Approved: 04/09/10
Date

MINUTES OF THE JOINT SENATE PUBLIC HEALTH AND WELFARE COMMITTEE AND HOUSE HEALTH AND HUMAN SERVICES COMMITTEE

The meeting was called to order by Chairman Jim Barnett at 1:30 p.m. on February 9, 2010, in Room 784 of the Docking State Office Building.

All members were present.

Committee staff present:
Nobuko Folmsbee, Office of the Revisor of Statutes
Renae Jefferies, Office of the Revisor of Statutes
Iraida Orr, Kansas Legislative Research Department
Terri Weber, Kansas Legislative Research Department
Amanda Nguyen, Intern, Kansas Legislative Research Department
Jan Lunn, Committee Assistant

Conferees appearing before the Committee:
Senator Mary Pilcher-Cook
Senator Tim Huelskamp
Representative Peggy Mast
Sarah McIntosh, Constitutional Law and American Politics, Wichita State University
Jim O'Connell, former Kansas Department of Health and Environment Secretary under Governor Graves
George Watson, MD, President, Association of American Physicians an Surgeons
Richard B. Warner, MD, past president of the KS Medical Society
Richard D. Fry, Project Co-Coordinator, Coalition of Citizen Advocacy Groups Supporting State Sovereignty
David J. Powell, President, David J. Powell & Associates, LLC
W. Paul Degener, private citizen
Dave Roland, Policy Analyst, Show-Me Institute
Ira Stamm, PhD, ABPP
Senator David Haley

Others attending:
See attached list.

Nobuko Folmsbee, Office of the Revisor of Statutes, briefed those attending on **SCR 1626 - Constitutional amendment to preserve right to choose health care services and health insurance plan** which amends the State Constitution by adding a new Article 16. The purpose of the new constitutional article would be to preserve the freedom of Kansans to provide for their health care. If the resolution is approved by two-thirds of the members of both houses, the proposed amendment would be submitted to the electors of the state at the general election in November 2010.

SCR 1626 - Constitutional amendment to preserve right to choose health care services and health insurance plan

Senator Pilcher-Cook described the proposed constitutional amendment and clarified the legislation would not block federal health care reform as long as the federal law does not require a mandate to purchase health insurance or forbid patients from paying directly for their medical services (Attachment 1).

Senator Huelskamp spoke in favor of the Healthcare Freedom Act adding the amendment ensures health care decisions can be made by Kansas families and not by government. He described recent Virginia legislation which prohibited citizens from being required to purchase health insurance (Attachment 2).

Representative Peggy Mast encouraged support of the proposed constitutional amendment indicating it is a statement of freedom and protection from federal government infringement on an individual's right to make health decisions (Attachment 3).

Sara McIntosh, speaking as a private citizen and constitutional lawyer, provided background for the Constitution, discussed the ninth and tenth Constitutional amendments, the powers of Congress, the commerce clause and recent Supreme Court decision regarding the clause, and reiterated that **SCR 1626** is essential to protect Kansas' sovereignty and to protect Kansan's civil liberties (Attachment 4).

Jim O'Connell announced he was speaking as a private citizen and not on behalf of any group or organization. He indicated he evaluated the amendment from two perspectives: one, as a retired lawyer

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and two, as the CEO of a Kansas hospital. He discussed the economics of health care, statistics involved in health care with "effective and efficient" treatment recommendations, current restrictions under Medicare, Medicaid and insurance plans, and the concept of maintaining excellence in health care and strengthening competition (Attachment 5). He encouraged favorable passage of **SCR 1626**.

Dr. George Watson, President of the Association of American Physicians and Surgeons, spoke in support of **SCR 1626.** He indicated there was no constitutional basis for federal involvement in healthcare, and Kansas patients and doctors need protection from the federal government (Attachment 6).

Dr. Richard B. Warner, Overland Park, Kansas, presented testimony in support of **SCR 1626**. He stated there was no authority under the Constitution that requires an American citizen to buy anything; he provided an alternative solution to pre-existing conditions; and he supported the proposed amendment's provision to protect the right of individual patients and physicians to contract for the direct payment for lawful services (Attachment 7).

David Powell, David Powell and Associates, offered comments concerning his support of **SCR 1626**. He encouraged committee members to favorably pass this constitutional amendment that guarantees patients and businesses can offer — and providers can accept — direct payment for healthcare services (Attachment 8).

W. Paul Degener, private citizen, appeared as a concerned citizen supporting **SCR 1626**. He opined that the government is responsible for increased healthcare costs, and they are treating symptoms not causes of healthcare cost increases. He also encouraged that no health care or social services be provided to illegal immigrants (Attachment 9).

Richard Frye, a member of the November Patriots, indicated he supported **SCR 1626.** He commented that the Health Care Freedom Act (**SCR 1626)** is necessary to support liberty for Kansas and its citizens. (Attachment 10) In addition, he indicated the duty of legislators is to support and protect the United States Constitution and the Kansas Constitution.

David Roland, policy analyst for Show-Me institute and speaking a neutral perspective, presented testimony related to the policies implicated by the bill, and he addressed the constitutionality of issues raised by the federal Health Care Reform Bill. Mr. Roland also commented on the constitutionality of the federal legislation. In summary, he indicated that if **SCR 1626** , isfsuccessfully adopted, could offer the potential for a case that would test the boundaries of state sovereignty (Attachment 11).

Ira Stamm, PhD, speaking from a neutral position, provided a brief history of his professional experience as a psychologist at the Menninger Clinic. He indicated a fundamental fact of insurance and healthcare economics is that every American, in order to have lowest possible insurance premium, must be a part of the insurance pool. Premiums paid by young and healthy offset expenses incurred by caring for the sick, elderly, and disabled (Attachment 12).

Senator David Haley, spoke as an opponent to **SCR 1626**, indicating this constitutional amendment is being heard in the incorrect Committee. He commented that while many have spoken today as if the federal government is the enemy, in his opinion, that is untrue. He stated that as American citizens, healthcare access is a fundamental right. In addition, federal healthcare reform legislation may provide more access to care and a means to pay for that care, therefore, benefitting Kansas citizens. He urged committee members not to support **SCR 1626** (Attachment 13).

