those benefit mandates that are
19 more than 26 states. So I do not believe it would
20 require --

21 Senator Grassley. So we would have to assume that
22 if it was in that many states that it might be foremost
23 in consideration of being mandated, but it would not have
24 to be.

25 Ms. Fontenot. I assume that is right. If it was

1 that many states, it would more than likely be mandated.

2 Senator Grassley. I don't know about, I may want,
3 if that is true, Mr. Chairman, and you agree with what
4 she said, then someplace along the line I think I want to
5 clear up some of these things in regard to what is
6 mandated.

7 The Chairman. What would you have in mind?

8 Senator Grassley. Oh, I guess I would have in mind
9 that if--I thought the intent of it was that if a
10 majority of the states had it, you assumed that a
11 majority of the commissioners would recommend it be
12 included that it would be included. That is what I had
13 thought. I want to make it clear, that you and I have
14 never had any discussion on this.

15 The Chairman. That is right.

16 Senator Grassley. So this may be something that we
17 haven't given enough consideration to.

18 The Chairman. Well, that is a very good point.
19 Frankly, it is a little vague because there are views on
20 both sides of that coin, how much to be in the national
21 plan, how many of the state mandates be include and how
22 many not. And we are going to have to address that
23 somehow.

24 Senator Kerry?

25 Senator Kerry. Is he finished?

1 Senator Grassley. I'm done.

2 Senator Kerry. Well, I am prepared to call up an
3 amendment then, Mr. Chairman. I'm not sure I want to
4 vote on it, but I do want to call it up and have some
5 discussion about it. It's Amendment Number 226 C-1.

6 The Chairman. 226 C-1.

7 Senator Kerry. It is co-sponsored by Senators
8 Bingaman and Schumer. What the amendment would do is
9 strike the free rider provisions in the Chairman's mark
10 and replace it with an employer mandate. I am very
11 confident, Mr. Chairman, that if this committee doesn't
12 embrace this we are going to have this debate on the
13 floor of the Senate. This amendment is based on what was
14 put into the HELP Committee's final product.

15 I offer this amendment because I have concerns,
16 shared by many, many people, about the free rider
17 provision that is in the mark. And one of the things I
18 am particularly concerned about is that the free rider
19 provision actually winds up inadvertently discriminating
20 against low-income workers.

21 And it does this because it sets up a penalty, a
22 free rider fee as it is called. It will cause employers
23 to consider who they are hiring and their income level.

24 Now the mark that you have, Mr. Chairman,
25 appropriately I believe, includes an individual mandate.

1 But it does not include an employer mandate. So you
2 have designed this free rider fee which applies to
3 employers with more than 50 employees who do not offer
4 health insurance. And under the mark those employers
5 would be required to pay a fee for each employee who
6 receives a tax credit for health insurance through the
7 exchange.

8 The fee is capped at an amount equal to \$400
9 multiplied then by the total number of employees in that
10 firm.

11 What my amendment does is it strikes the free rider
12 fee, replaces it with an employer mandate. For an
13 employer that does not offer coverage, there would be an
14 excise tax of \$750 for each full-time employee and \$375
15 for each part-time employee. And the first 25 employees
16 are exempt from this provision, so we are not talking
17 about the smallest of small businesses.

18 I used to chair the Small Business Committee working
19 very closely with Senator Snowe. We worked hard for many
20 years to try to get some kind of an expanded pool for
21 small business to purchase health insurance.

22 And I am fully cognizant of the difficulties of the
23 small business operating under a mandate obviously. But
24 exempting small firms with less than 25 employees really
25 works. And I will speak more about that in a moment.

1 The amount of the excise fee would be prorated with
2 respect to each month that an employee is without
3 coverage. So it is not an automatic full-fledged fee
4 simply because we know 86 million Americans did not have
5 coverage for a certain period of time. It is prorated
6 according to the period of time that they would not have
7 that coverage.

8 And the amount of the excise would be adjusted to
9 the CPI beginning in 2013, so we have a fair amount of
10 time for people to make plans before this would take
11 effect.

12 Now why do this? Well, if we are requiring
13 individuals to be covered, we also have to address the
14 other side of the equation. And I think you have got to
15 require employers to offer insurance.

16 Let me just say, we have more than 160 million
17 Americans who currently get their health insurance from
18 an employer. We decided during the course of our work at
19 the Library of Congress and through the issuance of the
20 Chairman's white paper on health care reform, that the
21 employer-based health insurance system in America is the
22 cornerstone of our health care system.

23 And so we want to preserve and build upon it. That
24 is a fundamental and philosophical decision that we made
25 approaching health care reform.

1 But the truth is, employer insurance is eroding. As
2 costs increase, more employers are dropping coverage and
3 shifting costs to workers. And so you cannot go to one
4 of these town halls and ask your constituents, "Have you
5 had your benefits cut or have you had your premiums go up
6 or your co-pays go up?" without an affirmative answer to
7 every single one of those questions.

8 And the average premium for job-based health
9 insurance has more than doubled in the last decade. And
10 everybody is feeling the pain of this--the employer, the
11 employee, and the entire system that has to pick up those
12 people when they get dropped.

13 And what happens is, that cost of picking them up
14 when they get dropped or don't have coverage in the first
15 place gets distributed in a completely haphazard, unfair,
16 cost-shifting process that takes place within the health
17 care system. You pick up some of it in Medicare, you
18 pick up some of it in Medicaid, you pick up some of it
19 obviously in the private premiums that people pay in
20 their health insurance.

21 And mostly companies pick it up. If you are a
22 corporation, you wind up paying for it at the back end in
23 a far less efficient way than if you were in fact
24 covering people up front. The fact is that employers who
25 cover their workers now are unfairly shouldering the

1 burden of higher premiums for other workers who cannot
2 get insurance through their jobs.

3 It actually adds \$1,100 to the cost of premiums for
4 everybody else. So people who have insurance today are
5 paying a higher premium to the tune of \$1,100 because we
6 don't effectively share these costs throughout the
7 system.

8 And as we think about this, we ought to think about
9 it in the context of insurance. Insurance is a hedge
10 against something happening. That is not in effect what
11 we do in the health care system. We spread costs highly
12 inefficiently. In fact, the insurance fees that are
13 charged to OB-GYNs, brain surgeons, other specialists are
14 much higher than everybody else in the system because we
15 do not even spread those fees throughout the whole
16 system.

17 If you are a homeowner in America, your homeowner
18 fees are spread actuarially throughout the whole system,
19 risk against theft, risk against burning down, etcetera.

20 And every homeowner's fees are basically set on that
21 basis. Same thing for car insurance. It is legitimate
22 insurance, and everybody pays the fee.

23 We do not do that in the health care system. It is
24 not really insurance in that sense.

25 So what our legislation says is, if you cover your

1 workers we want to make it more affordable for you to be
2 able to do so. If you do not cover your workers, then
3 you have to pay part of the cost of providing them with
4 decent insurance.

5 And what we call this is "shared responsibility."
6 It is embraced in the concept of a free rider fee, but I
7 think not in a way that is going to provide the kind of
8 certainty and the breadth of coverage and the strength to
9 the employer provided system that the country needs.

10 Without this requirement, I am convinced that more
11 employers are going to end their coverage. And we are
12 going to increase the prices of health insurance in
13 America. With this modest requirement, \$750 for a full-
14 time worker, \$375 for a part-timer, you can keep
15 employers in the system and you can save money for
16 everyone.

17 Now why do I say that? Because it is precisely what
18 we are doing in Massachusetts today. I have a letter
19 here from Michael Widmer, the president of the
20 Massachusetts Taxpayers Foundation, which is an entity
21 that has historically in Massachusetts always come down
22 on the side of protecting against budget deficits, and
23 against wasted money. It is the watchdog of tax
24 expenditures. And they signed on to this.

25 Alan MacDonald, the executive director of the

1 Massachusetts Business Roundtable--representing the
2 business interests in our state, signed on to this. Paul
3 Guzzi, the president and CEO of the Greater Boston
4 Chamber of Commerce, our Chamber of Commerce signed on to
5 this. And finally, Richard Lord, the president and CEO
6 of the Associated Industries of Massachusetts.

7 And here is what they say to us. "Our four groups
8 wanted to take the opportunity to express our strong
9 support for health reform in Massachusetts. We view the
10 landmark legislation and its successful implementation as
11 a competitive advantage for our state. As you know, our
12 reform is based on the principle in reality of shared
13 responsibility among all parties including employers,
14 consumers and the government.

15 "The key to the law of success is the combination of
16 the individual mandate and broad employer mandate as well
17 as public subsidies for those who cannot afford coverage.
18 In addition, in order to care for the small number of
19 individuals who do not have health insurance, employers
20 who do not provide a minimum level of coverage are
21 assessed an annual fee of \$295 per employee. Since
22 reform, an additional 148,000 individuals have enrolled
23 in employer coverage, in most cases those who had
24 previously declined an employer offer.

25 "This has been an important element in achieving

1 near universal coverage in Massachusetts in a short
2 period of time."

3 And I would say, Mr. Chairman, the mark includes a
4 penalty of \$750 for individuals between 100 percent and
5 300 percent of the poverty level and \$950 for individuals
6 above 300 percent of the poverty level. So the penalty
7 for families above 300 percent of the poverty level is
8 \$1,900. We are penalizing families, and we are not
9 sharing the responsibility in asking employers to
10 strengthen what has worked for 160 million Americans. I
11 think we can do better than that. I think an employer
12 mandate is easier to administer than a free rider
13 approach because the free rider approach requires
14 employers to provide state officials with a regular
15 process of information and that is paperwork and time and
16 cost.

17 I think it is far more effective to provide the
18 insurance and strengthen the whole system.

19 The Chairman. Senator, there is a series of votes.

20 Senator Kerry. My timing is impeccable.

21 The Chairman. We have two minutes left on the first
22 vote.

23 Senator Kerry. Well, I have spoken on my amendment,
24 Mr. Chairman. I appreciate you listening.

25 The Chairman. Are you going to withdraw?

1 Senator Kerry. I think Senator Bingaman might want
2 to speak to this.

3 The Chairman. Well, we're not going to return until
4 about 7:00 because we have a whole slew of votes. So we
5 will reconvene at 7:00.

6 Senator Kerry. Thank you, Mr. Chairman. I
7 appreciate it.

8 The Chairman. Are you intending to withdraw when we
9 get back?

10 Senator Kerry. My intention is to have this debate
11 on the floor of the Senate.

12 The Chairman. Okay. That is an oblique way of
13 saying yes. All right.

14 You may recess until 7:00.

15 [Whereupon, the hearing was in recess at 5:16.]

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AFTER RECESS

[7:16 p.m.]

The Chairman. The committee will come to order. The first amendment received here this evening will be that offered by Senator Nelson. I think it is regarding OIG.

Senator Nelson. Yes, sir. Thank you, Mr. Chairman.

Under Medicare Part D, the Medicare Trust Fund provides drugs of course for low income seniors. Prior to the creation of Part D, a lot of this is the same commentary that we went through earlier in me describing a previous amendment, the one on the rebates.

What I would like to do is to have the Inspector General at the Department of Health and Human Services to study how --

The Chairman. Senator, as I understand it, this is Amendment D3, is that correct?

Senator Nelson. Yes, sir.

The Chairman. For everybody's information. Okay. Thank you.

Senator Nelson. Nelson D3.

The Chairman. Nelson D3.

Senator Nelson. Yes, sir. What it would be is a report by the Inspector General at the Department of

1 Health and Human Services to study how much Medicare and
2 Medicaid are actually paying for the prescription drugs
3 so we get specific data.

4 It will certainly help us understand the impact that
5 the drug prices are having on both our taxpayers as well
6 as seniors and knowing how much Medicare pays for drugs
7 compared to Medicaid it seems to me is an important step
8 to helping bring down unnecessarily high health care
9 costs for seniors as well as for taxpayers. That is what
10 it is. It is a study.

11 The Chairman. Is there any discussion on the
12 amendment? Senator, as I can tell this is a study and I
13 see no problem. I urge us to accept the amendment.
14 Seeing no objection, the amendment is agreed to.

15 Okay. Other amendments. I do not see it here. The
16 list I have here, I do not know if they want to offer
17 them as Ed Schumer, Puerto Rican territories -- hospice
18 provision. Also another amendment potentially offered by
19 Senator Wyden, a Bingaman amendment -- the index,
20 amendments, two of them -- strike state compacts. Do you
21 want to do that now or later?

22 Okay. Let us do it. Strike state compacts. What
23 number is that? Is that C1, Senator? Thank you.

24 Senator Nelson. Yes. It is C1. Just a second.
25 Okay. Now, here is aside from the issue, Mr. Chairman

1 and members of being able to form larger pools for the
2 health insurance exchange.

3 Let us assume that a state is a small state, and of
4 course to get the principle of insurance working for you,
5 you want to get as many lives in the insurance pool, and
6 so if it is a small state, you want to get several states
7 put together to have that option. That is a good thing
8 so that you have got millions of lives instead of a few
9 hundred thousand that you are spreading the health risk
10 across in order to get your greater economies of scale
11 and to have the principle of insurance over millions of
12 lives that will be both young and old and sick and well.
13 You bring the cost of that insurance down.

14 But there is another consequence of the way the bill
15 is written that I do not know if it is intended or not.
16 I hope it is not intended because if it is, it is a
17 subterfuge to get around the state insurance regulator
18 being able to require in a particular state the things
19 that that state requires in health insurance.

20 So if we had state A and B under the way the bill is
21 written and I hope it is unintentional, if State A had
22 lots of things that it required in its health insurance
23 policies such as a woman could not be kicked out of the
24 hospital earlier than 48 hours after she had given birth,
25 if that is what State A wants, but if State B did not

1 have that requirement and under the way the bill is
2 written, if you had this compact, State B could sell the
3 health insurance policies in State A and State B's
4 requirements would take effect.

5 I do not think that is what we want to do. We do
6 not want to do that, for example, on a second surgical
7 opinion. We do not want to do that on rehabilitative
8 services. Mind you, there are seven states that require
9 rehabilitative services. There are only 16 of the 50
10 states that require prosthetics. What happens if that
11 state married up with another state that did not require
12 that?

13 What about mastectomy minimum stay? A woman has a
14 mastectomy. She is in a state that requires a minimum
15 amount of time before she can be kicked out of the
16 hospital. They marry up in this consortium with another
17 state that does not require that but that other state
18 then starts selling the insurance into that state with
19 that required minimum stay. That lady who just had the
20 mastectomy is not protected as her state law would
21 require.

22 I do not think we want to do this and I do not think
23 it is good policy. I think it is unintentional. I hope
24 it is not intentional in the way the bill is written and
25 that is what the amendment C1 that I have offered will

1 correct.

2 Senator Bingaman. Mr. Chairman, if I may?

3 The Chairman. Senator Bingaman?

4 Senator Bingaman. Can I just ask Staff, I do not
5 know who the right person is to ask. But the way this
6 is, I cannot find the language in the mark here that we
7 are striking, but my impression was that all this did was
8 to say that states could in their own choosing enter into
9 compacts if they wanted to.

10 It was not us overriding any state law or it was not
11 us saying that a state had to in any way defer to the law
12 of another state. It was giving states the option to
13 make that judgment themselves if they wanted to.

14 Could you explain how the underlying mark would work
15 as we intended as the Chairman's mark intends it?

16 Ms. Fontenot. Sure, Senator. It is on the bottom
17 of page 12 of the mark. It is called interstate sale of
18 insurance.

19 The expectation of the provision is that the states
20 would have to agree to enter into a health care choice
21 compact. Once they had agreed to do that, the insurance
22 policies would only be subject to the laws and
23 regulations of the state where the policy is written.

24 So in other words, to Senator Nelson's point, if
25 there is State A and State B and they have agreed to

1 enter into a compact, both states have agreed --

2 Senator Bingaman. Now, when you say both states
3 have agreed, does that mean the legislature of the state
4 has agreed and the Governor signed the bill?

5 Ms. Fontenot. We do not specify the process the
6 state has to go through in order to enter into an
7 agreement.

8 Senator Nelson. And if the Senator will yield,
9 that is a very important point because you could have the
10 two Governors or you could have the two insurance
11 commissioners agree, but the law of the state passed by
12 the legislature and signed into law says that that lady
13 is entitled to stay 48 hours in the hospital before she
14 is kicked out after having a child or after having a
15 mastectomy.

16 Senator Bingaman. But I assume that if the state
17 law says that, then it would be illegal for the
18 Superintendent of Insurance to go sign an agreement
19 saying that does not apply.

20 Ms. Fontenot. I think you are right. I think there
21 would have to be some sort of action by the legislature
22 to overturn the law to allow the state to enter into --

23 Senator Bingaman. The state legislature would have
24 to pass a new law saying, notwithstanding anything else
25 that we might have passed, the Commissioner of Insurance

1 has the authority to sign up and have it governed by
2 someone else's laws instead of our own laws which I do
3 not think many legislatures would do.

4 I do not know that, I guess my honest opinion is I
5 do not think that states would take advantage of this.
6 Or if they did, it would be because the state legislature
7 in its wisdom decided this made sense for the state and
8 the Governor agreed and signed the bill. If that is the
9 case, then I do not know if we should stand in the way.

10 Senator Nelson. Mr. Chairman, may I ask the Staff
11 a question?

12 The Chairman. Senator Nelson?

13 Senator Nelson. Where in the way the bill is
14 drafted does it give the specifics that would protect
15 against one state administrative apparatus agreeing with
16 a compact with another state and therefore there would be
17 no check and balance that they would have to obey law?
18 Where does it say that that they would have to obey the
19 state law?

20 Ms. Fontenot. Well, again, in the provisions on the
21 bottom of page 12 on the mark, as I said, we did not
22 specify the process that the state has to go through in
23 order for there to be assumed agreement.

24 I think Senator Bingaman's point was that it seems
25 unlikely the first state to agree to that would be able

1 to agree to not abide by their own laws without action by
2 their legislature. But it is not specified in here, you
3 are correct.

4 Senator Nelson. Well, it would not be the first
5 time that administrative executive branch of government
6 had tried to circumvent the law. I think that this is a
7 potential hole that you could drive a truck through and
8 perhaps with some kind of perfecting language, Mr.
9 Chairman, or accompanying report, something to clarify
10 here so that we do not have an unintended consequence
11 here.

12 Senator Kerry. Mr. Chairman?

13 The Chairman. Senator Kerry?

14 Senator Kerry. I just want to underscore what
15 Senator Nelson is saying. I agree with him.
16 Particularly in our state this would be fairly harmful
17 because we have fairly high standards and this would
18 allow people to opt out and get into lower standard
19 situations.

20 So I think that the Senator is correct. I think
21 that his solution may be the correct way if we could try
22 to work through it.

23 The Chairman. I am not sure what solution the
24 Senator has in mind.

25 Senator Nelson. Well, let me just say that you

1 know, a lot of these protections requirements in law take
2 years to put into law, and this could be eliminated in
3 one fell swoop by an administrative decision. I do not
4 think you intend to do that.

5 Senator Kerry. There is another possible
6 correction. I remember when Senator Snowe and I were
7 struggling as I mentioned earlier with small business
8 issues, we wanted to create compacts and we were looking
9 at the various health associations that you might be able
10 to create.

11 You get into cherry picking issues to some degree,
12 as part of the problem depends on different state benefit
13 standards. But more importantly, states like
14 Massachusetts can have a fairly high set of benefit
15 requirements to cover preventive visits such as prostate
16 exams or mammograms. We have pretty high standards and
17 we like them. Allowing states to enter into a compact
18 with another state that has a totally different
19 structure, you begin to find people migrating to the
20 place where, or pressured to the place of the lowest
21 common denominator.

22 So if you put in that you are going to have the
23 highest standard apply in the compact, that may be one of
24 the best ways of carrying it, I think. I see a few heads
25 nodding. I do not know. Do some of the experts want to

1 comment on this about the cherry picking and the
2 consequences? Ms. Fontenot?

3 Ms. Fontenot. I think the possibility of cherry
4 picking back when the discussion was around association
5 health plans was higher than it is now that we have
6 proposed federal rating rules.

7 So in a world where there are no federal rating
8 rules, then I think you are absolutely right.

9 Senator Kerry. We have high rating bonds, too. I
10 do not think federal reform will get as high as we are in
11 some of those areas.

12 Ms. Fontenot. That is right. And there are a
13 handful of states that are more protective than the rules
14 we are talking about, which comes back to the state
15 actually having to agree to not have this plan abide by
16 those rules.