Senator Barnett called attention to written testimony provided by:

Christie Herrera, Director, Health and Human Services Task Force, American Legislative Exchange Council (Attachment 14)
Jeff Glendening, Vice President of Political Affairs, The Kansas Chamber (Attachment 15)
Derrick Sontag, State Director, Americans for Prosperity (Attachment 16)
Leslie Kaufman, Executive Director Kansas Cooperative Council (Attachment 17)

Chairperson Barnett excused Senators attending to return to the Capitol for the Senate Session convening at 2:30 p.m. Legislative House Representatives remained at the meeting.

PUBLIC HEALTH AND WELFARE and HOUSE HEALTH AND HUMAN SERVICES
GUEST LIST
February 9, 2010

NAME	AFFILIATION
Sammy E. Peck	topeka912
Robynn Tolbert	self / topeka 912
Dana Stone	Topeka 912 Project
Richard D. Fry	olathe CCAG-555
Tom Stoffers	Tonganoxie CCAG NOV. PATRIOTS
Sharon Evans	CCAG November Patriots
Don Harmonson	Salina Tea Party
Liz Winship	Saline TEA Party
John & Jan Desch	Topeka 9-12 Project
Chad Austin	KHA
Richard B. Warner MD	KMS
Dan Morin	KS Medical Society
Don SlinKard	Kansas Citizens
Renee SlinKard	Self/LinnCty Tea Party
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TIM O'CONNELL	PRESIDENT - SHAWNEE, KS
George R Watson, D.O.	AAPS President - Wichita, KS
Marilyn Bianchino	Overland PK.
Tom Ward	Prairie Village KS
Nancy Hanaford	O.P. KS
[illegible]	Sal Health System

PUBLIC HEALTH AND WELFARE and HOUSE HEALTH AND HUMAN SERVICES
GUEST LIST
February 9, 2010

NAME	AFFILIATION
Dave Ramsey	KHI
[illegible]	self
Lisa Corwin	KSBHA
Bob Eckhardt	self
Phillis Setchell	self
Stephen McGinnis	9.12 State Sove Coll.
James Powell	Self (Kansas)
David J. Powell	Self (Kansas)
Michelle Butler	Cap. Strategies
Marlee Carpenter	Bright Carpenter
Connie Reese	KAMC
Paul Degener	self
Chris McCush	self
Kent Fulton	CS Comm on Publication
Chris Tawney	Self KS FHTP
Larry L Tawney	Self KS. FHTP
Lauren Kaine	self
Erin Doughty	Forward Kansas
Aaron Belenky	self
CHUCK HENDERSON	SELF- FLINT HILLS TEA PARTY
Myron Holter	My own www FAITH2.com
LINDA MCGINNIS	TOPEKA 912 & KS SOVEREIGNTY COALITION
CYNTHIA BOANDS	SELF
Royce L. Bounds	Self

STATE OF KANSAS

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Testimony by Senator Mary Pilcher Cook
Senate / House Health Committees – **SCR 1626**
Tuesday, February 9, 2010

Chairman Barnett, Chairman Landwehr, and members of the committee:

Thank you for the hearing on this proposed constitutional amendment, sponsored by more than half the Republican Kansas state senators. This amendment would preserve the freedom of Kansans to make their own health care choices. Citizens may pay directly for lawful health care services with their own money, and it would be prohibited to penalize individuals or employers from failing to purchase insurance. Citizens should have the right to make their own treatment decisions.

Mandating that individuals must have health insurance would be an exceptional violation of individual liberties. By its nature it would have to be enforced, and to enforce it the government would have to inflict penalties for noncompliance – unpaid penalties would lead to collection agencies, garnishment of wages and ultimately jail time, as we have seen in the federal health bills. Jail time for simply being born, and refusing to buy a service? What service or product will government force us to buy next? Power exerted over individuals "for their own good" is a sign of denial of inherent rights.

SCR 1626 will not block federal health care reform as long as the federal law does not require a mandate to purchase health insurance, or forbid patients from paying directly for their medical services. The people of Kansas, if they choose to do so, can still participate in any federal health plan – they just can't be ***forced*** to participate in any health care system.

It is incumbent upon Kansas state legislators today to protect the liberty of the people of Kansas. Sections 1 and 2 of our Kansas Bill of Rights, which every legislator takes an oath to uphold, states:

Section 1. Equal rights. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.

Section 2. Political power; privileges. All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit.

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STATE OF KANSAS

Senator Tim Huelskamp, Ph.D.

Committee Assignments

Agriculture
Education
Information Technology, Chairman
Local Government

Testimony by Senator Tim Huelskamp
Tuesday, February 9, 2010

I am here today to present in favor of the Healthcare Freedom Amendment.

It is imperative that we pass this proposed constitutional Amendment. This is about preserving the freedom of Kansans to provide for their own healthcare in the manner they decide is best for them. Healthcare decisions are some of the most personal and intimate decisions a person can make, and they should be decided by that person, their family and their medical provider, not a government bureaucrat buried under papers in Washington or Topeka.

It is consistent with our political tradition in America, not to mention consistent with common sense, that individuals not be forced to participate in any healthcare system or health insurance plan. Individuals also deserve the right to pay a provider directly for lawful healthcare services and healthcare providers should not face criminal punishment for accepting such payment.

Fortunately, Kansas is not alone in this effort. Recently, Virginia passed a bill prohibiting their citizens from being required to purchase healthcare insurance. This bill, which was bipartisan in nature, passed a Republican house and a Democrat senate. But this Amendment goes even further than Virginia or Kansas. It was recently reported that lawmakers in 35 states have filed or proposed amendments to their state constitutions or statutes rejecting health insurance mandates.

We as a legislative body should pass this legislation and give voters the opportunity to express their wishes at the ballot box on one of the most important political issues of our time.

Thank you.

Senate Public Health and Welfare
Date: 02/09/10
Attachment: 2

HEALTH AND HUMAN SERVICES TESTIMONY

February 9, 2010

SCR 1626

Honorable Chairs and members of the Committee, I want to thank you for giving this important piece of legislation a hearing today and hope it can be speedily worked through the process and appear before the citizens of the great state of Kansas for final ratification soon.

The Health Care Freedom Act is not a bill for the state. It is a protection for the people of the state. SCR 1626 is a statement of freedom and protection from Federal Government infringement on an individual's right to make health care choices. It is an insurance policy for individuals that health care insurance will remain competitive and regulated by our state. It is freedom for a physician to practice and together with the patient choose the best legal treatment the patient can afford to have.

I feel the importance of this bill every time I talk to citizens who are concerned with the uncertainty they see in the future of our country. They are afraid the federal government is beginning to take control outside of those mentioned in the 10th amendment. So, this bill is a health insurance policy that shows the citizens of Kansas we recognize their concern and the limited powers granted to the federal government by our U. S. Constitution.

With that, I will be happy to stand for questions.

Peggy Mast

Peggy Mast
Representative, 76th District

Senate Public Health and Welfare
Date: 02/09/10
Attachment: 3

Prepared Statement of Sarah McIntosh
Constitutional Scholar & Concerned Citizen
Submitted to the Kansas Legislature
February 9, 2010

Introduction

My name is Sarah McIntosh. I am a resident of the state of Kansas and I teach constitutional law courses for the political science department at Wichita State University. I received my law degree from Georgetown University Law Center in Washington, D.C.

Today I testify in support of SCR 1626, both as a constitutional lawyer and as a concerned citizen. None of the remarks I make today are made on behalf of Wichita State University.

Federal Constitutional Background

The United States Constitution establishes a federal system of limited government. It specifically enumerates those powers, which are given to the executive, Congress, and the judiciary. At the time of the passage of the Constitution, there was great debate as to whether they should include a bill of rights to the Constitution. Some were worried that there would be no way to specifically list all the rights retained by the states and the people. Others worried that without the bill or rights the federal government would fail try to exceed its enumerated powers.

Ninth and Tenth Amendments

In order to ameliorate the concerns of both camps, the Bill of Rights specifically enumerates rights of the people, but it also includes two very important amendments: the 9th and 10th amendments. Basically the 9th Amendment says that just because there are these enumerated rights here doesn't those are all the rights the people retain.

The 10th Amendment basically says if the Constitution doesn't specifically give the power to the federal government or specifically say the states cannot do it, then the states and the people retain those powers.

So states can do what is not specifically denied to them by the federal government or by their own state constitutions.

Congressional Powers

It is with that understanding that we then look to the Constitution to see either where Congress derives the power to mandate that individuals purchase health

insurance or where Congress derives the power to prohibit individuals from making their own health care choices.

While current federal legislation fails to articulate where they find the power to make these mandates, it is a fundamental question that needs to be answered, and will have to be answered, if passed and then challenged in federal court. The best way to establish a case for the state's to protect their citizen's rights is to pass this health freedom amendment.

It is important to note that the Constitution only enumerates 17 powers of Congress. In the past Congress has invoked the commerce clause or the necessary and proper clause in conjunction with the supremacy clause to claim powers not given to them by the Constitution, at least in enumerated form.

Commerce Clause

The commerce clause gives Congress the power to "make regular" commerce among the states. The necessary and proper clause was included to say that Congress can do what is necessary and proper in order to act upon the previously enumerated powers conferred in Article 1 section 8. Recent Supreme Court decisions have acknowledged that the commerce clause is, in fact, limited in scope.

No Constitutional Authority for Mandating Coverage

There is simply no constitutional authority for federal health care reform that mandates the purchase of health insurance or prohibits an individual from paying for the health services he or she desires. At the very base level, mandatory health insurance coverage is a violation of our civil liberties.

Health care choices are very basic rights that must be retained by the people. Never has the federal government maintained that it have the power to force individuals to purchase something.

While the states gave away a little bit of their sovereignty so the federal government could do some essentially "national" things---like defense---the states very clearly did not give up their sovereignty in its entirety. If Kansas allows the federal government to pass legislation squashing Kansans' health choice rights, it will be forfeiting not only the rights of the people but the powers of our state's sovereignty.

SCR 1626 Constitutional and Essential

SCR 1626 is essential to protect the sovereignty of the state of Kansas and to protect Kansan's civil liberties.

States have always been able to provide a greater protection of rights than the federal government. Recent Supreme Court decisions have upheld the powers of the states to provide protections of civil liberties.

Kansan's should have the freedom to choose our own health care provider and the insurance we want. Kansans should have the right to make their own health care decisions and the state of Kansas should not let Washington take that power away.

It's time for the State of Kansas to assert its sovereignty and protect this fundamental right that all Kansans should be ensured.

As a resident of Kansas I encourage you to pass SCR 1626 so that my friends, family, and fellow Kansans can retain the right to secure the medical care they desire and prevent the federal government from coming between patients and their doctors.

Testimony in Support
of
The Health Care Freedom Amendment

My name is Jim O'Connell and I am here as an individual citizen of Kansas and not on behalf of any other group or organization.

By way of background, I am retired from law practice and had previously spent twenty (20) years as chief executive of two different hospitals in the Kansas City area. I also served as Secretary of the Department of Health and Environment under Governor Bill Graves.

With the exception of maintaining a strong national defense, nothing is more important to America than maintaining the highest quality of medical care in the world. Critics love to cite a United Nations report that ranks the U.S. 37th in health care, but that report rested heavily on socioeconomic factors, not quality of care. There is a reason why people from other nations with the means to do so come to the U.S. for sophisticated medical care.

Before we allow our medical care system to be driven over a cliff because health care costs of 17 or 18 or 20% of GDP is too much, consider what that measure represents:

—the percentage of GDP represented by health care is a reciprocal of all the other components of GDP, that is, when manufacturing, services, retail, etc. decline the health care percentage goes up

—health care demand has grown with the growth and aging of the population and costs have naturally grown with that demand

—health care costs are also increased by increased mandatory coverages under health insurance, by services not known years ago and by growth in services usually not covered by insurance such as Lasik eye surgery, cosmetic surgery, Botox injections and more and better medications

—the sophistication and the incredible success of today's health care is not the same product as it was 10 or 20 years ago any more than today's cars, with anti-lock brakes, anti-rollover, GPS, etc. are the same product as back then

—there is great concern over jobs and jobs are highly sought after in other services, in retail, clerical, casinos, etc., but somehow growth in health care jobs is bad??????