17 The Chairman. Just a question if I might, Senator.
18 Would you be amenable to withdrawing your amendment and
19 place that action, we amend the mark, sort of legislative
20 approval is required for a state to get into a compact.

21 Senator Nelson. By law. Legislative approval
22 signing into -

23 The Chairman. Yes.

24 Senator Nelson. I think that would be a reasonable
25 fix.

1 The Chairman. Let me ask other Senators what they
2 think of that.

3 Senator Ensign. Mr. Chairman? The only comment I
4 would make on it, first of all if you did have that, it
5 would be pretty unlikely Massachusetts would enter into
6 any kind of a compact with another state.

7 However, just from this Senator's perspective, I
8 actually think an individual if they decide they want to
9 go to a different state, they want to go to Connecticut
10 and buy a plan because that meets their needs that they
11 should have the freedom, let me emphasize that word,
12 freedom to choose.

13 It is a conscious decision that they make as an
14 adult citizen of the United States to choose the kind of
15 insurance they want. If they want a series of 42
16 mandates in a state, they want to buy a plan that meets
17 kind of their desires that they have that they want to
18 take the risk in certain areas and not in other areas, it
19 seems to me that they should have the freedom to be able
20 to do that.

21 Senator Conrad. Mr. Chairman?

22 The Chairman. Senator Conrad?

23 Senator Conrad. Mr. Chairman, when I read the
24 language of what is in the mark, here is what I see.
25 Senator Nelson, maybe you can help me understand what is

1 wrong with this.

2 Compacts shall provide that the state where the
3 consumer lives maintains authority to address market
4 conduct, unfair trade practices, network adequacy and
5 consumer protection standards including addressing
6 disputes as to the performance of the contract.

7 So how would this race to the bottom that you see as
8 being potentially there not be superseded by this
9 language that compacts shall provide the state where the
10 consumer lives retains authority to address market
11 conduct, unfair trade practices, network adequacy and
12 consumer protection standards?

13 Senator Nelson. Because that language refers to
14 the benefits and the rating. It does not apply to the
15 consumer protections.

16 Senator Conrad. Even though it says and consumer
17 protection standards?

18 Senator Kerry. Mr. Chairman?

19 The Chairman. Senator Kerry?

20 Senator Kerry. Just to answer Senator Ensign. The
21 problem with that, Senator, and the appeal is obvious. I
22 think it sounds great to say you ought to have the
23 freedom to go choose the plan somewhere else.

24 The problem is that the delivery of health care in
25 America is fundamentally local. If you have a plan in

1 Connecticut and the person lives in Massachusetts, the
2 health care is going to be delivered locally through that
3 system. So how is the entity in Connecticut going to
4 negotiate its delivery structure, its payment structure,
5 et cetera, in a state that has high set up requirements?
6 You cannot. So effectively --

7 Senator Ensign. You do that with auto insurance.

8 Senator Kerry. Well, that is very different.

9 Senator Ensign. You get a car that is broken, you
10 get a car in an accident, the work is done locally, but
11 it is paid for in an auto insurance company.

12 Senator Kerry. That is the first time I have ever
13 heard an analogy of auto mechanics --

14 Senator Ensign. We are talking insurance. We are
15 talking insurance. We are talking coverage -- not the
16 actual quality of care. We are talking coverage of the
17 insurance. All I am talking about is the freedom to be
18 able to choose the kind of plan just like you choose the
19 kind of plan that you want.

20 People are intelligent. They can read policies
21 today. There is so much more information out there.
22 Have laws to make them simple, simple language and all
23 that, but --

24 Senator Kerry. A state should be able to make its
25 own legislative decision and codify a certain standard

1 for which it wants that state's health care to be at.
2 If another state does not meet that same standard, the
3 state should have the right to say they are not going to
4 --

5 Senator Ensign. For the plans in that state. But
6 we regulate interstate commerce and if we allow states,
7 people to be able to buy insurance across state lines --

8 Senator Kerry. That is precisely when you run
9 into the kind of problem that I described. I wish it
10 were otherwise.

11 The Chairman. I wonder if I could return to the
12 more narrow subject at hand and that is the amendment as
13 well as my suggestion if the Senator from Florida is
14 agreeable to it. Withdraw his amendment and insert the
15 word "language" which requires legislative approval for a
16 state to enter into a compact.

17 I see a nod. Is there an objection to that change
18 if we make that change to the mark? All right. So
19 ordered. Without objection, the mark is modified to make
20 that change. Thank you everybody. I know you have other
21 obligations. Thank you very much for your great
22 cooperation. Other amendments?

23 Senator Enzi. Mr. Chairman?

24 The Chairman. Senator Enzi?

25 Senator Enzi. I have that one amendment that is

1 left over from this morning, that's Enzi C3 as modified.

2 I have made an additional modification. I think that
3 might be passed out. I added more specificity on the
4 Secretary of Labor's certification.

5 The Chairman. How is that?

6 Senator Enzi. I have added more specificity. That
7 is what you had a problem with this morning.

8 The Chairman. That is correct.

9 Senator Enzi. So the Secretary of Labor would use
10 the National Compensation Survey from the Bureau of Labor
11 Statistics to make her determination. That gives
12 earnings data that is available for Metropolitan and
13 rural areas and broad geographic regions and on a
14 national basis.

15 The Chairman. Not individual. I have no problem
16 with it.

17 Senator Enzi. Can I have a role call?

18 The Chairman. Do you want to role call on this?
19 Sure.

20 Senator Enzi. Please.

21 The Chairman. Would you hold, please? Senator
22 Bingaman?

23 Senator Bingaman. I just wondered if we are going
24 to have a role call, could someone explain what the role
25 call is on?

1 Senator Enzi. The role call would be on Enzi's
2 Amendment C3 as modified again.

3 Senator Bingaman. Okay.

4 Senator Enzi. This is the amendment where the --
5 would certify that it would not reduce worker's wages.
6 That would be based on the National Compensation Survey
7 from the Bureau of Labor Statistics.

8 Senator Conrad. Could the Senator tell us what,
9 just for the help and understanding, the changes that
10 were made from the amendment that we debated this
11 morning. What has been modified?

12 Senator Enzi. The modification is to come up with
13 some specificity on what the Secretary of Labor would use
14 to determine whether wages had been reduced. Before it
15 was just one paragraph and now it is three paragraphs to
16 add that specificity.

17 Senator Conrad. Somehow I am missing what they
18 have handed out here. It says Enzi Amendment as
19 modified, but there must be another modification. Further
20 modified. Okay. All right. Now I am on. I see. I
21 thank the Senator.

22 The Chairman. With that, is there any comment or
23 discussion on the amendment? Seeing none, without
24 objection the amendment as modified is agreed to. Would
25 you like a role call vote?

1 Senator Enzi. I would like a role call vote, yes.
2 The Chairman. You want a role call vote? Okay.
3 Call the role on the Enzi amendment as modified.
4 The Clerk. Mr. Rockefeller?
5 Senator Rockefeller. No.
6 The Clerk. Mr. Conrad?
7 Senator Conrad. Aye.
8 The Clerk. Mr. Bingaman?
9 The Chairman. Pass.
10 The Clerk. Mr. Kerry?
11 Senator Kerry. Aye.
12 The Clerk. Mrs. Lincoln?
13 Senator Lincoln. Pass.
14 The Clerk. Mr. Wyden?
15 Senator Wyden. Aye.
16 The Clerk. Mr. Schumer?
17 Senator Schumer. Aye.
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. Aye by proxy.

1 The Clerk. Mr. Carper?
2 The Chairman. Aye by proxy.
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 Grassley. Aye by proxy.
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.
25 Senator Rockefeller. Mr. Chairman?

1 The Chairman. Senator Rockefeller?

2 Senator Rockefeller. My main problem with this, I
3 do not understand what it was. I do not understand the
4 implications of it over the long term, so I voted no.
5 Everybody else has voted aye. If you collect all the
6 wattage around the room, I suppose I would have to give
7 way to that and I will on this one and vote aye.

8 The Clerk. Mr. Rockefeller, aye.

9 The Chairman. Clerk, will you count the tally?

10 The Clerk. Mr. Chairman, there are 21 ayes, zero
11 nays and two passes.

12 The Chairman. The amendment is agreed to.

13 Senator Enzi. Thank you, Mr. Chairman.

14 The Chairman. You bet. Are there any further
15 amendments?

16 Senator Enzi. Mr. Chairman?

17 The Chairman. Senator Enzi?

18 Senator Enzi. I would call up Enzi Amendment C9.

19 The Chairman. Enzi C9.

20 Senator Enzi. This has to do with my concern over
21 states being able to afford Medicaid changes that we are
22 doing.

23 The Chairman. I am sorry, Senator. I could not
24 quite hear you.

25 Senator Enzi. This has to do with my concern over

1 states being able to handle the Medicaid expansions that
2 we are doing.

3 The Chairman. Okay.

4 Senator Enzi. So it would exempt any state whose
5 revenues have declined for two consecutive fiscal year
6 quarters from the mandatory Medicaid expansions.

7 We are expanding that Medicaid program to 133
8 percent of poverty and I think that will have a
9 devastating effect. The states are required to pay a
10 share of all Medicaid expenses. The national average is
11 43 percent of total costs.

12 I understand that we have this formula for five
13 years that takes care of a portion of that. As a result,
14 state budgets are sagging under the burden of Medicaid.

15 The Chairman. I just want order in the chamber so
16 they can hear you.

17 Senator Enzi. Thank you.

18 The Chairman. You are welcome. Go ahead.

19 Senator Enzi. So Medicaid is spending now the
20 fastest growing line item in any state's budget. A lot
21 of that has to do with the down turn. We do not know how
22 long the down turn will last. We hope that it will come
23 back which would eliminate any problem with this. But
24 unless -- spending slowdown, Medicaid spending will
25 double by 2017 at an average growth rate of 8 percent a

1 year.

2 Medicaid is the fastest growing federal entitlement
3 program that we have. So we are shifting the costs from
4 the federal to the state governments. I know that we
5 have some percentages in there to provide some
6 protection, but it comes at a time when tax collections
7 from states have dropped to their lowest levels in 46
8 years.

9 The National Conference on State Legislators reports
10 that this year's budget cap for all states is \$121
11 billion. California is writing IOUs to pay its debt. So
12 furthermore, according to the Rockefeller Institution of
13 Government State Government and Local Government
14 employment has declined by 33,000 jobs, that is 6/10 of a
15 percent, and local government employment is declined by
16 22,000 jobs. That is 2/10 of a percent.

17 More than 20 states have imposed furloughs on state
18 employees that will reduce their pay and hours worked
19 without eliminating jobs. Recent budget actions and
20 other indicators suggest that further cuts are on their
21 way.

22 This expansion is simply unaffordable or could be.
23 This is a way of making sure that the states will have
24 some kind of a say and some capability, so it would
25 exempt them from expansion if the state's revenue has

1 declined for two consecutive fiscal year quarters.

2 The Chairman. Okay. Are you finished? Any
3 discussion on this amendment? Senator Stabenow?

4 Senator Stabenow. Mr. Chairman, I am wondering if
5 I might just have some clarification from the sponsor and
6 from the staff.

7 This appears that the expansion of Medicaid would
8 not apply to states if their revenues had declined in the
9 last two years. This was, as I understand it, the
10 Chairman's mark worked out carefully with Governors and I
11 wonder if we might have an explanation of the ratio of
12 federal funding and state funding. What the state
13 obligation would be.

14 Mr. Schwartz. Sure, I'd be happy, Senator Stabenow.
15 We have done some analysis and it is preliminary but it
16 is based on working with outside people who crunch
17 numbers for a living.

18 The Chairman. I am sorry. There are loud noises.
19 Mr. Schwartz, could you speak up, please?

20 Mr. Schwartz. Is that better?

21 The Chairman. Much.

22 Mr. Schwartz. Okay. We had worked with outside
23 analysts who actually really do things like crunch
24 numbers for a living and we shared with all of the
25 offices, I believe it was yesterday or the day before

1 what our analyses were and the provisions in the
2 Chairman's mark lay out that states get an additional
3 increase in their federal match or FMAP as we call it to
4 cover the cost of newly eligibles.

5 We categorize states into expansion states or other
6 and then we pay them differently for the first five
7 years, and then in the sixth year which is 2019, they all
8 get the same rate which is a 32.3 percentage point
9 increase in FMAP and that would bring the national
10 average which is currently 57 federal, 43 state, if you
11 added the 32, you would end up at 89 and 11.

12 So for the cost of the mandated population in the
13 Chairman's mark, the federal government would pay 89
14 cents, on average, of every dollar.

15 Senator Enzi. Mr. Chairman, we spent several days
16 in committee working on this particular thing. Would you
17 care to mention how many different iterations we have of
18 those same numbers?

19 Mr. Schwartz. Absolutely, Senator. We have
20 updated them several times and again, part of that was as
21 policies changed, the original construction of the 32.3
22 percent would have put certain states actually over 100,
23 and so then we changed the policy and scaled back.

24 I am sure that we gave --

25 Senator Enzi. Even after we had arrived at the 95

1 percent being the maximum and everything, we still had at
2 least three more that had different numbers without us
3 knowing what the bases were on them. So I am not real
4 comfortable with numbers that change on a regular basis
5 like that.

6 I think Nevada comes out really terrible and Senator
7 Reed mentioned that. I think the next iteration that
8 went down, I am sure that wasn't just because of Senator
9 Reed. It was probably because of some different
10 assumptions. I know that Texas went up dramatically in
11 that same one.

12 So the Governors themselves have run these numbers
13 and their numbers do not agree with our numbers, any of
14 those iterations. So I want to put in some kind of a
15 protection that if it is going to bankrupt him, that it
16 will not do it right away.

17 Senator Stabenow. If I could reclaim my time, I
18 would like to just express a concern to my friend who
19 offered this amendment.

20 Coming from a state right now with the highest
21 unemployment in the country and certainly revenues have
22 declined for more than two consecutive years given what
23 is happening in Michigan, the reality is that we have
24 more and more people losing their jobs who have never
25 needed to worry about their health care before that now

1 have to and are now turning to Medicaid as a safety net,
2 which it is for families.

3 So for states like ours that are in the worst
4 position, we would be saying to them this additional
5 help, while we are paying a higher match, would not be
6 available to those who need it the most. So I would be
7 extremely concerned about this.

8 It seems to me, I am not sure that it is the
9 Senator's intention, but it is certainly from our
10 perspective as a state, we have thousands, tens of
11 thousands of people who are asking for help with their
12 health care who are going to Medicaid and who have never
13 done it before.

14 They are overwhelming the state offices. To say to
15 them you are going to be punished because you have two or
16 more consecutive fiscal year quarters in which your
17 revenues have declined, it goes the opposite of what I
18 certainly would want to see it do.

19 The Chairman. I might say, too, with all due
20 respect, Senator, the result of your amendment is a
21 little bizarre at best in my perspective. Mainly you are
22 basically saying that during a recession poor people
23 would not get health care.

24 I think during a recession poor people have health
25 care and as Senator Stabenow says, during the recession

1 essentially there are more people who lose their jobs,
2 more people who lose their health coverage and some of
3 them could be eligible for Medicaid.

4 I just, it does not make sense to have poor people
5 lose their health insurance during a recession.

6 Senator Enzi. Mr. Chairman, this refers to the
7 expansion. This would be a one-time decision that would
8 have to be made before that expansion began, not after it
9 was already in effect.

10 It does not force the states to do that, but it
11 would exempt them if it is declined like that. Now, if
12 they are in a situation like Michigan, and I certainly
13 hope Michigan is in the worst shape it is ever going to
14 be in, they probably would not want to exempt out.

15 But they are the ones that kind of control a good
16 deal of the revenues in this thing and if they cannot
17 afford it, they ought to have some way of avoiding it up
18 until the expansion occurs.

19 Once the expansion occurs, then this is not optional
20 anymore.

21 The Chairman. I just think still, I misread it, I
22 apologize. Even if it applies only to the expansion and
23 not to all Medicaid, I still think that it does not make
24 sense for on again off again. Particularly the trigger
25 to drop Medicaid in the expansion population not able to

1 get Medicaid simply because state revenues are down.

2 And as has been pointed out and as you well know
3 working on this so many times in the group of six that
4 basically the additional burden on states, on Medicaid,
5 on the expansion is about 1 percent above states' current
6 obligation. That is due to FMAP, it is due to the drug
7 rebate. As I recall, except maybe ones at 1.5 percent or
8 --

9 Mr. Schwartz. 1.3.

10 The Chairman. Excuse me?

11 Mr. Schwartz. 1.3.

12 The Chairman. 1.3 percent extra burden on the
13 states over the 10 year period. As I recall too during
14 the first three years of that period, all states get
15 extra money and come out ahead. I think it is not
16 advisable to adopt an amendment which cuts back expansion
17 coverage just because revenues drop in the state.

18 Senator Enzi. Mr. Chairman, we did not have CBO run
19 those numbers. Those are not CBO numbers. That is other
20 institutes and things that came up with these numbers.
21 If I had supreme confidence in them, I would have more
22 confidence in them if I had not seen the same numbers run
23 three different times and come up with three different
24 numbers. That does not give me a lot of confidence of
25 1.3 or .8 or 2.8.

1 The Chairman. We have discussed this many times.
2 First of all, we both know CBO does not do statewide
3 state analysis. So because Senators like to know the
4 effect on their own states, we went to three different
5 organizations to try to put this compilation together the
6 best we can.

7 The first iteration as I recall is based on data. I
8 think it was 2006 data. The numbers changed because we
9 got updated information. Mr. Schwartz, why do not you
10 explain that new information we have which caused them to
11 change the numbers?

12 Mr. Schwartz. I would be happy to. Senator Enzi,
13 you are right, we did have multiple versions, but always
14 in an effort to try to provide something that we thought
15 was accurate and consistent with CBO which provides the
16 national number.

17 The Chairman is absolutely correct. The data that
18 we accessed originally was a 2006 baseline and we were
19 able to get more recent information. Obviously Medicaid
20 enrollment will change, states are free to vary their
21 programs over time and so we updated that data and then
22 CBO twice in September has given us different numbers
23 publicly on tables that were made public and then a third
24 time corrected their number for state spending in an
25 email that they sent to bipartisan committee staff.

1 So their bottom line of state spend was always our
2 control because we wanted to match what the information
3 that they were providing as the estimate of state
4 spending as a result of the bill. So that explains why
5 there were multiple iterations over the course,
6 particularly of the past two to three weeks.

7 Senator Snowe. Mr. Chairman?

8 The Chairman. Senator Snowe?

9 Senator Snowe. I would like to pose a question on
10 this issue since there have been several iterations of
11 the numbers affecting each state.

12 Have there been ongoing conversations between the
13 states in the committee regarding what has been
14 incorporated in the calculations? That is what I am
15 hearing from my governor and other governors that I have
16 had conversations with since these discussions in the
17 group of six and they are trying to run the numbers.

18 So are you getting feedback from the states once
19 they have run the numbers and they fully understand what
20 you are including that reaches those calculations?

21 Mr. Schwartz. We have not changed the elements that
22 we are counting. Like I said, we have changed some of
23 the years' worth of information, but we are not taking
24 out or putting in new concepts.

25 We have shared, obviously it is a little tricky to

1 try to deal with 50 different Governor's offices, so we
2 have been dealing with the NGA. They have all of the
3 same sheets that were provided to all of the members of
4 the committee and their staffs earlier in the week. They
5 did actually come back to us with some questions that I
6 have started to compile answers to but have to do on a
7 Blackberry, so I am trying during breaks to back and
8 compile answers so that they can understand our
9 assumptions.

10 My understanding is that they are also working with
11 an outside group to do an estimate similar I guess to the
12 one that we did which I expect will be off slightly, but
13 they did not seem to think that these were way off the
14 mark. I do not know how much variation there might be.

15 The Chairman. I guess the question is to what
16 degree have you talked to the Governors since we had that
17 conference call?

18 Mr. Schwartz. When we sent this information
19 earlier this week, we sent it to them that same day. So
20 just within the past two or three days. Their list of
21 questions came in yesterday and so I did not have a
22 chance to speak with those staff at the NGA, but we are
23 communicating by email.