—in 2008, health care workers <u>in the private sector</u> were 13 million and represented 11.6% of all <u>private employment</u>

Is there really an economic reason for risking the destruction of American health care?

In the heyday of the HMO movement I witnessed the effects of the payment system on medical services. It affected the behavior of doctors and other

providers and not just for patients covered by HMOs. It made so-called "efficient andeffective" approaches the norm and it established today's requirements for pre-approval to make a referral to a specialist or perform some tests. The recent recommendation to reduce the frequency of mammography screening illustrates the problems that can and do arise. Those proposed guidelines are no problem, **unless** you are the 45 year old woman for whom detection of her breast cancer is delayed with likely catastrophic results. Therein lies the problem with the proposal to establish Federal panels to identify the most "effective and efficient" treatments—they are based on statistics not patients.

We hear again the statistics about the high cost of medical care in the later stages of life as if it is some great revelation that people have more health problems as they age and medical care costs go up when people are sick. Nearly 20 years ago my mother had heart valve replacement surgery at age 82 and lived until she was 93. Is that now too costly for us?

Since we already have restrictions under Medicare, Medicaid and insurance plans, why object to having the Federal Government make it universal through its version of "acceptable" health insurance plans? I object because it enshrines and expands the things we find so objectionable today. It goes in exactly the wrong direction by killing off the best hope of maintaining excellence in health care—the strengthening of competition rather than the destruction of it. If a more

competitive health insurance market was in place, no insurer, except government, could stay in business if it imposed onerous conditions on its coverage. If the Federal government will not knock down barriers to interstate health insurance competition, perhaps we can ask Commissioner Praeger to pursue proposals for state law changes through the National Association of Insurance Commissioners. Frankly, this approach is much more appealing because it would avoid having Washington in total control of health care and it moves the decision making to state legislatures, the level most closely in tune with the people.

The supporters of the current "health care reform" legislation talk about the cost shifting generated by unreimbursed care provided to the uninsured. What makes their purported concerns in this regard so incredible is that they simultaneously support an expansion of the greatest of all cost-shifters, government health programs. (Medicare and Medicaid) Then they compound their hypocrisy by trying to compel a tremendous shift of insurance costs onto the young who currently elect not to purchase insurance. They see this as the only way to achieve a universal health program.

At the risk of being cast as a "right wing zealot" because I refer to a Constitutional principal, I believe the proposed Amendment is most important because the imposition of a universal requirement to purchase insurance would be an infringement on personal freedom. It would compel purchase of insurance, that

is it would require that individuals enter contracts not of their own volition but under penalty of law.

Two final points:

1. The Massachusetts universal coverage plan is often cited as an example because it is claimed that 96% of the residents have health coverage. However, you will not be surprised to learn that the costs are running significantly higher than the state government estimated and will require more tax subsidy than planned.

   I am a native of Massachusetts and have family there. The state has long had stringent controls on health providers, including strong restrictions on capital expenditures. To illustrate the problem, my younger brother fractured a bone in his foot last Fall. His doctors in Boston took the "conservative" approach, not just for a while but for months and the fracture did not heal. Finally in December an MRI was ordered to see what was happening in the foot. The test was scheduled for the first available appointment 10 days later for 10:15 p.m. on a Friday night!!!!! He needs surgery and the first available date for this "elective" surgery is March 8.

By the way, the state also reduced allowable costs for training physicians and teaching hospitals have reduced training slots. The cost curve can be "bent" by restricting supply as well as by restricting demand where government controls both sides of the equation. This is governmental universal coverage at work.

Kansans and all Americans deserve better. You cannot protect all Americans, but you can and must act to protect Kansans. At a minimum, you should put the question to the voters by allowing them to consider the Health Care Freedom Amendment.

One final word, recently it was reported that a provincial governor in Canada was coming to the U.S. for his heart surgery as it was not available in his province. Leaving aside the question of why he did not go elsewhere in Canada, we can only conclude that the heart surgery programs in the United Nations' 36 countries with better health care than ours were all booked up and he had no choice but to settle for 37th best!!!! We have the best, lets keep it.

Respectfully submitted,

James J. O'Connell
Shawnee, Kansas

Dr. George Watson, President of AAPS
Testimony in Support of SCR1626
February 9, 2010

Chairmen Barnett and Landwehr and Committee Members:

I am Dr George Watson from Wichita. I am President of the Association of American Physicians and Surgeons, the foremost advocates for patient confidentiality and the private practice of medicine. I am a doctor who has NO CONTRACTS with Medicare or any insurance company. My patients, insured and uninsured, contract directly with me, in exchange for my undivided attention and a fair price. I am also a U.S. Air Force Combat Veteran—sworn to uphold the Constitution against all enemies, foreign and domestic.

I and the Association of American Physicians and Surgeons strongly support SCR 1626, the Healthcare Freedom Amendment. Kansas patients and doctors need protection from an out of control federal government.

There is NO Constitutional basis for federal involvement in healthcare. And yet, Congress gave us thousands of pages of Medicare regulations and a system on the verge of bankruptcy. Then Congress gave us 1,000 pages of HIPAA regulations—the Health Insurance Portability and Accountability Act. But there is NO portability, because patients don't own their own insurance policies. Patients in Wichita, laid off from Cessna or Raytheon lose their insurance, because THEY don't own it. Accountability? More regulations for doctors and the patients' records opened to thousands of bureaucratic eyes.

Betrayal of trust, treachery, trickery, deceit. These words define TREASON! They also describe the closed-door meetings, lies about the details, bribes, and votes in the dead of night that Senator Reid used to try to force 2,000 more pages of mandates, fines, or imprisonment on all the citizens of the United States.

Enough is enough!

Your vote for SCR 1626 will preserve the rights of patients to be FREE of federal mandates; FREE to contract directly with the doctor of their choice; FREE doctors to accept direct payment for their services; and FREE Kansas insurance companies to sell to patients FREE to own the insurance policies of their choice.

Dr George Watson

Richard B. Warner, M.D.

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Statement of Richard B. Warner, M.D.

Testimony before the Joint Hearing of

the Kansas Senate Committee on Public Health and Welfare and

the Kansas House Committee on Health and Human Services

February 9, 2010

Chairman Barnett, Chairman Landwehr, and Honorable Members of the Committees, I am Richard B. Warner, M.D. from Overland Park, and I appreciate the opportunity to talk with you in support of the Health Care Freedom Amendment. My perspective is that of a psychiatric physician in private practice. I am a recent past president of the Kansas Medical Society and a member of the Kansas delegation to the American Medical Association. I also serve on the Board of Directors of the Kansas Health Insurance Association, which administers the high risk pool for the State of Kansas.

The Health Care Freedom Amendment is timely, because we are engaged in a great national debate about the reform of health insurance and its markets. Legislation that has nearly passed Congress has at its heart a provision that mandates that all citizens of the United States who are not provided health insurance by their employer or the government must purchase it individually or face taxes administered by the Internal Revenue Service. While increasing the

individual ownership of health insurance would be a very good thing, to do so by mandating its purchase would be both unwise policy and contrary to our constitutional system of government.

To take the constitutional question first, there simply is no authority under the enumerated powers of Congress to require that a citizen to buy anything, whatever the virtue that such a purchase might be thought to hold. As the Congressional Budget Office stated in 1994, "A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States." Under the tenth amendment any such power is reserved to the states or to the people. The proposed amendment is important as a protection of the prerogatives of the state of Kansas and its citizens.

Beyond the question of the constitutionality of mandating health insurance purchase lies the question of whether it might be good policy. This question has been addressed by the Kansas Medical Society in its Principles for Health Care Reform, adopted by the KMS House of Delegates in 2004 and reaffirmed in 2008. That opinion is that while health insurance coverage for every person in Kansas is the ideal, mandating universal coverage by law is not desirable. Mandating the purchase of insurance is inevitably accompanied by the government prescribing the design of health insurance benefits and premiums, often in ways that satisfy social wishes but which are uneconomic. For instance, the federal legislation that is pending in Congress proposes to solve the problem of pre-existing conditions by requiring that insurance companies abide by guaranteed issue and community rating for premiums. In the eight states that attempted this solution in the 1990's, all ruined their markets for individual health insurance. People found they could delay their purchase of insurance until they had real need for it. Since people of low risk remained out of the risk pools, higher premiums were necessary to cover the people who

remained in the market. It is proposed that the requirement that everyone purchase insurance will prevent that from happening, but the fine needed to enforce the mandate has to be so high that it is politically unpalatable. The better approach to the problem of preexisting conditions is state-based subsidized high risk pools. Kansas and 34 other states maintain such pools.

Similarly, the legislation passed by the US House of Representatives calls for the age ratio in setting premiums to be no more than 2 to 1 for the oldest to the youngest. Since the normal market ratio is more like six to one, it would result in the doubling of premiums for people under the age of thirty, which is the age group least likely to buy health insurance as it is. The designers of that legislation rely on the individual mandate to coerce people into buying something that they find uneconomic at even half the price.

Finally, I would like to touch on the Amendment's provision to protect the right of individual patients and their doctors to contract for the direct payment for lawful services. Besides protecting a basic liberty, this would encourage arrangements that would help us to reduce our excessive reliance on third party payment, which underlies much medical inflation and the loss of control over medical decisions. It would result in truer pricing and the transparency for which many have called. It would protect the patient-physician relationship, which is the moral bedrock upon which medical care rests.

Thank you for the opportunity of sharing these brief remarks. I would enjoy discussing them further with you.

Sincerely,

Richard B. Warner, M.D.

February 9, 2010 "Kansas Hea[illegible]Care Freedom Amendment" Testin[illegible]y

David J. Powell, CLU, ChFC, CFP, RHU
President, David J. Powell & Associates, LLC
El Dorado, Kansas

Position: Proponent of this proposed legislation

Thank you for the opportunity to address this group. **I support this amendment**.

I oppose Obamacare!

The current administration in Washington is trying every method they can to force their version of Health care reform upon the citizens of the United States. With this legislation Kansas joins 34 other states considering State Constitutional changes to blunt their actions, obvious and not so obvious.

I want to make the point that not only must you, our legislative representatives, be vigil, but we must insist that our representatives in Congress be on guard as well.

I say this because of the latest unpublicized maneuver of the Obama administration to include funding for health care reform within the recently released Obama budget tax proposal sent to Congress from the White House.

The budget includes systematic health reform, based on the principles (and scoring) contained in the House (H.R. 3962) and Senate (H.R. 3590) passed bills, as of December 2009, with "overlap" between the two bills removed.

We must urge our Congressmen to **strike Obamacare from the Federal budget!!**

It is their intent to force this upon us one way or another. It is up to you and us as citizens to fight to retain our states rights given us by the Constitution and the 10th amendment.

We must continue to demand smaller government, both federal and state, so that we can get back to the principals that this nation was founded upon. Kansas is the heart of **this land of opportunity** and needs to follow the lead set by Arizona, a state that passed a similar bill on June 22, 2009, putting a constitutional amendment on their ballot for November 2010 "that guarantees that individuals and businesses can offer – and providers can accept- direct payment for health care services without facing penalties or fines."

W. Paul Degener
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February 6, 2010

SUBJECT: SCR 1626, Health Care

Mr./Madam Chair, members of the committee.

My name is Paul Degener, I am a resident of rural Shawnee County and I appear hear today as a concerned citizen in support of Senate Concurrent Resolution 1626.

I would like to begin with a quote from Thomas Jefferson:

The Works of Thomas Jefferson - Page 475
by Thomas Jefferson, Paul Leicester Ford - United States

In questions of power, then, **let no more be heard of confidence in** man, **but bind him down from mischief by the chains of the Constitution** ....

I am here today in an attempt to point out some of the transgressions of the Federal Government relative to health care and further to show why it is important that we take these measures to protect the citizens of Kansas.

It is evident that for the past 100 years or more our federal government has been guilty of ignoring their oath of office which is to protect and defend the Constitution against all enemies, foreign and domestic.

So now it is our turn, the states and the citizens, to take those steps necessary to protect ourselves from an out of control federal government that is attempting to force unconstitutional health care proposals onto to the people.