24 Senator Snowe. Well, I think it is important for
25 the committee, Mr. Chairman, to have a full understanding

1 of what the response is from the various Governors. I
2 truly think that we ought to hear from all 50 for that
3 matter because it is my understanding in the discussions
4 that I have had is that they are concerned about what has
5 been used in these calculations to arrive at these
6 numbers.

7 They will run their numbers, but they have to
8 obviously know what is included. I think that is very
9 important.

10 Then secondly, how they all work together, even
11 coupled with what is in their individual mandate, the
12 maintenance of effort which is another issue that
13 hopefully I can address later.

14 But I think the point is we have to have a common
15 understanding with the Governors in the way that we
16 arrived at this bottom line. Are all 50 states measuring
17 the same way? We have to have the same understanding.

18 The Chairman. I suggest that you go back to
19 Governors the next day and try to get a definitive answer
20 as you can to this question. I understand that Governor
21 Douglas just a couple of days ago publicly stated that
22 the mark is, I do not remember the words, but on the
23 right track or something. Do you remember the words?

24 Mr. Schwartz. I do not unfortunately, Mr. Chairman,
25 but I think he was speaking at the National Press Club if

1 I am not mistaken and he said positive things but I do
2 not want to misquote him.

3 Senator Snowe. I got, Mr. Chairman, I got a
4 document from Governor Douglas and I spoke to him that
5 night in which he spoke to the National Press Club and he
6 did offer some recommendations and concerns regarding the
7 numbers in the provisions in the legislation.

8 The Chairman. Could you get those recommendations?

9 Mr. Schwartz. I certainly will.

10 Senator Snowe. I will share them with you.

11 Mr. Schwartz. That would be great.

12 Senator Enzi. Mr. Chairman?

13 The Chairman. Senator Enzi?

14 Senator Enzi. When we had that conference call
15 with the Governor, one thing they wanted was the list of
16 assumptions that we were based on. I do not think that
17 the outside numbers match the CBO numbers, do they? The
18 totals? Because the total is all we get from CBO.

19 Mr. Schwartz. So, right. CBO's current total of
20 state spending which again came in a clarification email
21 from them is in their words about \$33 billion.

22 Our bottom line is lower than that because we
23 include in our total calculation the increased revenue
24 states will receive from increasing the Medicaid drug
25 rebates.

1 So if you took out the rebates which are just over
2 ten, our bottom line number is 22. If you added, well,
3 that is rounded. If you added the ten back, you would
4 come up to about 33, so they do match.

5 Senator Enzi. I do better when I look at numbers.
6 Can you show me which table adds up to the \$33 billion in
7 new state spending?

8 Mr. Schwartz. Thirty-three is CBO's number. So
9 again, our bottom line number is not 33, it is 22 because
10 there is one additional item added in. So I do not think
11 we shared a table that said 33, I think we shared a table
12 that said 22.

13 Senator Enzi. That is part of where my confusion
14 comes from. I do know that in 2003 the Congressional
15 Research Service questioned the methodology that the
16 Urban Institute uses in coming up with their analysis.
17 That leads me to want to come up with some way that
18 states can say whoa, your numbers were way off and we are
19 in a declining economy, so I would really like to do
20 something about it. I would like to exempt out until we
21 can come up with the right numbers. So that is the
22 purpose of this amendment.

23 The Chairman. Any further discussion. If not, the
24 vote is on the amendment. Senator Enzi?

25 Senator Enzi. I would like a roll call, please.

1 The Chairman. A roll call vote is requested. The
2 clerk will call the roll.

3 The Clerk. Mr. Rockefeller?

4 The Chairman. No by proxy.

5 The Clerk. Mr. Conrad?

6 Senator Conrad. No.

7 The Clerk. Mr. Bingaman?

8 The Chairman. No by proxy.

9 The Clerk. Mr. Kerry?

10 Senator Kerry. No.

11 The Clerk. Mrs. Lincoln?

12 The Chairman. No by proxy.

13 The Clerk. Mr. Wyden?

14 The Chairman. No by proxy.

15 The Clerk. Mr. Schumer?

16 Senator Schumer. No.

17 The Clerk. Ms. Stabenow?

18 Senator Stabenow. No.

19 The Clerk. Ms. Cantwell?

20 Senator Cantwell. Pass.

21 The Clerk. Mr. Nelson?

22 The Chairman. No by proxy.

23 The Clerk. Mr. Menendez?

24 The Chairman. No by proxy.

25 The Clerk. Mr. Carper?

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

1 The Clerk. Mr. Chairman, the final tally is 10
2 ayes and 13 nays.

3 The Chairman. The amendment does not pass.
4 Further amendments?

5 Senator Crapo. Mr. Chairman?

6 The Chairman. Senator Crapo?

7 Senator Crapo. Mr. Chairman, I would like to offer
8 my Amendment Number C2 as modified.

9 The Chairman. C2 as modified.

10 Senator Crapo. This amendment is a good amendment
11 to follow up on the one that Senator Enzi just proposed
12 because I understand the point that was raised by Senator
13 Stabenow and yourself, Mr. Chairman, that you had an
14 objection to reducing Medicaid at a time when there may
15 be difficulties in the states.

16 However, we cannot ignore the issue that Senator
17 Enzi raised with his amendment which is the burden that
18 the increased cost of the Medicaid expansion will place
19 on the states.

20 I will talk about in just a minute the discussion we
21 just had about the different numbers we had on that, but
22 I do not think that we can ignore the fact that there
23 will be some burden placed on the states by this
24 legislation at a time when they cannot face it.

25 There is a July letter that was written by the

1 Chairman for the Governors, Governor Douglas and Governor
2 Mansion. The letter states, I think we have all read it,
3 that any unfunded expansions would be particularly
4 troubling given that the states face budget shortfalls of
5 over \$200 billion over the next three years.

6 This gap they are talking about as they indicate
7 persists even after the Recovery Act or the Stimulus
8 Acts, temporary increases in the federal share of
9 Medicaid. So what my amendment does is simply provides
10 that we will not pose an unfunded mandate on the states.

11 I recognize that the mark has increased the federal
12 share significantly and the Chairman has argued today and
13 on several occasions that the gap is very small. CDO has
14 an estimate of \$33 billion. We had a discussion here
15 just now about the fact that there are other studies that
16 are being done that indicate that that number may be
17 different.

18 I personally agree with Senator Enzi. It is a
19 little bit difficult to accept the notion that all of a
20 sudden since CBO's number was not an acceptable number
21 that we got additional studies now that seem to reduce
22 that number.

23 But the bottom line is whatever the number is, we
24 should not be imposing an unfunded mandate on the states.
25 My legislation would compensate for the federal

1 government picking up the remainder of that share by a
2 corresponding reduction in the insurance subsidies in the
3 Chairman's mark and as we analyze it, it would only
4 impact those making over \$80,000 for their subsidies to
5 be reduced a small amount for us to be able to
6 accommodate this burden on the states. So this is really
7 an unfunded federal mandate issue.

8 It is another way to approach the problem that
9 Senator Enzi has raised and one that I think addresses
10 the issue that Senator Stabenow was concerned about that
11 gives us the opportunity to not put another unfunded
12 mandate on the states at a time when they cannot handle
13 it and when they will simply have to increase taxes on
14 their citizens at that time.

15 I just would like to conclude, Mr. Chairman, by
16 indicating that I personally think that the difference is
17 probably close to what the CDO said. I have confidence
18 in CBO's analysis in recognizing that CDO does not do the
19 state by state analysis that some are trying to be
20 engaged in now and recognizing that we do have other
21 studies under way and we are going to hopefully hear from
22 the Governors as to their analysis of these numbers.

23 The bottom line is if CDO is right, we are looking
24 at a \$33 billion hit to the states. If CDO is wrong and
25 the numbers that the Chairman has mentioned earlier are

1 more accurate and that differential is very, very small,
2 then this amendment would have a very, very small impact.

3 So my point is what we ought to do is take a
4 position as a committee right now that we will protect
5 the states from yet again one more unfunded mandate and
6 in fact one that could go and amount to be a very
7 significant mandate at a time when the states can least
8 afford it.

9 Senator Conrad. Mr. Chairman?

10 The Chairman. Senator Conrad?

11 Senator Conrad. Mr. Chairman, might I just quiz
12 the staff on a couple of issues that have been raised by
13 this?

14 The Chairman. Go ahead.

15 Senator Conrad. First of all, is it not true that
16 the expansion of Medicaid does not begin until 2013?

17 Mr. Schwartz. It is 2014.

18 Senator Conrad. 2014 now. So there is no
19 expansion, nothing asked additionally of the states until
20 after 2014?

21 Mr. Schwartz. That is correct.

22 Senator Conrad. And is it not the case that in the
23 first three years the states will actually get additional
24 payments?

25 Mr. Schwartz. That is correct. They will get

1 additional revenue from the increases in the drug rebates
2 and Medicaid.

3 Senator Conrad. The drug rebates from Medicaid.
4 So not only do they not face any change in Medicaid until
5 2014, but in the first three years they get increases.

6 Number three, is it not the case that the analysis
7 that has been done not by this staff but by outside
8 analysts is that the impact over the ten years to the
9 states is on average 1.3 percent?

10 Mr. Schwartz. That's correct, Senator.

11 Senator Conrad. And is it not the case that the
12 estimates by CBO that have been referenced, the \$33
13 billion almost directly tracks the underlying estimates
14 that have been provided here, the \$22 billion plus the
15 \$10 billion of the drug rebate money?

16 Mr. Schwartz. If I could just answer that in more
17 than yes/no just to clarify.

18 CBO has consistently been providing what they refer
19 to as three different tables. A coverage table which
20 comes in typically two pages, it shows an increased
21 enrollment, that is where the 94 percent coverage figure
22 comes from, and spending on Medicaid and the tax credits.

23 They separately do what they call a Medicaid
24 provider table and then the third table is their Medicare
25 table. CBO's footnote of \$33 billion is on the coverage

1 table. It is what they predict, it is a footnote, but it
2 is what they predict total spending for states on
3 Medicaid and CHIP which are combined into one line.

4 So that is their \$33 billion. Separately on that
5 Medicaid provider table is where the drug rebates show up
6 because it is a programmatic change, it does not really
7 have anything to do with coverage. So our analysis
8 combined everything to present what we thought was an
9 actual bottom line.

10 Had we done two separate tables the way that CBO
11 did, we would have probably broken it out the same way.
12 But we had enough difficulty producing one table. I
13 would have been overwhelmed by a second. So bottom line,
14 it is one answer that members and Governors and folks
15 back in the states could see what the net impact of the
16 Chairman's mark would be.

17 Senator Conrad. And the fact is the net impact
18 that you have is almost exactly what the net impact that
19 CBO has. So this talk about a difference is a difference
20 without a distinction. It is the difference between
21 showing it in one table and showing it in two tables.

22 So I hope we do not get distracted by what is a
23 difference without meaning. Beyond that, again, there is
24 no expansion until 2014.

25 Mr. Schwartz. Correct.

1 Senator Conrad. In the first three years, would
2 that be 2014, 15 and 16?

3 Mr. Schwartz. No. The first three years of the
4 budget window because the drug rebates take effect in
5 2010.

6 Senator Conrad. So they will be getting extra
7 money now.

8 Mr. Schwartz. Right away. Right away.

9 Senator Conrad. You know, honestly if there is to
10 be shared responsibility in this country and it is all to
11 be on the federal government, the state have no
12 responsibility for anything, I mean, this expansion does
13 not even begin until 2014 and then the estimates are it
14 has a combined impact of 1.3 percent on average?

15 We are going to have a real hard time dealing with
16 problems across the country if it is all supposed to be
17 on the federal government, it has record deficits. The
18 states just expect the federal government to write a
19 check for 100 percent of everything. I do not think that
20 is a reasonable expectation.

21 To be asking them to put up 1.3 percent on average
22 over the next ten years and the expansion does not even
23 begin until 2014, I do not know of any prognosticator who
24 thinks the economy of the United States are going to be
25 in recession until 2014.

1 I would hope that we would resist this amendment and
2 go forward with the mark. By the way, when we had the
3 conversation with the Governors, one after another of
4 them thanked us for how dramatically we had improved the
5 package from their perspective.

6 The Chairman. That is true. In fact, they were
7 relieved. They felt good about it.

8 Senator Crapo. They thought it was going to be a
9 bigger hit.

10 The Chairman. They thought they were going to get
11 hit, to be honest. Just taking the temperatures of the
12 Governors in the last conference call, they felt pretty
13 good about it.

14 Senator Crapo. Mr. Chairman, can I just ask a
15 question and then respond? A question to Mr. Schwartz.

16 Has the hospital DSH impact on the states been
17 included in the numbers which you analyzed? My
18 understanding is there is about a \$25 billion impact
19 there.

20 Has that been included in your analytical figures?

21 Mr. Schwartz. That is not in the tables.
22 Everything that is in the tables is identified and DSH is
23 not on that list.

24 Senator Crapo. Would not it be true though that
25 during the same time period that we have just been

1 discussing the states are going to lose about \$25 billion
2 under the hospital dish provisions?

3 Mr. Schwartz. CBO's total for Medicaid DSH
4 reductions I think is \$24.9 billion, so yes.

5 Senator Crapo. Well, Mr. Chairman, I think you see
6 my point. What we have here is we are starting to look
7 at income to the states to balance it off against the
8 impact of the Medicaid expansion and argue that we have
9 got new charts now that we can show that the impact will
10 not be as large or it is different than what CBO
11 estimated.

12 But first of all, understanding that the impact does
13 not start until 2014 does not mean there is not going to
14 be an impact. Secondly, if you look at the drug rebates,
15 I think you had better also look at the hospital dish
16 impact and start balancing all of the impacts on the
17 state into the analysis before we make a final conclusion
18 as to what the impact is.

19 Third, we have a disagreement obviously over what
20 the charts are saying and what the impact is, whether it
21 is a 1.3 percent impact or as CBO says, a \$33 billion
22 impact or whatever it is. My point is that Medicaid
23 spending is now the fastest growing line item in every
24 state in the country.

25 In 2006 it accounted for 23 percent on average of

1 every state's budget. To say that we need to have a
2 shared opportunity here to pay for health care between
3 the states and the federal government ignores, and to
4 imply that there is not already a major share of skin in
5 the game on the share of the states is I think a
6 mischaracterization.

7 The states right now, unless spending slows down,
8 will see a doubling of Medicaid spending by 2017 that an
9 average growth rate of what we are seeing now of 8
10 percent a year. Medicaid is the fastest growing federal
11 entitlement program.

12 So all that my amendment does is say that there
13 should not be yet another unfunded mandate on the states.
14 I think it is a higher unfunded mandate than apparently
15 you do, but whether it is 1.3 percent or not, even if it
16 was only 1.3 percent because that would make the impact
17 to my amendment very small.

18 But my point is one way or the other, we have got to
19 protect the states from the impact of this yet again one
20 more federal mandate at a time when the states are in as
21 dire a circumstance financially as the Federal Government
22 is.

23 Senator Stabenow. Mr. Chairman?

24 The Chairman. Senator Stabenow.

25 Senator Stabenow. Mr. Chairman, I just wanted to

1 briefly support what you had said, Mr. Chairman, and what
2 Senator Conrad said.

3 And speaking again for Michigan, if there is a
4 litmus test as to whether or not this is a burden on the
5 states, it would be the reaction of the governor from
6 Michigan, and the fact that the governor is supporting
7 this and feels that the work that's been done is
8 reasonable and that what has happened is something that
9 is minimal on the state.

10 I think, for me, reflects -- pretty heavily on the
11 burden overall that's being provided, or put on to the
12 states.

13 And the trade-off for that is being able to take --
14 not only help the states, but more importantly, families
15 who have been in very difficult times, who find
16 themselves out of a job, who are now low-income --
17 families, children, seniors.

18 I mean, all of those who are impacted by Medicaid,
19 there is a huge value -- huge value -- in what is being
20 done in this mark with minimal concerns that I'm hearing
21 from, from a state that is under more duress than any
22 other state in the country.

23 Senator Conrad. Mr. Chairman?

24 The Chairman. Senator Conrad.

25 Senator Conrad. Just very briefly, on the state --

1 on that point that Senator Crapo made -- and I have high
2 regard for Senator Crapo. He analyzes things very
3 thoughtfully.

4 On the DSH payments, the reason we're able to make
5 reductions in DSH payments is because there's going to be
6 less uncompensated care, and DSH payments are to offset
7 uncompensated care. When you cover 30 million more
8 people with insurance, there are then going to be much
9 lower numbers for uncompensated care.

10 So if we make a -- calculation that includes all of
11 the elements, the states are going to have significant
12 benefits that don't show up in any of these calculations.

13 If we were going to do a full calculation, we would
14 need not only what's going to happen to DSH payments, but
15 what is also going to happen with the reduction in
16 uncompensated care because of the increase in the number
17 of people who are now going to have insurance coverage.

18 The Chairman. I might say on top of that, too,
19 that uncompensated care today costs the average working
20 family about \$1,100 a year.

21 With more coverage, that uncompensated care amount
22 that private health insurance holders pay will go down
23 very significantly.

24 And one other point, too. We're all concerned about
25 rising Medicaid costs. We're all very concerned about

1 that. I suppose governors, a little more concerned even
2 than we.

3 But this -- the major aim and goal of this
4 legislation is to start to reduce the rate of growth of
5 health care costs in this country.

6 This is not just for Medicaid. It's Medicare, it's
7 all of us, it's private consumers, it's all government
8 budgets, it's companies, small business especially.

9 And we're trying to get the rate of growth in health
10 care -- start to -- begin to reduce the rate of growth of
11 health care costs in this country.

12 And that certainly is going to inure to the benefit
13 of those Medicaid budgets, too, is start to get the
14 Medicaid budgets a little bit more under control.

15 Senator Crapo. Mr. Chairman, just --

16 The Chairman. Senator Crapo?

17 Senator Crapo. Let me just respond briefly.

18 I certainly understand the point that Senator Conrad
19 has made about the DSH payments and the question as to
20 whether we will be reducing uncompensated care.

21 By all the estimates I'm aware of, we will still
22 have about 25 million uninsured after this legislation is
23 passed, if it is passed and implemented. So we will
24 still have the issue of uncompensated care, and we don't
25 know exactly what that will be.

1 But again, my point is that if you are correct and
2 the issues that we're raising here are not as serious as
3 I think they are, then the impact of this amendment is
4 not that serious, either.

5 All it does is to say when there -- if there is an
6 unfunded federal mandate to the state arising out of this
7 expansion of Medicaid, that we will not put that burden
8 on the states.

9 And again, if that burden is as small as you
10 indicate, then there's a very small fiscal impact here
11 that is accommodated by the offset.

12 Then the only other point I wanted to make is I
13 understand that a number of the governors have expressed
14 relief.

15 But I think that the point is not that they were
16 expressing relief that they were going to be able to
17 share in this additional fiscal responsibility. I
18 believe it was an expression of relief that it was not as
19 bad as it appeared that it was going to be.

20 And again, just -- the bottom line here is, very
21 simply, we don't at this point in time -- we should not,
22 at this point in time, be imposing another unfunded
23 mandate on the states.

24 I hope that it is as small as you say it is. I am
25 concerned that it might not be. But whatever it is, we

1 ought to be sure that we don't impose it.

2 The Chairman. For me, it all comes down to a very
3 simple point: Should there be shared responsibility here
4 or not? Do we share it, if we've worked to put health-
5 care reform together or not?

6 And I think that states should also share, and about
7 a 1.3 percent, I think, is not asking too great a share.

8 I think it's -- it's right.

9 Senator Crapo. Well, the states already share
10 extensively in Medicaid, but I understand your point.

11 The Chairman. Any further discussion? Senator
12 Snowe?

13 Senator Snowe. Mr. Chairman, yes, I just wanted to
14 ask several more questions.

15 I noted in the chairman's mark -- and I just want
16 some clarification -- that effective January 2013 that
17 states would be required to provide premium assistance to
18 Medicaid beneficiaries that have employer-sponsored
19 insurance plans?

20 The Chairman. That's correct.

21 Senator Snowe. Is -- and how much would that be?
22 What kind -- what's the fiscal cost to the states?

23 Mr. Schwartz. So the way that premium assistance
24 works is states only actually have to do it if it's cost-
25 effective, which means that it can't exceed the cost of

1 what it would have cost the state to actually provide
2 services directly. That's current law.

3 Senator Snowe. But is that the higher -- is that,
4 it's 100 percent, 133 percent, or is it at their current
5 eligibility levels? Or --

6 Mr. Schwartz. Well, it would include the expanded
7 population when -- effective January 1st of 2014, when
8 133 percent becomes the level.