Their reason for doing this is because of the high cost of health care in the United States. In my view, it is the federal government who is responsible for the outrageous costs of health care. They are treating the symptoms and not the cause.

I have reviewed several of my more recent Medicare Explanation of Benefits (EOB's). In several instances Medicare has approved around 35% of charges submitted, in 1 instance Medicare approved 17% of charges submitted and in 1 instance 0% was approved. This loss has to be made up by the health care providers, i.e. increase his fees and/or pass it on to private insurance. Keep in mind also that Medicare pays only 80% of the amount approved.

The U.S. Supreme Court has declared that health care providers must provide health care to illegal aliens at no charge. There are approximately 20 million illegal aliens in this country and health care providers and the citizens are paying for health care for illegal invaders into our country.

The federal government has done nothing to stem the tide of illegal aliens and/or terrorists from entering our country.

Our own worst enemy is a domestic enemy, the federal government, and it is still growing and becoming more intrusive and dictatorial in its actions.

I would add one provision to this amendment: No health care or social services are to be provided to persons illegally within the borders of the state of Kansas.

I urge you to support this legislation.

Thank you for allowing me to appear before this joint committee.

W. Paul Degener

CCAG-SSS

Coalition of Citizen Advocacy Groups

Supporting State Sovereignty

A CCAG Coordinated Project

Proponent

Sharon Evans
Richard D. Fry (Oral)

Testimony before the

Senate Public Health and Welfare

And

House Health and Human Services

Committees
On

Health Care Freedom Act

SCR 1626

Tuesday, February 9, 2010

(DOCKING State Office Building- ROOM 784)

(1:15 P.M.)

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.

-Louis D. Brandeis, Olmstead vs. United States, 1928

Chairpersons:

Sen. Jim Barnett, 234-E
785-296-7384
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Rep. Brenda Landwehr 151-S
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I. Executive Summary

(Oral Testimony)

We support the Kansas Health Care Amendment as part of a nationwide effort to stop further encroachment by the federal government into the rights and liberties of a free peoples and the sovereignty of the several states. To date over thirty eight (38) states are or have been somewhere in the process of passing "Tenth Amendment" or "State Sovereignty" resolutions. There are numerous states which are somewhere in the process of passing health care amendments similar to SCR1626.

The Kansas Health Care Act does or attempts in part to nullify portions of the proposed federal health care "reform" law. Nullification of federal statutes and mandates as a means by which the states assert their authority and their citizens' natural rights or to protest the federal government's usurpation of or exceeding its Constitutional authority has a long history. It can be an effective way to limit federal tyranny in a non-threatening and non-violent manner.

In the war of 1812 Massachusetts refused to marshal its militia to the call by the federal government for an expeditionary force to Canada. Massachusetts' position was that while the federal government could call for the militia, that under the tenth amendment it was the states that had the right to determine if the expressed criteria to federalize the militia was meet and it determined the proposed excursion in the North was not to "repel invasion".

Your duty, under your oath of office is to support and protect the U.S. Constitution and the constitution of Kansas. It was upon the sovereignty of the several states upon which this Republic was built. It will only be upon the sovereignty of the several states that this Republic is saved. **Your first loyalty is to Kansas.** You serve our nation best by upholding your duty to Kansas first.

You cannot fulfill this duty while at the same time adding legitimacy to a federal law that exceeds the scope of the federal government's authority. The Constitution is not a smorgasbord and you may not fulfill your duties of office only when it is uncomfortable in doing so. Passage of this amendment will take Kansas and the nation further down the road of recovery. Therefore we urge you to vote in favor of this resolution.

II. Argument

a. The Enumerated Powers of the Constitution

The federal Constitution does not provide the federal government with the authority to take over a private industry or to force U.S. citizens to buy any product including health care. This action by the federal government is yet another incident of the federal government acting beyond it Constitutional authority. As such the federal government's proposed health care reform bill is Unconstitutional.

b. State' Duty to its Citizens

"Our best protection against bigger government in Washington is better government in the states."
Dwight D. Eisenhower

Each of you has taken an oath of office. In your oath you swore to support the constitution of the United States and the constitution of this state, and faithfully to discharge the duties of your respective offices. You cannot sit by and watch the Constitution be violated and at the same time "support" the Constitution. You have an affirmative duty by virtue of your oath to actively support and to protect the Constitution. One of the ways to support and protect the Constitution is by not lending legitimacy to those federal laws which exceed the federal government's authority to pass them.

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A key principle of Constitutional law is that any law which is Unconstitutional is null and void upon its passage. Therefore any such law is not required to be followed. By not following such Unconstitutional laws they are nullified. This resolution is an attempt to preemptively encourage the non-passage of an unconstitutional federal law or having failed that to give the good citizens of this date direction and support in their resistance to such unconstitutional laws.

The Kansas Heath Care Amendment is a step toward nullify the laws relating to the federal governments take over the insurance industry and taking away our rights to contract freely. Freedom is about the ability for one to make choices and to be personally responsible for such choices. The federal government is seeking to control or limit our rights as a free people to look after our own health and to contract freely based upon our own judgments.

III. Conclusion

The issue before you is not about health insurance but about control. It's about the creeping choking control of the federal government in every facet of our lives. It's about the federal government's persistent encroachment on our ability to exercise our freedom of choice and to live our lives in the manner we choose not how someone in Washington thinks we should live our lives.

It's also an issue of principles and duty. Do you, or do you not, adhere to the principles of individual freedom and the sovereignty of the citizens over the governments they create. A vote in favor of this amendment is a vote in support of the sovereignty of not only Kansas but all our sister states. It's a vote in support of the liberty not only of Kansans but all our fellow citizens.

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For the sake of liberty,

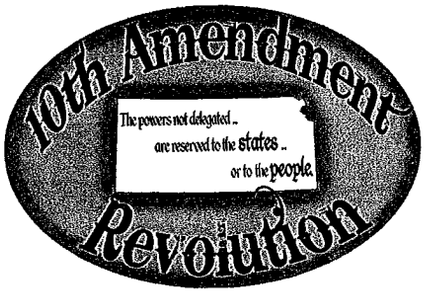
Sincerely,

Richard D. Fry

Richard D, Fry
Project Co-Coordinator
Coalition of Citizen Advocacy Groups Supporting States Sovereignty;
November ☑ Patriots, Dir. Field Ops.
Independence Caucus –Assist. State Rep.
Continental Congress-Kansas Delegate

Sharon Evans

Sharon Evans
Project Co-Coordinator
Coalition of Citizen Advocacy Groups Supporting States Sovereignty;
Kansas 9-12, founder



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Health Care Policy and Constitutional Rights:

The Health Care Freedom Amendment

Testimony Presented Before the Kansas Senate Public Health and Welfare and House Health and Human Services Committees

by Dave Roland

Chairman Barnett, Chairman Landwehr, and members of each committee, I thank you for the opportunity to testify before you today. My name is Dave Roland, and I am a policy analyst for the Show-Me Institute, a non-profit, non-partisan, Missouri-based think tank that supports free-market solutions to the state's social challenges. Prior to joining the Show-Me Institute, I spent several years in Washington, D.C., gaining expertise in constitutional law as a litigator with the Institute for Justice, a public-interest law firm that specializes in the protection of Americans' liberties. The ideas I will offer today are my own, and should not be taken as necessarily representative of the organizations with which I am affiliated.

Among the elements of the health care reform bill being considered by Congress is a requirement that almost every adult would either have to purchase a health insurance policy or face punitive fines to be collected by the Internal Revenue Service. There has been widespread debate in legal circles about whether the courts would uphold such a requirement, but lawmakers in at least 33 states are trying to do what they can to insulate their citizens from such a requirement. In Kansas, members of this legislature are considering SCR 1626, also known as the Health Care Freedom Amendment, which would offer citizens the opportunity to modify the Kansas Bill of Rights to formally recognize their right to decide for themselves whether they will participate in any private health care system. Under this amendment, the government would not be permitted to prevent citizens from offering or accepting direct payment for health care services, and neither could it substantially limit the purchase or sale of health insurance in private health care systems.[1]

My testimony today is not intended as an endorsement of any bill, but rather to explain the policies implicated by the bills just mentioned. I will particularly address the constitutional

[1] It appears from the current text of the Health Care Freedom Amendment that the General Assembly would retain the ability to pass a comprehensive, tax-based, single-payer public health insurance system, so long as in doing so it did not either outlaw the sale or purchase of private insurance policies or restrict citizens' abilities to offer or accept direct payment for health care services.

issues raised by one element of the federal health care reform bill, the way that courts would likely resolve those constitutional issues, and the likely impact of the Health Care Freedom Amendment on the courts' resolution.

Should Everyone Have Health Insurance?

The linchpin of the current federal health care reform bill is a requirement that almost every adult in the nation must obtain a health insurance policy that would meet certain requirements imposed by Congress. In addition to the fact that many Americans currently carry health insurance policies that would *not* fit the requirements Congress is considering, there are also many who have reasons for choosing to remain uninsured. A brief look at the basic mechanics of the health insurance industry will help illustrate why some people make these choices.

Insurance is gambling, both for the insurers and the insured. The insurer looks at your profile and makes a careful statistical determination of how much your health care is likely to cost them over a given period of time. They then charge you a premium that - if their calculations are correct - would allow them not only to cover your expenses, but also to pay their employees and to make a profit on top of that. Their risk lies in the possibility that you might incur costs greater than they expect and/or sooner rather than later. But the odds are heavily stacked in their favor. These companies are very good at making their guesses, and the large pool of resources that results from their customer base means that, just like a casino, they almost always come out ahead.

For the insured, there is also a gamble involved. If, in fact, the insurance companies are correct (as they usually are), the insured will end up paying far more for their health care than they would have if they had remained uninsured. This is the risk they assume in order to gain peace of mind that, should a catastrophic injury or illness occur sooner rather than later, they will be taken care of. But, financially speaking, the great majority of people would be better off putting 85% of what their insurance premium would have been into a savings account earmarked for health care expenses.[2] Then, whenever health care costs emerge, the money is ready to be

[2] Even the best of health insurance companies usually only apply about 85% of the premiums they receive on their clients' health care costs.

used - and, importantly, it can be used for any procedure and any health care provider the insured prefers.[3]

So the health insurance trade off is, the insured sacrifices extra money and a significant range of choice as to providers and procedures for the assurance that they will have their expenses covered if they should need treatment sooner than they would otherwise be able to pay for it. It is not a necessity, and a large majority of people would ultimately be better off if they simply saved their money instead of giving it to insurance companies. That is why it very easily could make economic sense to forgo health insurance.

While some people may not carry health insurance because it is unaffordable, many Americans *choose* not to purchase health insurance. Some people's religions may not permit the use of modern medicine, while others may not believe it to be effective. Still others are simply confident enough in their propensity for health that they are willing to risk the costs of illness or injury in order to direct their money to concerns that they believe to be more pressing for themselves and their families. And there are some who, recognizing that most people pay far more to insurance companies than they are ever likely to need for their own treatment costs, would prefer to self-insure by creating their own health fund. For each of these people, a congressional directive to purchase a health insurance policy would mean giving up a huge amount of money — as well as a significant amount of autonomy and privacy — committing themselves to a contract for goods and services that they do not want, and in some cases may be prohibited from using.

The Federal Constitution

As we all remember from high school, congressional authority is limited to those powers explicitly granted by the Constitution. In this case, the question would be whether the Constitution gives Congress the authority to punish citizens for refusing to purchase health insurance.

Those backing the bill suggest that this authority is part of part of Congress' power "to regulate commerce … among the several states[.]"[4] It is true that courts have generally

[3] Most health insurance companies place limits on the doctors from whom a policy holder can receive treatment as well as on the types of treatment that are covered.

interpreted this power very broadly, resulting in a U.S. Supreme Court decision that a farmer named Filburn was bound by agricultural regulations even though he was not taking his grain to market.[5] More recently, the Supreme Court also held that Angel Raich was subject to federal drug laws even though her medical marijuana was homegrown and neither bought nor sold.[6]

But courts have also recognized limits to congressional authority under the Commerce Clause. In *U.S. v. Lopez*, the Supreme Court held that the Commerce Clause did not permit Congress to create a federal law banning possession of firearms in a school zone.[7] In *U.S. v. Morrison*, the court struck down a law that addressed the subject of gender-based violent crime.[8] The primary reason that the court struck down the laws in *Lopez* and *Morrison* was that the subjects Congress sought to regulate lacked a clear nexus with commerce among the states.