9 What the chairman's mark actually does --

10 Senator Snowe. But not in 2013?

11 Mr. Schwartz. Correct.

12 Senator Snowe. It'd be just their current
13 population.

14 Mr. Schwartz. Correct. And that was to sync it
15 with the advent of the exchange.

16 Really, what this provision does is currently states
17 have the option to offer premium assistance or not. This
18 takes that option away and says all states have to offer
19 that option.

20 It's a way to better leverage employer-sponsored
21 coverage. There are obviously some low-wage workers who
22 are offered ESI but can't afford it. And so this is a
23 way to help them afford it.

24 Senator Snowe. So that's an additional requirement
25 on the states, though. So it changes from optional to

1 required.

2 Mr. Schwartz. That's correct.

3 Senator Snowe. So what do we estimate that to be
4 the cost to the states? Do we have any estimate?

5 Mr. Schwartz. I don't know that CBO broke that out
6 individually. I don't think that they attributed for us
7 who gets in through premium assistance versus who comes
8 in as a traditional Medicaid enrollee.

9 But again, the current law cost-effectiveness test,
10 which we're moving forward with leaving it untouched,
11 says again that this -- the cost of providing premium
12 assistance to beneficiary x cannot exceed the cost of
13 beneficiary x if they were in your fee-for-service or
14 managed care Medicaid program.

15 Senator Snowe. On the maintenance-of-effort
16 requirements, which concerns me. Obviously, we have
17 expanded; our population's up to 206 percent.

18 Mr. Schwartz. Correct.

19 Senator Snowe. And I guess there are a few states
20 even higher than that, but very few.

21 And I know that the governor of Vermont as well has
22 expressed his concern, because they have maintenance-of-
23 effort requirement up until 2014, when the exchange is up
24 and running and all the other requirements kick in.

25 But is it fair, really, to require these states to

1 maintain high eligibility standards up to 2014? There's
2 no flexibility in the context of a very difficult
3 economic time.

4 In fact, the budget deficit's projected, I know for
5 our state -- and the governor of Vermont indicated the
6 same in their next budget cycle of 2011 and 2012 -- of
7 consecutive budget deficit years. And they're required
8 to balance their budget.

9 So it offers them little flexibility, and I'm not
10 sure I understand the fairness in those -- for those
11 states who have gone above and beyond in making
12 investments in health care and expanding the eligibility
13 standards in Medicaid up to 206 percent, for example, and
14 now they're required to maintain that level through -- to
15 2014.

16 So those who have been leaders, it seems to me, have
17 been penalized. There's no flexibility, and the only
18 choices they have, in tough budgetary times, is to cut
19 the payments to providers or to cut the benefits.

20 And I think that that is sort of counter to the
21 goals of this legislation. So I'm not sure that that is
22 fair and equitable for those states.

23 And that's another area of serious concern to states
24 with these maintenance-of-effort requirements. They have
25 to maintain high standards.

1 So you have disparate examples. Some states are at
2 28 percent of poverty level, and you have other states
3 who are 206 percent of poverty level. So those that are
4 at 206 percent have to stay there until 2014.

5 So that is putting enormous financial pressures on
6 in some very difficult financial times.

7 And I understand the concerns of what the chairman's
8 saying, and I agree. We want to all achieve the shared
9 responsibility of including more people under the
10 insurance umbrella.

11 At the same time, I think we also have to put it in
12 the context of what these states are facing. And as --
13 know that these are going to be some very serious
14 budgetary constraints.

15 They're going to face budget deficits after budget
16 deficits over the next few years, and it could well go
17 into 2011, '12, '13 and '14.

18 And as I said the other day, that there have been
19 some recent reports, Mr. Chairman, that demonstrates that
20 states' budget levels will be at the same level as they
21 were in 2007, even as we emerge from this recession.

22 So I think we have to be circumspect about the kind
23 of imposition we place with these expansion of
24 populations and not being sensitive to the fact that they
25 have to accommodate a balanced budget.

1 Senator Kerry. Mr. Chairman?

2 Senator Snowe. Yes.

3 The Chairman. Senator Kerry?

4 Senator Snowe. And may I just add another point on
5 the maintenance of effort. In the stimulus plan we did
6 have requirements for maintenance of effort, but we also
7 provide them some funding.

8 So in this instance, we're just saying that you're
9 going to have to maintain the highest levels and there's
10 no flexibility.

11 And where they do have flexibility, it's not where
12 you want them to have it.

13 Mr. Schwartz. So I guess I would just respond with
14 a couple comments.

15 I think everything you said is right, and those are
16 concerns that we've had. And so in an effort to sort of
17 strike a balance, the maintenance-of-effort provision
18 ends as new sources of coverage become available under
19 the larger-picture plan in the Chairman's mark.

20 And so if -- let's use your state, for example. If
21 the maintenance-of-effort that all states are current
22 under, under the Recovery Act, that ends December 31st, I
23 guess, of next year.

24 So if the following day Maine decided to scale back
25 its coverage from 206 percent to 150 percent or whatever

1 number it picked, the people, the adults that just became
2 no longer eligible for Medicaid would become uninsured,
3 because there isn't another source for them right now.

4 So the Chairman's mark has a maintenance-of-effort
5 that, again, expires as the exchange comes on line for
6 those that could be eligible for the tax credits, or in
7 2014 when the expansion of Medicaid kicks in.

8 And I think that stands in contrast to the provision
9 that's in the House bill, which is a permanent
10 maintenance-of-effort which we have all heard that the
11 governors really dislike, because it forever limits that
12 flexibility.

13 So I think this was intended to strike a balance and
14 not take steps backwards on the coverage side before we
15 can get our exchange out and our increases in Medicaid
16 eligibility.

17 Senator Snowe. No, I appreciate that, and I
18 understand. It's obviously less burdensome than what is
19 -- than the requirements in the House.

20 But on the other hand, you're putting enormous
21 pressure on those states who have made early investments
22 and some tough choices in becoming leaders. And that's
23 why we have a high number of insured in our states, in
24 Maine and Vermont, because we have made those investments
25 over a sustained period of time.

1 So in any event, I think we just have to be
2 cognizant of that in what we're doing here. We want to
3 meet the bottom-line goal of increasing the number of
4 insured, but at the same time I think we've got to be
5 sensitive to the fiscal constraints on the states at this
6 time.

7 The Chairman. Okay. Senator Kerry was seeking
8 recognition.

9 Senator Kerry. I have an observation and a
10 question that I want to ask of Mr. Schwartz.

11 It's sort of interesting, listening to a number of
12 the arguments as we've gone along here. And obviously
13 this one is subject to a federal standard, mandate,
14 whatever you want to call it. So I understand the
15 tension there.

16 But there's a tension all through these discussions
17 about the impact of a reduction here or a reduction
18 there.

19 On the other hand, the only two ways to bend the
20 cost curve, as we have coined the phrase here, you either
21 cut what we're putting out or you find more revenue to
22 put in to cover it. And we all understand where the
23 politics are in terms of finding the additional revenue.

24 Moreover, we're looking at Medicare, which we all
25 understand. Now, I think under this bill, we get about

1 an extra four or five years, Mr. Chairman? Is that what
2 we do?

3 The Chairman. Three.

4 Senator Conrad: Four to five.

5 Senator Kerry: That's all we're getting, folks.

6 Senator Conrad: CMS has just told us we get an
7 additional four to five years.

8 The Chairman. For what?

9 Senator Conrad: Solvency --

10 The Chairman. Oh, the solvency. Yeah, right.
11 Medicare, that's right --

12 Senator Kerry: I'm talking about the solvency.

13 The Chairman. Right.

14 Senator Kerry. But we're sitting here with a much
15 bigger problem sitting over our heads than there is a
16 political will to address.

17 And we have to remember that, as we think about this
18 and go forward, there are really only two ways to do
19 this.

20 If you decide that a service is worth it or
21 providing Medicaid assistance to the states is worth it,
22 then you've got to find a way to, obviously, fund it.

23 Now, in this case, the decision has been made to try
24 to reduce the DSH component. Because, as Senator Conrad
25 said, more people are going to be covered.

1 My question to you is what factors have gone into
2 arriving at that figure of the DSH reduction besides the
3 numbers of people that Senator Conrad has spoken to, who
4 will be covered? Is there any other calculation that you
5 are able to make that, as a consequence of things we're
6 doing in this bill or as a consequence of changes in the
7 health-care system, will reduce the negative impact on
8 the delivery of care to those affected by the
9 disproportionate share?

10 Mr. Schwartz. We did base the changes in Medicaid
11 DSH on state rates of uninsurance. But I should add that
12 -- and this will be, I think, of particular interest to
13 you, Senator Kerry -- that currently there are six states
14 that have what CMS refers to as DSH diversions, where
15 they have gone through the process and gotten approved to
16 use those DSH dollars to underwrite coverage of people,
17 instead of the traditional use of DSH, which is to make
18 payments to hospitals.

19 Three of those six states have diverted 100 percent
20 of their DSH funds towards coverage. The other three
21 have partial diversions.

22 Maine is actually a partial-diversion state.
23 Massachusetts is a 100 percent-diversion.

24 Senator Kerry. Do we go up to 300 percent with
25 subsidy? Three hundred percent of poverty, with subsidy?

1 Mr. Schwartz. Correct. Correct, and part of that
2 is funded with DSH dollars.

3 Senator Kerry. Correct.

4 Mr. Schwartz. So the Chairman's mark specifically
5 exempts any DSH dollar that's diverted to coverage from
6 the cuts.

7 So under the Chairman's mark, actually,
8 Massachusetts' DSH allotment would not be reduced.

9 And Maine's would be reduced. I think that your
10 diversion is 52 percent, but don't quote me on that. So
11 then that would mean only 48 percent of the allotment
12 would be subject to the cuts.

13 And again, they're phased in over time. They can't
14 happen before 2015, and it's incremental over a period of
15 years, based on what the state uninsurance rate is and
16 how it compares to the rate from the year before.

17 Senator Kerry. Right.

18 The Chairman. Senator Conrad.

19 Senator Conrad. One last question, if I could.

20 As I study this chart, Mr. Schwartz, it tells me
21 that over the next three years every single state will
22 have less in Medicaid spending because of this mark. Is
23 that true?

24 Mr. Schwartz. That's true.

25 Senator Ensign. Mr. Chairman?

1 The Chairman. Okay, Senator Ensign.

2 Senator Ensign. Mr. Chairman, I'm going to have an
3 amendment in a little bit, and I'll make a lot more of my
4 points when I do my own amendment.

5 But one thing that I wanted to point out, sometimes
6 we talk in weird numbers around here. Senator Conrad's
7 been around the Budget Committee enough years; anybody
8 who's been around this place, some of the numbers we toss
9 around, some of the ways that we speak the American
10 people kind of scratch their head and they go, you know,
11 that just doesn't make sense.

12 When we say that the Medicare Trust Fund is extended
13 out three, four, five years, whatever the number is, by
14 this legislation, and we say it's solvent for that years,
15 it's kind of like saying, you know, I have this idea that
16 I owe my kids' college fund x amount of dollars. And I
17 make up a number that I've extended out four or five
18 years.

19 But because of my rate of borrowing, or my rate of
20 spending right now, I'm not going to have the money to
21 pay that college fund, it really doesn't matter.

22 Whatever I say is in that college fund, if the money
23 isn't there -- and we know that the money is not there,
24 in the Medicare Trust Fund -- this is just an accounting
25 gimmick that is there.

1 If there's not funds, the bottom line is today --
2 correct me if I'm wrong on these numbers -- our deficit,
3 our amount of money we spend on interest on the debt is
4 around \$180 billion, 170 billion dollars, somewhere in
5 there this year.

6 By the time that -- this budget window is for this -
7 - in about 10 years, our interest on the national debt is
8 going to be somewhere around \$800 billion a year. Those
9 are accurate numbers I think everybody agrees with, okay?

10 When you're paying \$800 billion a year, that's the
11 biggest threat to Medicare. Okay? Because we're not
12 going to have the kind of money to be able to supplement.

13 And if the -- whether we owe the Medicare Trust Fund
14 money or not, if that money is not there, we can't pay
15 it.

16 And that's why I'm saying that spending is a big
17 deal here, and this bill spends money.

18 Senator Kerry. We're getting a little off the
19 subject here. Let's --

20 Senator Ensign. No, but you brought this subject
21 up. You're the one who brought this subject up about the
22 Medicare Trust Fund. And when you guys make a point,
23 it's fair for us to respond to that point.

24 I was making the point --

25 Senator Kerry. Well, I think it is fair to

1 respond, and a fair response --

2 Senator Ensign. It is, and that's why I was
3 continuing.

4 Senator Kerry. Well, a fair response requires an
5 acknowledgement that almost everything we've done here --
6 we put pay-as-you-go in. We have tried to make these
7 bills deficit-neutral.

8 The chairman has led the effort with respect to
9 that.

10 We had a balanced budget, a \$5.6 trillion surplus in
11 2000, as you recall, and we all know what happened in the
12 last eight years.

13 So if we want to go down that road --

14 Senator Ensign. I would be happy to go down that
15 road. I'll compare my record against anybody on this
16 Committee as far as spending is concerned.

17 Senator Ensign. Let me reclaim my time. Let me
18 reclaim my time. The bottom line is --

19 The Chairman. We're time -- we have to vote pretty
20 soon here.

21 Senator Ensign. We're seeing appropriations bill
22 after appropriations bill. I just had an amendment on
23 the floor to recommit the bill, the Interior bill. Not a
24 single Democrat voted. If we did, we got one or two
25 Democrats to decrease the spending to last year's level.

1 I did one last week, because last week's spending
2 bill was 23 percent higher than the year before. This
3 week's spending bill was 15 percent higher.

4 The bottom line is we're spending money like crazy,
5 and this bill -- you may say it's in balance, but we
6 established clearly, one of the reasons they say it's in
7 balance is because the Cadillac plans -- more and more
8 and more of them, because they're not indexed for medical
9 inflation; they're indexed for regular inflation -- are
10 picked up in this plan. So that tax hits more and more
11 people.

12 Plus the fact that we also understand that some of
13 the revenue-raisers go into effect for the first few
14 years before the spending.

15 So if you actually score the spending in a 10-year
16 period, the estimates can be as high as \$1.7 trillion in
17 actual spending, the true cost of the bill.

18 The Chairman. Okay. Ready to vote.

19 All those in favor -- I'm sorry, what? Want a roll-
20 call vote? Okay.

21 Senator Crapo requests a roll-call vote. The clerk
22 will call the roll.

23 The Clerk. Mr. Rockefeller?

24 Senator Rockefeller. No.

25 The Clerk. Mr. Conrad?

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

1 The Clerk. Ms. Snowe?
2 Senator Snowe. Aye.
3 The Clerk. Mr. Kyl?
4 Senator Kyl. Aye.
5 The Clerk. Mr. Bunning?
6 Senator Bunning. Aye.
7 The Clerk. Mr. Crapo?
8 Senator Crapo. Aye.
9 The Clerk. Mr. Roberts?
10 Senator Grassley. Aye by proxy.
11 The Clerk. Mr. Ensign?
12 Senator Ensign. Aye.
13 The Clerk. Mr. Enzi?
14 Senator Enzi. Aye.
15 The Clerk. Mr. Cornyn?
16 Senator Cornyn. Aye.
17 The Clerk. Mr. Chairman?
18 The Chairman. No. Senator Bingaman is no by
19 proxy.
20 The Clerk. Mr. Carper?
21 Senator Carper. No.
22 The Clerk. Ms. Cantwell?
23 Senator Cantwell. No.
24 The Chairman. Clerk will tally the vote.
25 The Clerk. Mr. Chairman, the final tally is 10

1 ayes and 13 nays.

2 The Chairman. The amendment fails.

3 I understand Senator Schumer would now like to offer
4 an amendment.

5 Senator Schumer. Yes. Mr. Chairman, I'm going to
6 offer this amendment, speak about it, and --

7 The Chairman. And what's the number?

8 Senator Schumer. It is number C-8.

9 The Chairman. C-8?

10 Senator Schumer. Right.

11 The Chairman. Thank you.

12 Senator Schumer. And I will then -- it's on behalf
13 of myself, Senators Menendez and Bingaman. And we're
14 going to withdraw the amendment. We want to speak about
15 it.

16 We don't have a CBO score yet, so we're not going to
17 go forward, but we wanted to speak about it for a brief
18 moment, let our colleagues know about it, because we will
19 move this amendment as we go forward in the process.

20 What it does is it would make American citizens
21 living in the five U.S. territories -- Puerto Rico, the
22 Virgin Islands, Guam, Samoa, and the Northern Mariana
23 Islands -- eligible to purchase health insurance in the
24 exchange and receive federal subsidies like the residents
25 of the 50 states and D.C.

1 Mr. Chairman, I was dismayed to find that the mark
2 did not allow these U.S. citizens, who happen not to live
3 in one of the 50 states, access to the reforms that are
4 such a significant part of the bill.

5 There are 4.4 million residents of the five U.S.
6 territories, 4 million from Puerto Rico. They're
7 American citizens; Puerto Ricans have been part of this
8 nation for 111 years.

9 And the amendment simply adds these residents of the
10 territories to also benefit from the insurance market
11 reforms and consumer protections established by this
12 bill. They'd be subject to the same mandates as everyone
13 else.

14 The Health Committee did include Puerto Rico and the
15 territories, and it makes sense. We want all Americans
16 to have equal access to quality and affordable health
17 care throughout our country.

18 Everyone here recognizes the contributions that
19 residents of the territories make to our country. For
20 instance, Puerto Rico sends a greater percentage of men
21 and women into our armed forces than all but one state.

22 These citizens have bravely served our country in
23 both Iraq and Afghanistan. They're willing to undergo
24 sacrifices to protect our freedoms.

25 The residents of the territories also pay all

1 federal taxes that Congress has asked them to pay,
2 including Medicare and Social Security, so they should be
3 able to benefit from health-care reform.

4 As you know, there are 4 million men and women
5 living in the 50 states who were born in Puerto Rico or
6 of Puerto Rican descent, 1 million in my home state of
7 New York alone.

8 They take great pride in their Puerto Rican roots,
9 follow events on the island with abiding interest, and
10 have sons, daughters, brothers, sisters, parents,
11 grandparents, that live in Puerto Rico still.

12 How can we tell these citizens their loved ones in
13 the territories, even though they're Americans, won't be
14 able to have access to the benefits that come with the
15 insurance market reforms and participating in the
16 exchange?

17 So we are offering this amendment so we don't have
18 to tell them that; so we can say to our neighbors, our
19 servicemen and -women, our friends, fellow citizens, they
20 deserve the same health-care reform that we do.

21 Unfortunately, as I mentioned, we haven't received a
22 score for this amendment, but I hope we can work with you
23 to find a way to include the territories -- Puerto Rico
24 and the territories -- in the exchange. It's the right
25 thing to do.

1 I believe Senator Menendez would like to speak on
2 this amendment, and then we'll withdraw it.

3 Senator?

4 The Chairman. Senator Menendez.

5 Senator Menendez. Thank you, Mr. Chairman.

6 Let me thank my colleague from New York for offering
7 an amendment that I've co-sponsored with him.

8 Let me start off with that sometimes I've had
9 members of Congress, when I was in the House of
10 Representatives, ask me did they need a passport to go to
11 Puerto Rico -- which I thought was a joke, when they
12 asked me that. But they were serious.

13 Puerto Ricans are United States citizens. They are
14 United States citizens. And the flow that goes back and
15 forth between states like Senator Schumer and my own,
16 which has the second-largest concentration in the nation
17 of Americans of Puerto Rican descent, is quite big.

18 So if they happen to have come to New Jersey for a
19 period of time, or maybe stayed, as many of them have --
20 well over a million -- they, in fact, would be eligible
21 for what we are doing under this bill.

22 If they move back to Puerto Rico, they are not.

23 And as Senator Schumer said, there are nearly 4
24 million United States citizens who reside in Puerto Rico.

25 They pay their same Medicare taxes as any American

1 in any of the states.

2 In my book that's coming out, I talk about the 65th
3 Regiment Infantry Division of the Korean War -- an all-
4 Puerto Rican division, the most highly decorated group of
5 soldiers in the history of the United States.

6 If we were to take a walk to the Vietnam Wall, most
7 of the Hispanic names you'd see, which are in great
8 abundance, unfortunately, would be of Puerto Rican
9 descent.

10 They are a critical part of the nation's fabric and
11 their security.

12 So that's why I also feel that they, as well as all
13 of the territories, must be part of the health-care
14 reform. That's why its residents, who are our fellow
15 United States citizens, must have access to the subsidies
16 the health care change provides for. And that's why I'm
17 proud to co-sponsor this with Senator Schumer.

18 Ironically, the bill would treat legal non-citizens
19 in the states -- in other words, legal permanent
20 residents of the United States -- better than American
21 citizens living in the territories.

22 And that simply isn't right.

23 Mr. Chairman, in the interest of time, let me just
24 propose an amendment that I won't offer, so that we won't
25 have to go through this.

1 But let me take this moment to say that a corollary
2 to this is another amendment that I was going to offer on
3 disparities in the Medicare system in Puerto Rico.
4 Again, Puerto Ricans pay Medicare taxes.

5 My amendment would have provided for Puerto Rican
6 hospitals to be paid based on the national average
7 standardized rate.

8 Right now, the formula yields payments to Puerto
9 Rican hospitals that are considerably lower than payments
10 made to hospitals in the states.

11 That is something that also --

12 The lone exception in this whole section,
13 particularly persons eligible to enroll in Medicare Part
14 B by reason of his or her entitlement to Part A, is
15 deemed to have been enrolled in Part B. In other words,
16 they're automatically enrolled to Part B -- the lone
17 exception is Puerto Rico.

18 So I have a real concern about fellow citizens who
19 happen to live in Puerto Rico and, for that fact, the
20 territories.

21 As a matter of fact, the Centers for Medicare and
22 Medicaid Services report that as of December, 12.5
23 percent of Part B enrollees in Puerto Rico were subject
24 to the delayed enrollment penalty, compared to 1.7
25 percent in the entire rest of the states.

1 So, Mr. Chairman, I know you have been a long
2 supporter of the territories in terms of fairness, and I
3 hope we can work on these issues as this process
4 proceeds.

5 I know this is an issue more of cost than policy.
6 So I look forward to working with you as we move forward.

7 But it is not fair. If you can serve on the front
8 lines, if you can man a post in Afghanistan, if you can
9 stand and be injured by an improvised explosive device in
10 defense of the country, you should be able to have access
11 to the exchange and its subsidies therein.

12 And that is, in fact, what we seek to be able to
13 accomplish.

14 And I appreciate, again, Senator Schumer bringing
15 the amendment forward.

16 The Chairman. Senator Bingaman.

17 Senator Bingaman. Yes, thank you, Mr. Chairman.

18 I want to just indicate my strong support for the
19 amendment that Senator Schumer and Senator Menendez have
20 put forward here.

21 I would say that Senator Menendez indicated that
22 he's got -- he's received questions from members of
23 Congress as to whether you need a passport to go to
24 Puerto Rico.

25 I get those same questions about people wanting to

1 go to New Mexico.

2 (Laughter.)

3 It says more about --

4 Senator Menendez. You don't need a passport there.

5 You need a visa.

6 Senator Bingaman. Yes.

7 (Laughter.)

8 It says more about the members of Congress than it
9 does about the areas we're talking about.

10 I do think that we did -- we tried very hard to do
11 the right thing by the -- by Puerto Rico, by the
12 territories, in the bill that we did in the Health
13 Committee.

14 And I think it's important that we do the same thing
15 here. And I know that this is not going to be voted on
16 now, but I do hope that as the bill moves forward, we can
17 figure out a way to bring fairness to the treatment of
18 citizens in these areas.

19 Senator Ensign. Mr. Chairman?

20 The Chairman. Senator Ensign.

21 Senator Ensign. Just very briefly, I think you all
22 bring up some very, very good points. I mean, a U.S.
23 citizen's a U.S. citizen, regardless of where they live.

24 And it would seem to me to be a matter of fairness.

25 So I hope we can work this out.

1 Senator Schumer. Mr. Chairman, I withdraw the
2 amendment.

3 The Chairman. The amendment's withdrawn.

4 Senator Cornyn.

5 Senator Cornyn. Thank you, Mr. Chairman.

6 Mr. Chairman, I'd call up my amendment, C-23, as
7 modified. It's been distributed.

8 The Chairman. All right. C-23.

9 Senator Cornyn. Mr. Chairman, we -- I remember
10 when the CBO director, Dr. Elmendorf, talked about the
11 fastest safe speed at which this bill and various
12 amendments might be scored.

13 I note Senator Schumer said that his amendment was
14 not scored, nor have many amendments been scored. And I
15 understand why, and I'm not critical of that. I just say
16 that's a fact that we have to deal with.

17 As a number of us have observed, this proposal
18 before us overhauls one-sixth of the economy, \$2.6
19 trillion. And I'm concerned that the process is being
20 driven by an artificial deadline.

21 I would note for the record this is September the
22 24th, 2009. But the main spending in this proposal does
23 not go into effect until 2013.

24 And, as we've discussed, the Medicaid expansions
25 don't go into effect until 2014, five years from now.

1 I believe it's imperative that we get this right,
2 and I've heard members on both sides of the aisle say
3 that.

4 Over the break, I learned that the Congressional
5 Budget Office made a mistake in scoring the Stabenow
6 amendment that was accepted by voice vote today. That
7 was Stabenow C-6.

8 As it turns out, it was a \$600 million mistake. And
9 because CBO, in its haste, had said it was revenue-
10 neutral, no offset was required by the chair.

11 Now, I don't blame the chair. I don't blame CBO.
12 Certainly I don't blame Senator Stabenow. But I think
13 the unrealistic timelines, which are artificial, that
14 have been imposed on the CBO helped contribute to the
15 \$600 million mistake.

16 As we know, \$600 million may not sound like a lot
17 when we're talking about trillions of dollars, but to the
18 hard-working Americans who are struggling in a tough
19 economy, \$600 million is real money.

20 Senator Stabenow's amendment has a worthwhile goal,
21 but it also deserves to have -- we also deserve to have
22 an informed debate and to get the details right as we're
23 voting on them.

24 So to ensure that that kind of mistake does not
25 happen again, I would propose my amendment, C-23.

1 My amendment was -- is designed simply to slow us
2 down so we can get it right -- not to slow it down for
3 slowing it down's sake, but so we can get it right.

4 My amendment would require that before the Finance
5 Committee votes on any amendment to the America's Healthy
6 Future Act of 2009, the CBO and Joint Tax scoring
7 estimates of such amendment must be publicly available
8 and posted on their respective Web sites for at least 24
9 hours before a vote.

10 This amendment obviously doesn't need an offset;
11 it's designed to actually help us save money, not spend
12 money. And I would urge my colleagues to support it.

13 The Chairman. Senator Stabenow, you seem to be the
14 subject of this amendment.

15 Senator Stabenow. Seem to be. And so, since my
16 name was invoked I don't know how many times as I came
17 into the room, I did want to just clarify one thing.

18 Because the amendment that I offered today, I
19 originally raised with the chairman that there were some
20 debates going on with CBO whether or not it scored.

21 It's a policy related to foster children. There was
22 an attempt to change it by the previous administration,
23 to remove access to health care services.

24 The rulemaking process was started and never
25 finished. So there's been discussions, does CBO score

1 that as part of the Medicaid baseline or not, back and
2 forth.

3 This really had nothing to do with rushing the bill.
4 It had nothing to do -- it has -- it's an ongoing
5 discussion that we've had now with them.

6 And there was a communication that, in fact, it had
7 scored it zero. And then -- just a mistaken
8 communication. And now -- and we're still having that
9 discussion.

10 But I think it's -- I would not characterize it as
11 being part of somehow rushing this process. It's more a
12 question of how they score, from a technical standpoint,
13 what is happening during the rulemaking process.

14 And we're still debating with them, because we
15 believe that, in fact, there is no score. And we're
16 still discussing it, Mr. Chairman. We'll continue to do
17 that.

18 But this really isn't a good example of what you're
19 talking about, because it was something that we'd been
20 having discussions on for some time.

21 Senator Cornyn. Just so that -- Mr. Chairman, just
22 so the distinguished senator understands, I'm not being
23 critical of her --

24 Senator Stabenow. No, I appreciate that. I didn't
25 take it --

1 Senator Cornyn. -- nor the substance of the
2 amendment.

3 But the fact of the matter is at least one of my
4 amendments was ruled non-germane because there wasn't a
5 CBO score.

6 The chairman said that it was irrefutable that it
7 was going to cost money, and so he ruled it out of order,
8 and the appeal from the chair was unsuccessful.

9 Conversely, the senator from Michigan's amendment
10 was voiced-voted because CBO said it was revenue-neutral
11 when, in fact, they came back and said it was a \$600
12 million mistake.

13 I think that's -- I'm not being critical of the
14 chairman or the senator from Michigan, or the substance
15 of the amendment.

16 Senator Stabenow. I appreciate that.

17 Senator Cornyn. I'm just saying this demonstrates
18 how trying to move too fast before we have all the
19 information creates serious problems for us.

20 Senator Stabenow. Well, if I might just speak --

21 Senator Cornyn. And my amendment is designed to
22 try to fix that so that we can know what we're voting on
23 when we're voting, and the chairman can make well-
24 informed decisions about whether scores are required --
25 or, excuse me, the amendments are revenue-neutral or not.

1 Senator Stabenow. Well, if I might just respond
2 again to my friend.

3 My point was simply that I believe you're using the
4 wrong example. Because if you're trying to make a case
5 for the fact that mistakes were somehow being made
6 because of something being rushed, this was not a matter
7 of being rushed.

8 This was just a disagreement as to some technical
9 points. We all could debate, sort of, the technical
10 parts of CBO and how they look at rulemaking and what's
11 in a baseline and not.

12 And so this was just an ongoing debate and a
13 miscommunication. Somebody had said they thought it was
14 all right.

15 And we're clarifying it, Mr. Chairman. We'll
16 continue to work on that one, and --

17 But I certainly wouldn't want this being used. You
18 may want to use another example, but --

19 And I didn't take it personally at all. But this is
20 just not an example of rushing, because we've been
21 spending a lot of time on this.

22 Senator Cornyn. To the contrary, this is a perfect
23 example of where we are making decisions, adopting an
24 amendment by a voice vote without accurate information.

25 Indeed, is -- I can't see the signs from here, but

1 do we have a representative of CBO at the table? CBO's
2 not here. I suppose they're back working on trying to
3 get scores on amendments and on the modified mark and the
4 like.

5 But I would say, Mr. Chairman, I know that both the
6 chairman and the ranking member's staff were -- and --
7 were notified that this was a \$600 million mistake. It's
8 not technical unless you call \$600 million a technical
9 mistake.

10 It demonstrates the disparity of treatment based on
11 whether amendments will be ruled out of order that are
12 not scored, like mine was, when those that actually cost
13 \$600 million, have no offset, are accepted by a voice
14 vote and not ruled out of order.

15 I'm not trying to criticize. I'm just saying this
16 is a good reason why my amendment needs to be accepted,
17 so we can make good decisions based on complete
18 information.

19 And I think that's something our constituents
20 deserve.

21 Senator Stabenow. Well, just for the record,
22 because again, more characterization --

23 The Chairman. Senator Stabenow's recognized.

24 Senator Stabenow. Thank you, Mr. Chairman.

25 The Chairman. I think we should seek recognition.

1 Kind of -- they get things kind of out of hand here.

2 Senator Stabenow.

3 Senator Stabenow. Thank you. Thank you, Mr.
4 Chairman.

5 Just for the record, this is not about costing
6 dollars. There was never any increased dollars involved
7 in this.

8 It's how CBO chooses to characterize a rulemaking
9 process that started and never finished. And they put
10 some numbers into the baseline.

11 And it's a question of accounting rules. So it's
12 not a question of technical.

13 It's a lot of money -- people in my state would view
14 that, and do believe that is a lot of money, and so do I.

15 But this was a debate about an accounting process
16 that we're involved in.

17 So I just -- just for the record.

18 Thank you, Mr. Chairman.

19 The Chairman. Senator, I'd just like to, if I
20 could, understand your amendment. Let me see if I can
21 get this straight.

22 Under your amendment, if an amendment is offered
23 here, you're saying we couldn't consider it. We'd have
24 to wait till it's -- CBO scores it, it's publicly
25 available on the CBO or Joint Tax Web site. Only then,

1 and after -- 24 hours after that, could we consider it.

2 And then say it's -- I don't know how many days
3 practically will have transpired by then. I'm guessing
4 about a week.

5 So then a week later, we come back and look at that
6 amendment. And as often is the case, that someone wants
7 to modify that amendment, so we can't consider that.

8 We'd have to send it back to CBO. It takes CBO and
9 Joint Tax a little while to get their numbers. And it
10 has to be on the Web site again.

11 So then we're at two weeks, probably, just being
12 practical about this -- that's if we're lucky -- before
13 we could come back and consider the amendment.

14 You know, at that rate, we're lucky if we get
15 anything through the Congress in a year. When you say
16 you're trying to slow things down, that's an
17 understatement. This will really slow things down.

18 I don't think that's quite really how we -- we'll
19 not be able to function, frankly. This Committee will
20 not be able to function, if that's --

21 I might just tweak you or tease you a little bit.
22 Did you get your amendment scored by CBO? Is it on a Web
23 site for 24 hours?

24 Senator Cornyn. Mr. Chairman, my amendment --

25 The Chairman. Well, no -- we have --

1 Senator Cornyn. I'm still --

2 The Chairman. Yeah. We just can't function if
3 this amendment passes --

4 Senator Cornyn. I'd be glad to modify it --

5 The Chairman. Sorry, could you --

6 Senator Cornyn. Before any bill is finally voted
7 on, that all amendments need to be scored. This is
8 before final passage. All amendments need to be scored,
9 and the bill, obviously, as amended, would need to be
10 scored.

11 And that it be an order that any amendment could be
12 revisited. I think that would address the concerns that
13 you --

14 In other words, this is -- instead of dealing with
15 problems on the front end, this would deal with them on
16 the back end, but would provide the kind of safety net
17 that would keep us from making \$600 million mistakes --

18 The Chairman. I think we've already voted on it.
19 That was -- amendment a few days ago, as I recall.

20 Senator Cornyn. I believe it was different. Are
21 you referring to the Bunning amendment, Mr. Chairman?

22 The Chairman. Yeah, the Bunning amendment.

23 Senator Cornyn. I believe that was a different
24 amendment.

25 But again, this is -- if I can ask counsel, can you

1 explain how the mistake was discovered?

2 Mr. Schwartz. Sure, Senator, I'd be glad to.

3 Last night, I think it was at about 7:30, CBO sent
4 an e-mail to bipartisan committee staff with several
5 scores that had been shared with different sponsor --
6 amendment sponsor offices.

7 This one was listed as having no cost or savings. I
8 said that earlier this afternoon, when Senator Stabenow
9 offered her amendment. We learned later in another e-
10 mail from CBO that it in fact did score \$600 million over
11 10 years.

12 The confusion, as Senator Stabenow pointed out,
13 stems from the fact that there is a proposed rule, that
14 no action has been taken on, and that was at one time, I
15 believe, the subject of a congressional moratorium.

16 And so it seemed not unreasonable, when that no cost
17 or savings response came in last night.

18 The Chairman. Well -- when did we find out this
19 error?

20 Mr. Schwartz. After the amendment was accepted, it
21 was --

22 The Chairman. Afterwards.

23 Mr. Schwartz. Yes. It was about 5:30 this
24 afternoon, I think.

25 The Chairman. After the fact.

1 Senator Cornyn. May I ask, Mr. Chairman, does the
2 \$600 million score on the Stabenow amendment still stand?

3 Mr. Schwartz. That is what CBO says the cost
4 estimate is now. Yes.

5 Senator Ensign. Did she offset it? Is it offset
6 now?

7 The Chairman. Now -- now --

8 Senator Ensign. Mr. Chairman? So your
9 requirement, does she have to now come up with a \$600
10 million offset?

11 The Chairman. Well, technically, because it's
12 already been voted on, the answer is no.

13 Senator Ensign. The reason I'm asking is because
14 if you --

15 The Chairman. It's already been voted on.

16 Senator Ensign. Yeah, but his modification, what
17 he just said his modification would be, is at the end of
18 the process, before we vote on final. You've already
19 agreed because in your opening amendment you said that
20 the bill would have to be scored and all the amendments
21 would have to be scored --

22 What he is saying, that if any amendments come back
23 as the wrong score, that they could be revisited before
24 final passage.

25 So in other words, Senator Stabenow's amendment

1 would have to then be revisited and then she would have
2 to come up with an offset. Or, if a different amendment
3 were scored. I think that's a reasonable accommodation.

4 The Chairman. You know what strikes me about all
5 this? This is so anti-Republican philosophy.

6 (Laughter.)

7 You're being so prescriptive, so tying everything
8 down so much into knots, instead of freedom.

9 (Laughter.)

10 Senator Ensign. Freedom to spend.

11 Mr. Chairman, we want to free the individual; we
12 want to tie down government. You need to remember that.

13

14 (Laughter.)

15 The Chairman. That's becoming pretty clear.

16 Senator Conrad. Mr. Chairman? Mr. Chairman?

17 The Chairman. Senator Conrad.

18 Senator Conrad. Isn't it the case that the
19 commitment that you've made is that before we vote --

20 The Chairman. Yes.

21 Senator Conrad. -- we'll have scoring from CBO?
22 And isn't it a further commitment that you've made that
23 the bill in its entirety, as scored by CBO, will have to
24 be paid for?

25 And isn't it further your commitment that not only

1 will it have to be paid for, deficit-neutral, but also
2 that it will bend the cost curve, according to CBO, over
3 the second 10 years?

4 So in this circumstance --

5 The Chairman. I'd say, in answer to your question,
6 all that's true. I've said that many times.

7 Senator Cornyn. Mr. Chairman, may I ask one
8 question about that? Does that include amendments that
9 have been ruled out of order because they're not germane,
10 because there's no CBO score at the time the amendment
11 was taken up?

12 The Chairman. The amendments -- well, if there's -
13 -

14 Senator Cornyn. The right to revisit amendments?

15 The Chairman. Amendments that are not germane are
16 out of order, and if there's no offset, they're not
17 germane, therefore out of order.

18 Senator Cornyn. With all due respect, Mr.
19 Chairman, that's a double standard. Senator Stabenow's
20 amendment did not have a --

21 The Chairman. I think -- you know, Senator, I
22 think the best thing to do is not undo things, go
23 forward. If you have an amendment, if you want to amend
24 it with Senator Stabenow, do it. That's certainly a
25 prerogative.

1 But I just think it's forward -- for us to keep
2 moving forward. If you've got an amendment, if you want
3 to offer an amendment that addresses the subject of the
4 Stabenow amendment, that's fine. But let's not go back
5 and kind of undo things.

6 Senator Cornyn. Well, I do have a pending
7 amendment that I would like to offer -- as I said, the
8 modification -- which I think would deal with your
9 concerns about slowing the process down on the front end.

10 It would provide a safety net for us to fix mistakes
11 on the back end and allow us the right to revisit those
12 amendments.

13 I just -- I think that's a fair outcome.

14 The Chairman. Yeah. Could the senator now state
15 his amendment? I'm not quite sure what his amendment is.

16 Senator Cornyn. The modification would say that
17 before the Finance Committee votes on --

18 The Chairman. So this is -- I'm just asking -- so
19 this is a further modification?

20 Senator Cornyn. This is --

21 The Chairman. It's not what you have before us.

22 Senator Cornyn. Once you told me that you thought
23 that the initial proposal was unworkable, I offered to
24 modify it. And now I'm explaining what I think that
25 modification --

1 The Chairman. -- modification to the modification
2 that's before us?

3 Senator Cornyn. That's correct, sir.

4 The Chairman. Okay. Thank you.

5 Senator Cornyn. Before the bill is voted on final
6 passage, that all amendments need to be scored. And that
7 any amendment that is -- has a score which -- or does not
8 have the score which was believed to have the score --
9 could be revisited.

10 The Chairman. Frankly, I'd like to see your
11 modification in writing first, so I know what it is.
12 Because I -- this is getting a little loose here.

13 Senator Cornyn. That's fair enough. I'll give it
14 to you in writing.

15 The Chairman. Okay. So you're going to withdraw
16 the current amendment?

17 Senator Cornyn. I'll withdraw it and I'll come
18 back and we'll -- I'll show you it in writing.

19 The Chairman. Okay. Thank you.

20 Are there further amendments?

21 Senator Menendez?

22 Senator Menendez. Mr. Chairman, I'd like to call up
23 my amendment, C-9, as modified.

24 The Chairman. C-9.

25 Okay, Senator.

1 Senator Menendez. Thank you, Mr. Chairman.

2 Mr. Chairman, I'm offering a modified amendment that
3 would clarify in the mark that behavioral health
4 treatment is part of mental health and substance abuse
5 services.

6 Behavioral health treatments help to reinforce
7 wanted behaviors and reduce unwanted behaviors, and the
8 treatments are critical for individuals affected by
9 autism, Down Syndrome, and a variety of other disorders.

10 They can help a child to communicate and care for
11 themselves; they can help that child from -- stop him
12 from hitting himself and those around him; they can
13 enable a child to attend regular education classes,
14 rather than special education classes; they can enable a
15 child to live at home, rather than an institution.

16 All of these alternatives save money in the long
17 run, and this is an effort to decrease long-term health
18 care costs.

19 As modified, the amendment requires no offset,
20 according to CBO. Very similar language has already
21 passed in the House Energy and Commerce Committee on a
22 bipartisan basis by voice vote.

23 And let me be clear: This does not expand the
24 minimum benefits package; it merely clarifies what is
25 already in the chairman's mark -- clarifying that

1 insurance plans must provide behavioral health treatment
2 as part of mental health and substance abuse services
3 will ensure better quality health care.

4 And, like all Americans, people with autism and
5 other behavioral health conditions should be able to live
6 healthy lives.

7 And I urge the Committee's adoption.

8 The Chairman. Is there further discussion?

9 Seeing none, I see no reason --

10 Yes, Senator Bingaman.

11 Senator Bingaman. Mr. Chairman, I hate to be the
12 skunk at the party here --

13 The Chairman. That's okay.

14 Senator Bingaman. But I do think it's --

15 The Chairman. That's your prerogative.

16 (Laughter.)

17 Senator Bingaman. That's my practice.

18 I think it's a mistake for us to start writing into
19 statute the definitions that we think the secretary of
20 Health and Human Services should put on all of these
21 benefits.

22 I think it's an endless process, and if we start
23 down that road, there'll be a long line of people outside
24 the Committee room, outside each of our offices, saying
25 we need to be clearly identified as included in this

1 category.

2 I think that would just be a mistake and, for that
3 reason, I'd like to be recorded against the amendment.

4 Senator Ensign. Mr. Chairman?

5 The Chairman. Senator Ensign.

6 Senator Ensign. You remember earlier today when we
7 talked about this, I raised this as a point, when we
8 talked about -- I think there was the mental health
9 parity issue earlier today.

10 And my son goes to school with a lot of autistic
11 kids. I see their parents; I see what they go through,
12 and all of that.

13 But why is a kid -- why don't we mandate the
14 coverage of diabetes? Why don't we mandate -- why don't
15 we do all of the various mandates that we think --

16 You're exactly right, we are going to have a line
17 outside with every one of the incredible special groups
18 that are out there they represent. They're going to ask
19 us to put that in, if we go down this line.

20 And that does take away some of the flexibility that
21 we talked about. These are all worthy-type things to do,
22 but --

23 But Senator Bingaman just raised a very important
24 point. I raised it earlier today, and this is the line
25 we're going to go down.

1 On the floor, you know, between the time we get now
2 and to the floor, if they know we've done a couple of
3 these, how are you going to say no to the next one?

4 Senator Bingaman. Mr. Chairman, could I just
5 clarify my position on --

6 The Chairman. Sure. Yes --

7 Senator Bingaman. I'm not saying that these
8 services should not be included in the coverage. I'm
9 just saying we should not be specifying that by statute.

10 We should -- we have the general description in the
11 chairman's mark, on page 17, saying what all plans are
12 required to cover. And we leave it up to the secretary
13 of Health and Human Services to further define that.

14 I think that's the way it ought to be, so I would
15 prefer that we do it that way.

16 The Chairman. Senator Menendez.

17 Senator Menendez. Mr. Chairman, I would understand
18 if we were listing the specific categories here, that
19 maybe there is some currency to that argument.

20 My view is that this amendment is merely clarifying
21 what the chairman's mark does. It does not create a new
22 set of benefits. The Finance bill already includes
23 coverage for mental health and substance abuse.

24 All this amendment does is clarify that mental
25 health and substance abuse services covers behavioral

1 health treatment. It's not just autism. Covers
2 behavioral health treatment.

3 And that's why what is reflected here is what a
4 series of states, many of the members of this Committee
5 actually, their states have this.

6 In Arizona, in Florida, in Montana, in Nevada, in
7 New Jersey, in New Mexico, in Texas, they specifically
8 cover -- not autism or some of the other behavioral-
9 related challenges.

10 They, in fact, just simply say that in fact we have
11 the coverage that behavioral health treatment is part of
12 that mental health. So I think that's far different than
13 creating categories.

14 And I really do believe, especially when it is
15 budget-neutral, that -- according to the CBO -- that it's
16 appropriate simply to ensure that there isn't
17 discrimination against this universe which we intend to
18 have, by virtue of the chairman's mark.

19 Senator Kyl. Mr. Chairman, I think Senator
20 Menendez --

21 The Chairman. Senator Kyl?

22 Senator Kyl. Just a question. So this has then
23 been scored by CBO as budget-neutral.

24 Senator Menendez. It has.

25 Senator Kyl. Thank you.

1 The Chairman. All right. If there is no further
2 debate, all those in favor, say aye.

3 [A Chorus of Ayes.]

4 The Chairman. Those opposed, no.

5 [A Chorus of Nays.]

6 The Chairman. In the opinion of the Chair, the
7 ayes have it. The ayes do have it. The amendment is
8 agreed to.

9 Further amendments?

10 Senator Ensign. Mr. Chairman?

11 The Chairman. Senator Ensign?

12 Senator Ensign. Mr. Chairman, Ensign amendment
13 number C-14, as modified, has that been passed out? I
14 will describe it as it is being passed out.

15 The Chairman. C-14.

16 Senator Ensign. C-14, protecting states from an
17 unfunded mandate. Before I do that, I would like to ask
18 unanimous consent to have this -- it was a note from Tom
19 Barthold written to me in response to an earlier question
20 that I had. We could just enter that in the record. I
21 will just read it real quickly.

22 It had to do with earlier today we had the debate on
23 the individual mandate and what penalties if somebody
24 conscientiously, because they objected to the individual
25 mandate, because they believe strongly in the

1 Constitution, so they were going to protest and say "I am
2 not going to pay my taxes" or "I am not going to pay this
3 mandate," they could be subject to the IRS for not paying
4 that fine, that tax.

5 It says Section 7203 of the Code provides that if
6 there is a willful failure to file, pay, maintain
7 appropriate records and the like, that the taxpayer may
8 be charged with a misdemeanor with a penalty of up to
9 \$25,000 and not more than one year in jail. So citizens
10 could be subject to jail.

11 Further, if it is found that it is actually tax
12 evasion, felony tax evasion provides for restitution and
13 a fine up to \$100,000 and for an individual, up to five
14 years in jail.

15 So I just wanted to have that on the record so that
16 people know, if there are Americans that are sincere
17 about this, and I have heard from a lot of them that they
18 believe that this is unconstitutional, the individual
19 mandate, and they protest because they believe it is
20 against the Constitution, that they think it is their
21 constitutional right to not do this, then they could be
22 facing fines and even possible jail time.

23 Now, to get back to my --

24 Senator Conrad. Would the Senator yield just on
25 that point?

1 Senator Ensign. Sure.

2 The Chairman. First of all, without objection, it
3 is included in the record.

4 Senator Ensign. Thank you.

5 The Chairman. Senator Conrad?

6 Senator Conrad. Mr. Chairman, just on that point,
7 I used to be a former tax commissioner in my state.

8 The Chairman. Really? Well, we forgive you.

9 Senator Conrad. I would just say to my colleague,
10 at the levels that we are talking about here, if you
11 could find anyone that has ever been jailed for a failure
12 to pay an amount like this, I would be very surprised.

13 Senator Ensign. Well, my trust in the IRS maybe
14 does not go as deep as yours. But having said that, let
15 us go on to my next amendment.

16 What my amendment says, earlier today, we had an
17 amendment that was a little different, but it had the
18 same kind of a principle. It was dealing with the
19 mandate to the states on Medicaid.

20 We understand that we are expanding new populations
21 on Medicaid. That is part of how to get more of the
22 uninsured in there, by increasing the level of the
23 federal poverty level in many of the states.

24 It establishes a new 133 percent federal poverty
25 level as a new mandatory minimum. Well, my state, for

1 non-pregnant adults, non-elderly, non-pregnant adults, we
2 have up to 25 percent. So this is a huge increase in my
3 state.

4 I realize that the Chairman took care of my state
5 for the first several years, not of my asking, by the
6 way, but realized that that is something that was done in
7 the mark.

8 My concern and the amendment says that states would
9 be able to opt out if this increases their costs by more
10 than 1 percent. The average in the bill, I think, is 1.3
11 percent based on one table. Other tables, the Urban
12 Institute, not exactly a rightwing think tank, has
13 estimated the average is somewhere around 2.7 percent.

14 So we can debate numbers, but the bottom line is we
15 know there is going to be an increased cost due to
16 expansion of Medicaid eligibility to the states.

17 Now, my home State of Nevada is in dire straits
18 right now as far as the budget. Many of your states are,
19 as well. The Senator from Michigan said that her state
20 is the worst of any state. I am not sure that her state
21 budget is any worse than our state budget.

22 We literally have had to slash education spending in
23 our state. Folks are talking about now laying off police
24 officers. In many states, they are talking about
25 releasing prisoners, because they cannot afford to keep

1 them in jail.

2 The bottom line is the states are in dire, dire need
3 and they just do not have the revenues. We do not know.

4 There seems to be a structural problem now. We have
5 looked at our state's budgets for the out-years and even
6 when this thing starts taking effect, people say, well,
7 the economy will be better and everything, nobody really
8 knows whether or not, because of these new baselines.

9 They are not starting from up here anymore. They
10 are starting from way down here. So their budgets may
11 not be able to afford when they have to start paying.
12 The estimates, even by the Democrat staff here, from what
13 I understand, you are estimating an increased cost to the
14 states of 1.3 percent over the 10 years.

15 But when this thing fully goes into effect, correct
16 me if I am wrong, the states actually have to pick up
17 almost 18 percent, after the strongest federal subsidies.
18 In the out-years, they have to pick up a full 18 percent.
19 Is that correct or not correct?

20 Staff Member. No. After the phase-down of the
21 enhanced FMAP, the average state obligation for newly
22 eligibles would be about 11 percent.

23 Senator Ensign. I thought the Federal Government's
24 share went down to 82.3 percent at that point.

25 Staff Member. Eighty-nine percent is the average.

1 Senator Ensign. Well, either way, it is much
2 higher than the current over that 10-year period, because
3 I realize some of this frontloaded from the states to
4 make it look attractive. But in the out-years, it is
5 higher and higher.

6 Now, I would argue if the governors came to us and
7 said "We like this program," would say the federal share
8 is too low, if this is a program they actually wanted.
9 But since we are forcing this program, this is an
10 unfunded mandate.

11 And we have heard how many times from local
12 government officials, state government officials, on and
13 on and on, "Don't put anymore unfunded mandates on us.
14 We can't handle anymore unfunded mandates. You guys pass
15 the bills up there, pass the laws up there, and then you
16 expect us to pay for them back here in our states."

17 One of the things we passed back in 1995 was this
18 law about we are not going to have anymore unfunded
19 mandates. Mr. President, this seems to be a big unfunded
20 mandate.

21 If we remember the argument on No Child Left Behind,
22 we heard from states this is an unfunded mandate. We
23 even put legislation in No Child Left Behind that says if
24 this turns out to be an unfunded mandate, you do not have
25 to pay for it.

1 Well, what my amendment says, simply, is if it turns
2 out to raise the cost for the states by more than 1
3 percent, the state can opt out. So if the State of
4 Massachusetts, State of West Virginia, you want to stay
5 in it, even though it raises your cost higher, you can do
6 that. Your governor, your state legislature, you can do
7 that.

8 Do we think that we care more about our people than
9 our state governors, our state legislatures? The state
10 legislatures are closest to the people and it would seem
11 to me that we should put our trust in our state elected
12 officials. They are accountable. They are closer to the
13 people. They are very accountable to the people.

14 The saying is that government closest to the people
15 is best. Well, let us put our trust them. Let us say
16 that if it raises by more than 1 percent cost to the
17 states, let us go ahead and trust those state elected
18 officials, our governors and state legislatures, to say,
19 "You know what? We want to suspend the program. We
20 appreciate that, but that is just not something we can
21 afford. So we are going to opt out. We care about our
22 people and we are going to figure out a different way to
23 do it than what you guys said and we are going to opt out
24 of this program."

25 Let us give the states the flexibility to do that.

1 Support my amendment and you will be giving the states
2 the flexibility to do just that.

3 Senator Conrad?

4 The Chairman. Senator Conrad?

5 Senator Conrad. Mr. Chairman, could I, by
6 unanimous consent, just ask that the speech that I gave
7 one hour ago on this same subject, on an amendment that
8 was virtually identical, just to appear on the record
9 once again.

10 The Chairman. I was going to incorporate all
11 discussion by reference.

12 Senator Cornyn. Mr. Chairman, I would object. I
13 would like for him to repeat it.

14 Senator Conrad. Senator Cornyn, who is a very dear
15 friend and very kind, would like me to give the speech
16 all over again. I will send you a tape of it tomorrow
17 morning.

18 [Laughter.]

19 The Chairman. Any discussion on the amendment?

20 Senator Grassley. Yes, Mr. Chairman.

21 The Chairman. Senator Grassley?

22 Senator Grassley. This amendment is a good place
23 for me to bring up a question that I have about the
24 modification. Yesterday, the Committee distributed a
25 table entitled "State Medicaid Spending 2010 to 2019."

1 So focus on that a few minutes.

2 There is a version that was distributed yesterday
3 and, also, you remember the table that was distributed on
4 September 14. Last week, your table showed that Iowa
5 would save money under the bill.

6 This week, Iowa will spend money, spend more money,
7 and, of course, I think my feelings ought to be hurt as a
8 result of that. In fact, it appears that 38 states
9 appear to have seen their spending go up since last week.

10 I also cannot help but notice that the State of
11 Nevada improved considerably since last week. Last week,
12 Nevada was looking at a 5 percent increase. This week,
13 Nevada is down to 1.6 percent increase and it is the only
14 state that has seen such an improvement of that
15 magnitude.

16 I do not know whether this is some shameless attempt
17 to get Senator Ensign's vote or what.

18 [Laughter.]

19 Senator Ensign. You figured it out. You figured
20 it out.

21 Senator Grassley. But we need to protect state
22 budgets from this sort of an expansion and I favor the
23 Ensign amendment.

24 The Chairman. Any further debate?

25 If not, all those in favor of the Ensign amendment,

1 vote aye -- that is, by recorded vote.
2 The Clerk. Mr. Rockefeller?
3 Senator Rockefeller. I vote no.
4 The Clerk. Mr. Conrad?
5 The Chairman. Pass.
6 The Clerk. Mr. Bingaman?
7 Senator Bingaman. No.
8 The Clerk. Mr. Kerry?
9 Senator Kerry. No.
10 The Clerk. Mrs. Lincoln?
11 Senator Lincoln. No.
12 The Clerk. Mr. Wyden?
13 The Chairman. Pass.
14 The Clerk. Mr. Schumer?
15 Senator Schumer. No.
16 The Clerk. Ms. Stabenow?
17 Senator Stabenow. No.
18 The Clerk. Ms. Cantwell?
19 Senator Cantwell. No.
20 The Clerk. Mr. Nelson?
21 The Chairman. Pass.
22 The Clerk. Mr. Menendez?
23 Senator Menendez. No.
24 The Clerk. Mr. Carper?
25 Senator Carper. No.

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

1 the same amendment, no.

2 The Clerk. Mr. Wyden?

3 Senator Wyden. No.

4 The Chairman. Senator Nelson is no by proxy. The
5 Clerk will tally the vote.

6 The Clerk. Mr. Chairman, the final tally is 10
7 ayes and 13 nays.

8 The Chairman. The amendment fails. Do you want to
9 do this again?

10 Senator Ensign. We might win it next time.

11 The Chairman. Does anyone seek recognition to
12 offer an amendment?

13 Senator Enzi. Mr. Chairman?

14 The Chairman. Senator Enzi?

15 Senator Enzi. Since I am one and one, I want to
16 see if I can break the tie here. I would call up Enzi
17 amendment C-6. There is no modification to it. So it is
18 in your regular packet.

19 What this amendment does is requires that before the
20 Finance Committee votes on any -- let me get the right
21 amendment here.

22 The amendment would allow individuals who would
23 otherwise be enrolled in Medicaid through the expansion
24 in this bill the right to choose to be covered by
25 Medicaid or a qualified private health plan offered

1 through the state exchange.

2 The reason I am doing this is we are about to shove
3 11 million more people onto Medicaid and Medicaid has got
4 some problems already. It is not the best base to build
5 on, because it is an inadequate program at the moment.

6 According to a 2007 *Wall Street Journal* article,
7 Medicaid beneficiaries have poor health than their peers
8 with private insurance. Additionally, many Medicaid
9 patients cannot find doctors, and we have talked about
10 this before. So they are not getting the care they need.

11 In California, 49 percent of family physicians do
12 not participate in Medicaid. In Michigan, the numbers of
13 doctors who do not see Medicaid patients has risen from
14 12 percent in 1999 to 36 percent in 2005.

15 The 2002 MedPAC report stated, and I have quoted
16 this a number of times, that is 2002 report, "Forty
17 percent of physicians restricted access for Medicaid
18 patients because of concerns about reimbursement and
19 billing paperwork."

20 A 2009 *Health Affairs* report indicates that Medicaid
21 physicians' fees increased by 15.1 percent, on average,
22 between 2003 and 2008 and that is below the general rate
23 of inflation, not the medical rate of inflation, the
24 general rate of inflation at 20.3 percent. So it results
25 in a real reduction in real fees.

1 Even Montana Governor Brian Schweitzer, who is a
2 Democrat, believes that this is a bad idea and
3 unaffordable. To quote him, "One of the least effective
4 programs in terms of health care in the history of this
5 country is something called Medicaid. Now, Medicaid is a
6 system that isn't working, almost everyone agrees. But
7 what Congress intends to do is increase the number of
8 people on Medicaid so they could do it for the cheap.
9 It's not working for anybody."

10 So I am saying if we promise someone coverage and
11 they cannot see a doctor, it really is not health care.
12 Every American should be able to choose to enroll in
13 private insurance. These are the choices that Senator
14 Wyden and I have been talking about for a long time.

15 Medicaid and its unique benefit package provide
16 necessary services and supports for many people with
17 disabilities and special needs, but it does not mean it
18 should be the only choice of 11 million additional low
19 income Americans.

20 Senators and their staffs all have the ability to
21 choose between competing plans, competing private plans,
22 and I believe we should give that same type of choice to
23 low income Americans. The bill prevents 11 million low
24 income Americans from enrolling in -- requiring that they
25 enroll in Medicaid and, therefore, become a part of this

1 lack of doctors.

2 My amendment fixes this problem.

3 Senator Conrad. Mr. Chairman, might I ask Senator
4 Enzi?

5 The Chairman. Senator Conrad?

6 Senator Conrad. I thank the Chairman. Senator, if
7 I could inquire. Is there a score to this? Is there a
8 cost?

9 Senator Enzi. I am sure there is a cost and I have
10 an offset listed and that is to reduce the exchange
11 subsidies as much as is necessary to make the amendment
12 budget-neutral, starting with the subsidies awarded to
13 individuals earning 400 percent of poverty. For a
14 family, that is \$90,100 worth the income and they get
15 about \$2,000 as a subsidy.

16 Senator Conrad. I think there is a kernel of a
17 good idea here. There is actually work being done on
18 another amendment and requests in for CBO scores on a
19 series of options.

20 It is not quite like this, but it has some of the
21 same elements, the idea of a basic plan that people would
22 have available to them. As I hear, Senator Enzi, what
23 you are describing is an option for people, if they are
24 in the expansion population, to go into Medicaid or, at
25 their choice, to go into another plan, a private plan.

1 It would seem to me there would be a way of
2 constructing that in a way that would not have a cost. I
3 do not know if the Senator would be open to exploring
4 that potential, but I am attracted to the notion -- and
5 there have been a lot of discussions on our side, as
6 well, about this about this very point -- an alternative,
7 some kind of basic plan that was not Medicaid, that would
8 be available.

9 It is not clear whether it would be done instead of
10 Medicaid entirely or is an option. But I do know if the
11 Senator really wants to push this to a vote tonight, in
12 which case I would probably be constrained to oppose it,
13 because I would hope we could do this in a way that did
14 not cost money.

15 But I do think there is a kernel of a good idea here
16 that should not be just dropped without further
17 exploration.

18 Senator Schumer. Mr. Chairman?

19 The Chairman. Senator Schumer?

20 Senator Schumer. I would like to speak, but I am
21 going to defer to Senator Wyden first.

22 Senator Wyden. I thank my colleague. I am going
23 to vote for this amendment. It seems to me that this
24 amendment at least starts the debate, in a serious way,
25 about additional choices for individuals who are now part

1 of a dysfunctional system, a health system that is
2 broken, that, in effect, puts the poorest and most
3 vulnerable people in our society through every manner of
4 bureaucratic red tape anytime their status changes.

5 This is a program that does not work for poor
6 people, it does not work for taxpayers, and we ought to
7 be pushing to come up with additional choices. As the
8 Senator from Wyoming knows, my first choice for the
9 poorest among us to have choices like members of
10 Congress.

11 Many of you have heard me say that the gorgeous
12 Wyden twins, almost two, pictures available on my iPhone
13 at any point, I do not think that they should have a
14 right with their health plan to always get better
15 coverage because they are the offspring of a member of
16 Congress and not the poorest among us.

17 Now, as Senator Conrad indicated, and I think he is
18 correct, this is going to need a significant amount of
19 work. But what Senator Enzi is doing tonight is at least
20 starting in a serious -- and I want it to be bipartisan,
21 which is why I intend to vote for it -- effort to come up
22 with these additional choices.

23 We can debate the details. For example, as I
24 understand it, under the legislation, nobody who earns
25 over 400 percent level of poverty would even be eligible

1 for subsidies. So this involves people earning right at
2 the 400 percent of poverty. We can work on those kinds
3 of details.

4 The Chairman. I must say that this is a very bad
5 amendment. It would cost about \$50 billion. That is an
6 unofficial CBO score, \$50 billion. And how is it paid
7 for? It is paid for by starting at 400 percent and going
8 down.

9 There are some on this Committee that are concerned
10 about affordability. If you are concerned about
11 affordability, you will reject this amendment out right
12 immediately.

13 For example, in the first category, 400 to 300
14 percent of poverty is going to cost about \$20 billion.
15 That is 20 out of the 50 right there. So you go down
16 below, you are going to eat up the 30, down 300 to 200
17 percent of poverty.

18 This amendment, if you are concerned about
19 affordability, and I think most members of this Committee
20 are, this one just blows affordability out the window.
21 We cannot accept this amendment.

22 Now, I understand what some of the earlier
23 discussion has been, trying to find some other option,
24 and somebody said this amendment needs a little work.
25 Well, it needs so much work that it has got to be

1 rejected so we can come out with something that maybe
2 does make some sense.

3 But I have got to tell you, if you are worried about
4 affordability, I cannot understand how anybody would vote
5 for this amendment.

6 Senator Schumer. Mr. Chairman?

7 The Chairman. The Senator from New York.

8 Senator Schumer. I think both Senator Wyden,
9 Senator Conrad and you, Mr. Chairman, even though you
10 have come out on different places, have some truth here,
11 as does Senator Enzi's amendment.

12 We do want to provide choice. There is no question
13 about it. It is a good thing. It is part of the
14 American way. We give people choice.

15 But the problem is this. Until we get the insurance
16 industry to provide choice at reasonable prices, it is
17 just extremely expensive. Hence, Senator Baucus says \$50
18 billion, I would not vote for it because of where it
19 would take it from. People who are 300 and 400 percent
20 of the poverty level are not rich. They are struggling.

21 You take away their subsidy, they cannot afford
22 insurance. They just cannot afford insurance. Neither
23 can poor people afford insurance. And one of the reasons
24 is the lack of competition in the industry, the fact that
25 our system, while providing good care, is less efficient

1 than any other.

2 So to simply say let people get out of Medicaid,
3 which is cheaper, considerably cheaper, and go to the
4 exchange, it is going to create havoc unless you reform
5 the system, which leads me to two other points.

6 Senator Enzi said -- and he is a good man, you are
7 and I like you very much, but you said we are shoving
8 people into Medicaid. These are not people sitting by
9 some pool with their feet up in a lounge chair being
10 forced to go into Medicaid.

11 If you give them the choice of what they have now or
12 Medicaid, they are grabbing Medicaid, because they do not
13 have health insurance. Most of the uncovered people are
14 people right above the 100 percent or 133 percent of
15 poverty.

16 So Medicaid has its problems, no question about it,
17 and we ought to fix it, but it is a lot better than
18 having nothing and they are not being shoved anywhere.
19 We are trying to help them in this bill and ask them, not
20 us. I guarantee you 99.9 percent of people would say "I
21 would rather be in Medicaid than have no health
22 insurance" when you are at that poverty level and cannot
23 afford any health care yourself.

24 I will never forget this scene. There is a movie
25 about James J. Braddock during the Depression. His

1 children got very sick, but he had no money for heat. It
2 was during the Depression. There was a very touching
3 scene where he had to go to his old buddies and beg money
4 so he could just pay for heat, because he could not
5 afford a doctor and he had to take them over there.

6 It is a horrible thing not to have health care,
7 horrible. You love your children, you love your spouse.
8 So they are not being shoved anywhere. That is not fair
9 to the Medicaid program, to the good intentions of this
10 country when it passed it, and it is not saying we should
11 be complacent.

12 I would just make one other point and that is this.
13 I like choice and that is why the thrust of this
14 amendment is good, even though -- so my first point was
15 let us have choice, but let us reform the insurance
16 industry so we can afford the choice.

17 I think Senator Cantwell is working on an amendment
18 that does just that and we ought to pay careful attention
19 to it. But the second thing I would say is we are always
20 for choice when the existing program is a government
21 program. Get them out of Medicaid.

22 Why should we not be choice when the existing
23 program is private insurance? If you are at this 400
24 percent level and your amendment passes, you have no
25 subsidy, why should we not give them a public choice, a

1 public option?

2 Choice is great just one way, but not the other way?

3 No one should be forced to take one plan or another.

4 But many, many people in this country are forced to take
5 a private insurance plan, where there is very little
6 competition, because 94 percent of the markets are
7 concentrated, according to the Justice Department.

8 We will debate public option tomorrow, but I wanted
9 to make sure that the issue of choice goes two ways.

10 Senator Grassley. Mr. Chairman?

11 The Chairman. Senator Grassley, you have been
12 seeking recognition.

13 Senator Grassley. Yes. Well, listen, this whole
14 issue ought to be about choice and people in Medicaid do
15 not have choice and you have quite an ironic situation in
16 this legislation.

17 You can have a person with an income below 100
18 percent of poverty -- a person with an income below 100
19 percent of poverty can buy insurance in the exchange. A
20 person that gets a tax credit to purchase insurance
21 through the exchange, you cannot get that sort of -- that
22 same person cannot get a tax credit to purchase insurance
23 through the exchange.

24 A person with an income below 100 percent of poverty
25 cannot buy health insurance through an agent or health

1 plan without using the exchange and a person cannot get a
2 tax credit if they buy directly from an exchange or
3 health plan, but do not use the exchange.

4 So a person with an income below 100 percent and a
5 person with an income of 101 percent can buy private
6 insurance, but the person with the higher income gets the
7 tax credit.

8 So you have got all this irony in this situation
9 now. And why is this the case? If a person below 100
10 percent of poverty cannot get a tax credit, they cannot
11 purchase health insurance in the exchange and the bill
12 effectively discriminates against poor people and forcing
13 them into Medicaid.

14 There is no good answer why that situation comes
15 out, but that is the situation. So Senator Enzi's
16 amendment provides all Americans a real choice and that
17 is what we ought to be doing as much as possible as we
18 can in this legislation.

19 The Chairman. I wonder if I could ask, Mr.
20 Schwartz, at what levels of poverty do people have choice
21 in health insurance?

22 Mr. Schwartz. Absolutely, Mr. Chairman. The
23 Chairman's mark provides what has sort of become referred
24 to as the bridge. If you picture a bridge, on one side
25 is Medicaid, on the other side is the exchange.

1 The Chairman's mark provides that individuals with
2 incomes between 100 and 133 --

3 The Chairman. Start below 100 percent. What
4 choice?

5 Mr. Schwartz. Senator Grassley was right on that
6 part. Those individuals below 100 percent of poverty are
7 Medicaid eligible and, therefore, ineligible for a tax
8 credit in the exchange.

9 The Chairman. What is the benefits package?

10 Mr. Schwartz. The benefit package under the
11 Chairman's mark for parents and childless adults --

12 The Chairman. I am talking about 100 percent, at
13 100 percent.

14 Mr. Schwartz. At 100 percent or below is what we
15 call the 1937 benchmark benefit package that exists in
16 Medicaid today. The Chairman's mark spells out that that
17 is the benefit package that newly eligible adults in
18 Medicaid would get.

19 The Chairman. What choice at different levels?

20 Mr. Schwartz. So then starting at 100 and going up
21 to the 133, the maximum new mandatory eligibility level,
22 those individuals, again, parents and childless adults,
23 would be able to choose between Medicaid on one side of
24 the bridge or the exchange.

25 The Chairman's mark makes clear that those

1 individuals are eligible for tax credits to purchase
2 through the exchange. Obviously, at those levels of
3 income, they would get pretty significant credits, and it
4 requires that the states make a contribution equal to the
5 amount that they otherwise would have made had that
6 individual chosen the Medicaid side of the bridge.

7 This amendment, I think, is, in theory, expanding
8 that, so that it goes all the way down to zero, although
9 it does not make clear that the individuals are eligible
10 or tax credits.

11 Senator Enzi. Mr. Chairman?

12 The Chairman. Senator Enzi?

13 Senator Enzi. Of course, they would be eligible
14 for tax credits. You cannot give them something much
15 less than you are giving the other people.

16 This is not a new request. At the 61 meetings our
17 group of six had, I do not know how many times I have
18 raised the idea that people under Medicaid ought to have
19 these other choices just as well.

20 In some instances, we are going to be moving people
21 from private insurance into Medicaid. Why does it cost?
22 It costs because the people get real access to real
23 doctors, Medicaid people.

24 My argument has been all along that Medicaid people
25 do not have insurance, because they cannot see a doctor.

1 That is a basic criteria. And we are saying, no, if you
2 are 100 percent of poverty or less, we do not care if you
3 do not get to see a doctor, and that is wrong. That is
4 completely wrong.

5 So we have got to do something to change that and
6 one easy way to do to change it is to say, yes, we will
7 pay a little bit more so that you can have access. I
8 think that is really fair.

9 The original score I saw on this had about \$50
10 billion extra and that is what you say this would cost.
11 That would be fair to the Medicaid people. That would be
12 fair.

13 But I am saying that there are some other ways of
14 doing the same fairness and my amendment does not use up
15 your \$50 billion that way. Instead, it takes the upper
16 people that probably could afford to go into the regular
17 insurance market and eliminates their subsidy, those that
18 are at 400 percent of poverty.

19 Senator Kerry. Mr. Chairman?

20 The Chairman. Senator Kerry?

21 Senator Kerry. Mr. Chairman, I would just like to
22 inquire. Senator Enzi works awfully hard on this stuff
23 and he has put a lot of time into it on two committees,
24 this and the HELP Committee. So I appreciate his
25 thoughtfulness about it all.

1 But I am trying to understand a couple of things
2 here. First of all, it is my understanding that this
3 amendment increases the overall cost of the Chairman's
4 mark, unless there is an offset.

5 Mr. Schwartz. That is correct.

6 Senator Kerry. And the offset that Senator Enzi
7 has chosen is a reduction in the subsidies that we have
8 chosen to give people to buy into the exchange.

9 Mr. Schwartz. That is correct.

10 Senator Kerry. So we are kind of robbing Peter to
11 pay Paul, in effect. We will have some people be able to
12 go from Medicaid into an exchange, but at the expense of
13 losing people who get a subsidy and buy into the
14 exchange.

15 Mr. Schwartz. That is correct.

16 Senator Kerry. That is one downside. Second
17 issue, Medicaid provides, does it not, some of the best
18 and most cost-efficient protection to the lowest income
19 Americans who have a special health need of one kind or
20 another?

21 Mr. Schwartz. That is correct.

22 Senator Kerry. If you have a disability, people
23 who are newly eligible for Medicaid are more likely, are
24 they not, to have a chronic condition, serious illness,
25 special needs that a private insurance plan, particularly

1 an exchange plan, may not be equipped to address?

2 Mr. Schwartz. That is correct and, in fact, the
3 inclusion of a significant number of low income
4 individuals into the exchange will have an effect on the
5 risk pool for everyone in the exchange and I think that
6 this population, the population below 133 percent of
7 poverty, is roughly 1.3 or 1.5 percent sicker, if you
8 will, than the higher income population.

9 Senator Kerry. Now, is it not also true that in
10 some instances, not across the board, but in some
11 instances, under Medicare Advantage and in the Part D
12 program for drugs, we have had some instances where
13 companies, in bad faith, have made proffers to seniors,
14 proffers to people, brought them in and they do not get
15 what the offer said. Is that not accurate?

16 Mr. Schwartz. That is correct.

17 Senator Kerry. We have had some bad abuses in that
18 effect.

19 Mr. Schwartz. That is correct.

20 Senator Kerry. So what I fear is that we create an
21 exchange and we put a vulnerable population into the
22 exchange that already has great difficulties navigating
23 the health care system. I think everybody would agree
24 that the private plan networks are less likely to include
25 the kinds of safety net providers that you have in

1 Medicaid.

2 Mr. Schwartz. That is also correct.

3 Senator Kerry. So I think each of those realities
4 builds a very powerful case for why this does not make
5 sense. The idea of choice sounds good, but in the
6 practical application to the world of Medicaid and the
7 type of folks who are enrolled in it, unless you have
8 some massive oversight system that I do not see here to
9 guarantee delivery or quality of service, I think we are
10 buying into a lot more problems.

11 Mr. Schwartz. If I could just chime in on one
12 thing, Senator Kerry.

13 Senator Kerry. Would you, please, Mr. Schwartz?

14 Mr. Schwartz. I think we think of Medicaid as sort
15 of this program that exists as a public program, but a
16 significant percentage of the beneficiaries actually
17 receive their care through Medicaid managed care, which
18 is private plans, some for profit, some not for profit,
19 that contract with the states to provide services. I
20 think that there is a special recognition in the Medicaid
21 statute where there are additional protections imposed in
22 an effort to protect the beneficiaries.

23 There are additional requirements imposed on the
24 plans that can participate in Medicaid and they are more
25 stringent than those that exist out in the commercial

1 market and it is exactly for the reasons that you
2 enumerated.

3 The Chairman. Thank you very much. I appreciate
4 that. Senator Schumer?

5 Senator Schumer. I would just like to follow-up on
6 Senator Kerry's line of questioning, because, again, this
7 is very expensive to do and we are not sure it would give
8 better care.

9 So let us just take the example of the bridge which
10 was talked about a minute ago and we said that people
11 from 100 percent to 133 or 135 --

12 Mr. Schwartz. One thirty-three, that is correct.

13 Senator Schumer. -- 133 would be allowed to leave
14 Medicaid and go to private insurance.

15 Mr. Schwartz. That is correct.

16 Senator Schumer. How much did CBO estimate that
17 costs?

18 Mr. Schwartz. That costs the Federal Government
19 about an extra \$20 billion.

20 Senator Schumer. \$20 billion. And how many people
21 did CBO estimate would join that program?

22 Mr. Schwartz. About three-quarters of a million.

23 Senator Schumer. Why so few, by the way?

24 Mr. Schwartz. Well, I think for the best answer,
25 you would probably have to ask CBO. But I think that

1 their underlying assumptions were that the sickest and
2 highest need individuals were not likely to go and --

3 Senator Schumer. Because the insurance would not
4 take them.

5 Mr. Schwartz. Because the benefits are better
6 under Medicaid.

7 Senator Schumer. Medicaid, the benefits are
8 better. Now, let me ask you this. Just do the math for
9 us. So three-quarters of a million --

10 Mr. Schwartz. I am not good at math, Senator
11 Schumer.

12 Senator Schumer. Do we have anyone at the table
13 who is? You are good at almost everything else, Mr.
14 Schwartz.

15 Mr. Schwartz. Thank you very much.

16 Senator Schumer. But if we took three-quarters of
17 a million by \$20 billion.

18 Mr. Schwartz. I am waiting for some counsel.

19 Senator Schumer. You want to play some background
20 music?

21 Senator Enzi. The answer is \$50 billion, not the
22 kind of math you are doing. I think the CBO number came
23 to \$50 billion, not three-quarters of a million times --

24 Senator Schumer. But we are saying three-quarters
25 of a million. The numbers are square with -- CBO said

1 just this for the bridge, not for your amendment, but it
2 is analogous, that three-quarters of a million people
3 would go from Medicaid to the exchange and it would cost
4 \$20 billion.

5 I am just asking the cost per person, which we can
6 just figure. If it is a million, let us figure it out.

7 Senator Enzi. The cost does not go quite that way.
8 Otherwise, CBO would not have come up with the other
9 number that they came up with. The two numbers do not
10 jive.

11 Senator Schumer. Just on average.

12 Senator Enzi. The two numbers do not jive.

13 Senator Schumer. Why not?

14 Senator Enzi. That is the problem we have got with
15 numbers around here.

16 The Chairman. I wonder if Senators should be
17 displaying their math prowess or lack of prowess publicly
18 like this.

19 Senator Schumer. I am just judging average cost
20 per person.

21 Senator Schumer has the floor.

22 Senator Schumer. Let me just finish here. It ends
23 up costing a lot of money a person. If it was a million
24 people and \$20 billion, it would be \$20,000 a person.
25 Right?

1 Mr. Schwartz. I think that is right.

2 Senator Schumer. So this is more. This is about
3 \$23,000 or \$24,000 a person.

4 Mr. Schwartz. Senator, that is a multiyear figure
5 I believe you were quoted. So you would have to divide
6 it by the number of years. If it were 10 years, it would
7 divide out to --

8 Senator Schumer. Well, let us ask. How many years
9 did they estimate per person would be on there?

10 Mr. Schwartz. That was the total budgetary cost.

11 Senator Schumer. So it ends up being about \$2,300
12 per year per person.

13 Mr. Schwartz. I think that is right.

14 Senator Schumer. And the bridge does not start
15 until 2014. Let me make my point without specific
16 numbers. It is very expensive.

17 Mr. Schwartz. I appreciate that.

18 Senator Schumer. It is very expensive. If we
19 were, for instance, to, in the abstract, put all Medicaid
20 people onto an exchange, it would be hugely expensive,
21 probably not for better care. They would be better off
22 going to community health centers, rural health centers,
23 places that are within Medicaid, but, by all acclimation,
24 give excellent care.

25 And it gets to a bottom line here that we can do all

1 the exchanging around we want. Moving from both the
2 public system and the private system, are expensive and
3 getting more expensive. We had better get at the costs
4 and getting the costs down, because if we do not, all the
5 exchanging in the world will not make a difference. We
6 are not going to be able to afford health care either for
7 the poor or lower middle class with subsidies or for
8 average middle class people just on their own.

9 So to me, this argument, which is better public-
10 private, private-public, I do not have a dog in that
11 fight. I think both have shown to give good care for a
12 lot of money and the reason is our delivery systems. The
13 reason is the kinds of inefficiencies. The reason is the
14 lack of prevention.

15 This amendment, I believe, will cost a lot of money,
16 maybe \$50 billion, the Chairman estimated. It is good to
17 be the Chairman. You can just throw out a number and it
18 is accepted as dogma. But a lot of money and not really
19 improve health care at all, although it will benefit the
20 people who are getting the money, ultimately, the
21 insurance companies and the providers, and we ought to be
22 reforming the system in terms of cost rather than arguing
23 about public versus private at the time.

24 The Chairman. How about voting on the amendment?

25 Senator Wyden. Mr. Chairman?

1 The Chairman. Senator Wyden?

2 Senator Wyden. I would just like to ask Senator
3 Enzi a question. I am not even going to begin to get
4 into the math here.

5 Senator Enzi, is it not your desire to address the
6 affordability issue without tethering people to a program
7 that desperately needs reform? Is that not the purpose
8 of what we are trying to do here? Because I think if it
9 is, we are going to be able to get back into the details
10 of exactly how the subsidies would work.

11 You and I have talked about it. I envisioned the
12 subsidy levels as being at 400 percent of poverty. But
13 to me, I think what is important now, as we go to the
14 vote, is establishing the principle, because as I
15 understand it, you want to address affordability without,
16 in effect, tying people for the indefinite future to a
17 program that very much needs reform. Is that your
18 intent?

19 Senator Enzi. That is absolutely the case.

20 The Chairman. Senator Kyl was seeking recognition.

21 Senator Kyl. Mr. Chairman, I will just be very
22 brief. There is kind of a hybrid of this in Arizona,
23 because from the very beginning, Arizona has had a waiver
24 from regular Medicaid. It is called the AHCCCS program
25 and it is essentially HMOs.

1 The cost would probably be somewhere in between.
2 But to Senator Kerry's point, there is a lot more
3 integrated and coordinated care, which is what HMOs do

4 I am not sure, therefore, that in terms of the
5 quality of care, that it would necessarily -- in fact, I
6 think the quality of care would actually be better, not
7 worse.

8 I think, to Senator Wyden's point, having some
9 options here does make some sense. So I hope that
10 colleagues would support this, as Senator Wyden said, as
11 the beginning of a debate about some other alternatives.
12 Thank you.

13 The Chairman. Any further debate? Senator
14 Lincoln?

15 Senator Lincoln. Can I just ask a question of Mr.
16 Schwartz? Can states get waivers to provide premium
17 assistance to Medicaid patients to go into the
18 marketplace?

19 Mr. Schwartz. That is absolutely right, Senator,
20 and Senator Kyl just made that point that Arizona has a
21 longstanding waiver.

22 Senator Lincoln. And some of that can be done now.
23 The point is that it is expensive in the marketplace and
24 I would imagine not many people do it.

25 Mr. Schwartz. I think it is difficult for states

1 to do that, but they certainly have that option.

2 Senator Conrad. Mr. Chairman?

3 The Chairman. Senator Conrad?

4 Senator Conrad. Mr. Chairman, just very briefly.
5 I agree with the Chairman that this pay-for is a problem,
6 certainly with respect to affordability. We wrote a
7 whole series of changes in the group of six before we
8 broke up to improve affordability and this would
9 undermine some of those changes. I think that would be
10 unfortunate.

11 At the same time, I personally believe Senator Enzi
12 has opened up a discussion that really does merit more
13 attention. That is, in the Medicaid population and
14 certainly when you expand it, there are those who benefit
15 greatly from the more extensive array of services that
16 are provided there.

17 I talked about some of that in the gang of six. A
18 gentleman that I have seen who has to be helped out of
19 bed in the morning, he is paraplegic, has to be helped
20 into bed at night and if he did not have that kind of
21 service that is not available in the typical health
22 insurance plan, he would not be a productive citizen.

23 This is somebody who goes to work and works eight
24 hour a day, is a taxpaying citizen, is low income. But
25 the only way he is able to function is people help him

1 get out of bed in the morning and get to bed at night.

2 But there are others who have a different
3 circumstance who going to be in the Medicaid expansion
4 population who might be better off with an alternative
5 choice, a more basic plan, one that would be less
6 expensive.

7 And before we throw the baby out with the bathwater,
8 I cannot vote for your amendment as is, Senator Enzi,
9 because of the pay-for, but I do think you have opened up
10 a discussion that merits more attention.

11 Senator Cantwell. Mr. Chairman?

12 The Chairman. Senator Cantwell is seeking
13 recognition.

14 Senator Cantwell. Thank you, Mr. Chairman.
15 Actually, I have a question for Senator Enzi on what
16 income level a population are you considering. Are you
17 talking at 133?

18 Senator Enzi. We are talking about the zero to 100
19 population that has no choice now because the 101 to 133
20 have a choice.

21 Senator Cantwell. So how would they get private
22 coverage?

23 Senator Enzi. By having a choice with the subsidy.

24 Senator Cantwell. With the subsidy.

25 Senator Enzi. Yes.

1 Senator Cantwell. Mr. Chairman, I think, to me,
2 this is a very important discussion and it is a very
3 important discussion from my perspective. I have been
4 kind of quiet here for the last 24 hours, but working
5 hard on something that I think is very important.

6 First of all, it is interesting that the other side
7 of the aisle has offered so many amendments to cut the
8 subsidy and do various things for the lower income
9 population with the reductions in that subsidy.

10 If you are serious about that, I think that is very
11 good news for America. I say that because this is about
12 driving down the cost of health care and many Americans
13 are asking if you just subsidize expensive insurance, how
14 are you really going to drive down the price and cost and
15 competition.

16 So if you really do believe that, then there is, as
17 Senator Conrad is saying, a world of opportunity to
18 discuss exactly how we are more cost-effective with
19 federal dollars and providing better coverage.

20 I truly believe, from the experiences in Washington
21 State, that you can provide coverage for the same
22 population that you are providing the tax incentives for
23 for 25 percent less. That means instead of giving
24 subsidies that are just going to prop up the price of
25 insurance, we instead could create a market that would

1 drive down the cost and provide less of a burden to the
2 taxpayer.

3 But there is an additional benefit. By creating
4 those markets, we also show efficiency and the more
5 efficiency we can show in the market of delivering health
6 care services, the more we all win. Everybody who gets
7 the benefits wins. The competition is there for there
8 for the marketplace.

9 With Senator Conrad, I have a concern about how you
10 are paying for this. I wonder if the Senator would
11 consider, since I have an amendment that is addressing
12 the population up to 200 percent of poverty and saying
13 that we could provide cheaper care, if the Senator would
14 withhold his amendment for now so we can compare notes
15 and look at the cost of how we do this.

16 The reason I am asking this is because this is --
17 Senator Wyden is bringing up choice. But this is about
18 whether we are going to provide enough competition in
19 driving down the price.

20 I think there is a way here in which states can play
21 a role in helping to negotiate for private coverage and
22 get us better coverage instead of us giving someone a tax
23 subsidy at 200 percent of poverty so that they can go buy
24 \$6,500 insurance and their contribution is somewhere
25 around \$1,900.

1 We in the State of Washington have shown that you
2 can have a basic health plan and the costs are probably
3 half of that and the individual contributions are
4 definitely half of that cost.

5 So I think this is very much worth exploring. I
6 think the way the amendment is currently drafted, though,
7 is problematic. So I would ask Senator Enzi if he would
8 consider engaging -- and I can understand if you have
9 been part of the gang of six for whatever it has been,
10 six months, that must be a challenging discussion, but
11 there are some of us who believe that this may be an
12 important compromise that we could work through.

13 The Chairman. Senator Enzi?

14 Senator Enzi. Well, I appreciate the offer to
15 withhold and look at something new. I am not going to do
16 that. I am going to ask for a vote at this time. I will
17 be happy to continue to work with you on any ideas.

18 This is something that I have been bringing up for
19 months, that we are not being fair to Medicaid people and
20 we need to be fair to Medicaid people and I have
21 suggested one way of doing it. Others might suggest some
22 other ways of doing it.

23 But right now, the way that we are handling costs in
24 this government program is to cut back on what doctors
25 get and, as a result, the doctors will not take the

1 Medicaid patients. It is not fair to the Medicaid
2 patients. If you cannot see a doctor, you do not have
3 insurance.

4 Not only that. There is a stigma to having
5 Medicaid. Part of that stigma, though, is because the
6 doctors will not take you. But there are people who will
7 not take that government handout that way because they
8 know that that is what it means to their neighbors and
9 their friends. I would like to finish my statement. I
10 have been patient through all of these others.

11 You can save money if you cut back on the doctors.
12 That is what CBO has told us before. But it means that
13 Medicaid patients will not be able to see the doctor.

14 There are a number of different ways of doing the
15 pay-for on this. I did one of the easier ones, because I
16 do not have a score and I know tough it would be to get a
17 score. But it would be easier for others to get a score.
18 Just a slight decrease in some other subsidies would pay
19 for this one.

20 But one of the things I want to emphasize right here
21 is that this shows how big the problem is that we are
22 trying to work on. We have never had a bill, I will bet,
23 in the history of the United States that has encompassed
24 absolutely everybody in the country, every single
25 individual, every single business, every single provider.

1 We are doing that and we are doing it in one heck of
2 a hurry and that is why I guess we have not had time to
3 talk about this Medicaid option, where people could have
4 a choice if they are under Medicaid.

5 I know we are going to have a chance to talk about
6 that tomorrow, but I am willing to bet that that is going
7 to be a bigger topic than we cover in one hour or two
8 hours or however long the Chair will allocate to it,
9 because any one of these things could be a week's topic,
10 we know from our group before. There are just so many
11 questions that need to get answered and if we do not
12 answer them correctly, America winds up in a real hole
13 and we do not want that to happen.

14 So I want to emphasize this problem that we have of
15 forcing people into Medicaid and not giving them the same
16 kind of a deal that we are talking about giving everybody
17 else in America.

18 So I would like to vote on my amendment.

19 The Chairman. The Clerk will call the roll.

20 The Clerk. Mr. Rockefeller?

21 Senator Rockefeller. No.

22 The Clerk. Mr. Conrad?

23 Senator Conrad. No.

24 The Clerk. Mr. Bingaman?

25 Senator Bingaman. No.

1 The Clerk. Mr. Kerry?
2 Senator Kerry. No.
3 The Clerk. Mrs. Lincoln?
4 Senator Lincoln. No.
5 The Clerk. Mr. Wyden?
6 Senator Wyden. Aye.
7 The Clerk. Mr. Schumer?
8 Senator Schumer. 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 The Chairman. No by proxy.
15 The Clerk. Mr. Menendez?
16 Senator Menendez. No.
17 The Clerk. Mr. Carper?
18 The Chairman. No by proxy.
19 The Clerk. Mr. Grassley?
20 Senator Grassley. Aye.
21 The Clerk. Mr. Hatch?
22 Senator Grassley. Aye by proxy.
23 The Clerk. Ms. Snowe?
24 Senator Snowe. No.
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 The Clerk. Mr. Roberts?

8 Senator Grassley. Aye by proxy.

9 The Clerk. Mr. Ensign?

10 Senator Ensign. Aye.

11 The Clerk. Mr. Enzi?

12 Senator Enzi. Aye.

13 The Clerk. Mr. Cornyn?

14 Senator Cornyn. Aye.

15 The Clerk. Mr. Chairman?

16 The Chairman. No.

17 The Clerk. Mr. Chairman, the final tally is 10

18 ayes and 13 nays.

19 The Chairman. The amendment fails. I understand

20 that Senator Menendez has an amendment now.

21 Senator Menendez. Thank you, Mr. Chairman. Mr.

22 Chairman, I would like to call up C-4 as modified. Mr.

23 Chairman, it is not an explosive amendment. It is a

24 rather simple amendment.

25 Mr. Chairman, this amendment is rather simple and it

1 is also -- I believe it has just one slight modification
2 to it.

3 Senator Menendez. Mr. Chairman, this amendment is
4 rather simple and it is also, according to CBT, budget-
5 neutral. It provides for a child-only health insurance
6 option in the exchange and it allows children to qualify
7 for coverage in health insurance exchange and ensures
8 access to any subsidies for which they may be eligible.

9 Now, one might ask why is this important and I would
10 just simply urge my colleagues to think of a family whose
11 parents are exempted from coverage because it is
12 unaffordable, what would happen to those children?

13 Unless there were insurance plans in the exchange
14 just for children, these parents would have to sign them
15 for adult coverage, which would be much more expensive,
16 or for gold coverage for their children all together.

17 I know that all of us, as parents, who are parents,
18 know we would do anything to protect our children and
19 keep them healthy, even if we could not do the same for
20 ourselves.

21 The amendment is essential to ensure that all
22 children eligible for coverage continue to have access to
23 affordable health coverage and this is particularly
24 important, because under the Chairman's mark, in order
25 for children to receive CHIP benefits, they need to first

1 obtain private coverage.

2 Again, if one would think about a child aging out of
3 foster care or consider children with parents whose
4 employers do not offer dependent coverage or, for
5 instance, a child living with a grandparent. In this
6 instance, the grandparent probably gets his or her health
7 coverage through Medicare. So it would be much more
8 affordable for them to purchase a child only plan.

9 Maybe the grandparent does not have income outside
10 of Social Security, so they do not file a tax form. How
11 would they get the tax credit if the child qualifies for
12 a subsidy?

13 There are similarly unique and complex circumstances
14 that we may not even have thought of yet. So we need a
15 place for them to be able to go and that is what this
16 amendment does.

17 As the legislation is currently written, tax credit
18 and subsidy determinations are made using taxpayer
19 information. Under this provision, even if a child could
20 access a child-only policy in the exchange, it is unclear
21 how children would qualify for the tax credit, since they
22 do not file income tax returns.

23 The amendment would address this issue by directing
24 the HHS Secretary to determine whether alternative means,
25 such as direct subsidies to the exchanges, are necessary

1 to provide support for the purchase of such coverage for
2 qualified children.

3 It is essential to ensure that eligible children who
4 do not have access to family coverage do not slip through
5 the cracks and that is simply what we are trying to do in
6 this amendment, Mr. Chairman.

7 The Chairman. Thank you, Senator. Ms. Fontenot,
8 how would this affect the exchange structure that we have
9 set up in the bill?

10 Ms. Fontenot. The difference would be that a
11 child-only policy, for example, would require that one of
12 the benefit categories that is covered is preventive care
13 services. There are different preventive care services
14 that are recommended for children versus adults.

15 So an insurer would make a child-only policy
16 available. That policy would likely be cheaper, because
17 kids are cheaper to cover, and it would give the parents,
18 as Senator Menendez mentioned, the option to buy just
19 coverage for their children as opposed to a family
20 policy.

21 The Chairman. It sounds good on the surface. Any
22 considerations here that we should address?

23 Ms. Fontenot. We checked with CBO just to make
24 sure. It sounds from them as if they have already
25 assumed that there would be child-only policies.

1 Insurers have these plans today. So they did not think
2 there was any effect.

3 The Chairman. Any further discussion?

4 [No response.]

5 The Chairman. Seeing none, let us voice vote this.
6 All those in favor, say aye.

7 [A Chorus of Ayes.]

8 The Chairman. Those opposed, no.

9 [A Chorus of Nays.]

10 The Chairman. The ayes appear to have it. The
11 ayes have it. The amendment is agreed to.

12 Now, I understand Senator Cornyn has an amendment.

13 Senator Cornyn. Yes, Mr. Chairman. Mr. Chairman,
14 I would like to call up my amendment C-24. We know that
15 there has been a lot of discussion about choice and
16 competition during this health care debate and,
17 certainly, I agree those ought to be two attributes of
18 whatever it is we ultimately embrace.

19 I would note, as Senator Enzi and others have noted,
20 that the only place we currently do not have competition
21 are the 58 million Americans who are trapped in a broken
22 Medicaid program that fails to provide them access to
23 quality care.

24 The proposed Chairman's mark is set to lock 11
25 million more Americans in this broken Medicaid program,

1 including 2.5 million more Texans. I do not support the
2 Medicaid expansions in this bill, because Medicaid is not
3 working for the present population, much less the
4 expanded population that would be called for in this
5 legislation.

6 According to the 2002 MedPAC report, 40 percent of
7 physicians restricted access for Medicaid patients
8 because of concerns about reimbursement and billing
9 paperwork.

10 Since Medicaid patients cannot find doctors, they
11 are not getting the care that they need in large numbers.
12 For example, in California, only 51 percent of family
13 physicians participate in Medicaid, while in Michigan,
14 the number of doctors who will see Medicaid has fallen
15 from a high of 88 percent in 1999 to 64 percent in 2005.

16 According to the *Journal of Health Affairs* this
17 summer, physicians typically have been less willing to
18 take on new Medicaid patients than patients covered by
19 other types of health insurance. Medicaid fees reimburse
20 at a national average of 72 percent of Medicare.

21 In real terms, Medicaid physician fees, on average,
22 were declining about 1 percent annually relative to
23 general inflation over the last five years, and, of
24 course, this has a direct impact on patients.

25 Numerous studies have documented the poor patient

1 outcomes of the Medicaid program relative to patients in
2 private plans. The *Journal of the American College of*
3 *Cardiology* in 2005 found that Medicaid patients were
4 almost 50 percent more likely to die after coronary
5 bypass surgery than patients with private coverage.

6 According to a recent Merritt-Hawkins survey, there
7 is an acute lack of access to medical specialists for
8 Medicaid patients. The Chairman's mark may provide
9 Medicaid coverage to up to 133 percent of poverty, but it
10 does not give patients the access they deserve.

11 Again, I do not support the Medicaid expansions in
12 the bill because I do not believe the program works as is
13 and why would you expand a broken program rather than fix
14 it. But if this bill passes and the majority of the
15 members of Congress actually believe Medicaid is a worthy
16 program that provides access to quality of care, then we
17 should lead by example and be willing to enroll ourselves
18 and our families in the same plans.

19 As public servants, we do not deserve to get health
20 care benefits and choices that are unavailable to the
21 rest of the people that we serve.

22 So this amendment would require all members of
23 Congress to enroll in the Medicaid program in our home
24 states. And I can guarantee you one thing, Mr. Chairman.
25 If this amendment passes and is incorporated in the final

1 legislation, Medicaid will get fixed, that is for sure.

2 The Chairman. All right. It is getting to be
3 10:30 with this amendment. Any comment? Any debate?

4 Mr. Bingaman. Mr. Chairman, I think we do some of
5 our worst work around here during these late hours and
6 this is a good example.

7 The Chairman. That was my point. That was exactly
8 my point.

9 Senator Cornyn. I will second the motion to
10 adjourn.

11 The Chairman. This is getting to be silly season.
12 Any further debate?

13 Senator Cornyn. I would like a roll call vote, Mr.
14 Chairman.

15 The Chairman. The Clerk will call the roll on the
16 current amendment.

17 The Clerk. Mr. Rockefeller?

18 Senator Rockefeller. No.

19 The Clerk. Mr. Conrad?

20 Senator Conrad. No.

21 The Clerk. Mr. Bingaman?

22 Senator Bingaman. No.

23 The Clerk. Mr. Kerry?

24 The Chairman. Pass.

25 The Clerk. Mrs. Lincoln?

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

1 The Clerk. Mr. Crapo?

2 Senator Crapo. Aye.

3 The Clerk. Mr. Roberts?

4 Senator Grassley. Aye by proxy.

5 The Clerk. Mr. Ensign?

6 Senator Grassley. Aye by proxy.

7 The Clerk. Mr. Enzi?

8 Senator Enzi. Aye.

9 The Clerk. Mr. Cornyn?

10 Senator Cornyn. Aye.

11 The Clerk. Mr. Chairman?

12 The Chairman. No. Senator Kerry votes no by
13 proxy. I have got a vote change.

14 Senator Grassley. Ensign, pass by proxy.

15 The Clerk. Mr. Chairman, the final tally is six
16 ayes, 16 nays, and one pass.

17 The Chairman. The amendment is not agreed to. I
18 would like to now take a temporary recess, about 15
19 minutes. So the Committee stands in recess now for 15
20 minutes.

21 [Whereupon, at 10:29 p.m., the Committee was
22 recessed.]

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AFTER RECESS

[11:10 p.m.]

The Chairman. The Committee will come to order. For the information of all who are interested, the Committee will recess until tomorrow at 9:30 and at 9:30, we will have two votes. The first will be on the Grassley GPCI amendment and the second will be on an alternative. It will be a side-by-side on the same subject.

Those will be the first order of business tomorrow at 9:30. Then we will continue our work after that. The Committee is in recess until 9:30.

[Whereupon, at 11:10 p.m., the Committee was adjourned, to reconvene Friday, September 25, 2009, at 9:30 a.m.]

I N D E X

PAGE

STATEMENT OF:

THE HONORABLE MAX BAUCUS
A United States Senator
from the State of Montana

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