Even though much of the health insurance industry is handled within the bounds of individual states,[9] courts will likely find that health insurance as a whole is an issue with a sufficient connection to interstate commerce to permit congressional regulation. But if Congress passes a bill mandating that individuals must either buy health insurance or face financial sanctions, courts will still have to answer a very specific question: Does the power to regulate interstate commerce give Congress the authority to penalize citizens *who do not wish to engage in commerce*?

As Prof. Randy Barnett pointed out at a recent Heritage Foundation debate,[10] the Supreme Court has never faced such a question, so we cannot be certain of its answer. I tend to agree with Barnett that the Court's response will likely hinge on the solicitor general's ability to explain which aspects of citizens' lives (if any) would remain beyond the reach of congressional regulation if the Court permitted these mandates to be enforced. If the Solicitor General offers a reasonable response that acknowledges clear limits to the powers available under the Commerce Clause, the Court may sustain the individual health insurance mandate. If not, I believe that the majority of justices will strike the mandate as unconstitutional.

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[4] U.S. Const. Art. I, § 8.
[5] *Wickard v. Filburn*, 317 U.S. 111 (1942).
[6] *Gonzalez v. Raich*, 545 U.S. 1 (2005).
[7] *U.S. v. Lopez*, 514 U.S. 549 (1995).
[8] *U.S. v. Morrison*, 529 U.S. 598 (2000).
[9] In part as a result of federal law, it is very unusual for individuals to be able to purchase insurance from companies outside the state in which they are currently domiciled.
[10] Video available at http://volokh.com/2009/12/09/video-of-heritage-session-on-constitutionality-of-health-care-mandate/.

Some professors have argued that even without relying on the Commerce Clause, authority for the health insurance mandate could be found in Congress' power "to lay and collect taxes ... [to] provide for the ... general welfare of the United States",[11] or even in the Sixteenth Amendment's authorization of an income tax.[12] I disagree. While taxation power *might* permit the creation of a tax-based public health insurance system like Medicare that all workers pay into, this is not what is anticipated in the insurance mandate under consideration; it is neither tax-based, nor part of a public health insurance system, nor would the alleged "tax" be collected from all workers. Furthermore, even if the fees for failing to purchase health insurance were classified as a tax authorized by Article I, section 8, Congress is specifically denied the authority to impose capitation taxes "unless in proportion to the census,"[13] a requirement that this proposal does not seem to meet.[14] It might be theoretically possible to achieve the same basic effect intended by this bill by raising the general income tax rates by several percentage points, then offering tax credits or tax deductions to anyone participating in a qualified health insurance plan – but political considerations make this sort of approach unlikely.

The next question courts would have to answer is whether the issue should be reserved to the states under the Tenth Amendment.[15] This is shakier grounds for a constitutional defense than one would really like to have. The Tenth Amendment applies only where courts have determined that a specific power has not been delegated to Congress—and if a court has already located congressional authority in either the Commerce Clause or the taxing power, there is a very strong possibility that it will also determine that the Tenth is inapplicable.

After considering the question of whether Congress generally has the authority to create an individual health insurance mandate, the question will then become whether such a mandate violates liberties preserved under the first nine amendments to the U.S. Constitution. The relevant provisions are contained in the First, Fifth, and Ninth Amendments.[16] The Supreme

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[11] U.S. Const. Art. I, § 8.
[12] U.S. Const. Amendment XVI.
[13] U.S. Const. Art. I, § 9.
[14] It might be argued that the penalties for failing to obtain health insurance could be considered an "income tax" of the sort that is exempted from the limitations of Article I, section 9. I think that such a penalty could not be considered an "income tax" because it would be selectively applied and collected separately from the general income tax authorized in the Sixteenth Amendment.
[15] U.S. Const. Amendment X.
[16] While the U.S. Supreme Court has rarely discussed the Ninth Amendment as a substantive source of individual liberties, its text—"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage

Court has previously recognized that the Constitution protects citizens' rights to associate with others of their choosing,[17] to enter into contracts, to make their own decisions regarding health care, and, of course, their right to privacy.[18] A violation of any one of these rights could be sufficient to invalidate the health insurance mandate.

Unfortunately, merely establishing an infringement of constitutional rights does not usually end the analysis. In fact, the Supreme Court has long permitted infringement of these kinds of liberty, as long as the government could advance an interest in doing so that a majority of the justices considered to be sufficiently important. In the case of the individual health insurance mandate, the government's interest is to make insurance premiums more affordable and, thus, to increase the number of people with access to health care. The courts will have to balance this interest against the liberty and privacy interests violated when citizens are forced to purchase coverage that they do not want and may have no intention of using. My opinion is that, particularly given the extremely high value that several current justices place on protecting the privacy rights of individuals, it will be difficult for the Solicitor General to convince a majority that the *potential* for lower health insurance premiums (because, in fact, there is no guarantee that the plan will work in the way Congress intends) can justify forcing someone to disclose private information about themselves and their health care.

The Health Care Freedom Amendment

If everything I've discussed above fails to persuade the courts to strike down the individual health insurance mandate, then the arguments will come down to state constitutional protections. This is one reason (but only *one* reason) why Kansans should take the Health Care Freedom Amendment seriously.

The Bill of Rights in the U.S. Constitution does not demarcate the outer limits of individual freedoms to which citizens are entitled. Rather, it merely establishes a baseline of liberty that cannot be violated by any level of government. The states, however, each have their own constitutions, and those documents can—and frequently do—provide an even higher level of

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others retained by the people"—suggests that it should be seen as such. See Justice Arthur Goldberg's concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[17] U.S. Const. Amendment I.

[18] U.S. Const. Amendments V and XIV (Due Process Clause).

protection for liberty than is afforded by the U.S. Constitution. Generally speaking, these additional protections are only applied against the actions of state and local governments, but if Congress tried to enforce a law that directly violated the terms of the Health Care Freedom Amendment (or some other freedom guaranteed under a state constitution), the courts would have to decide whether a state's guarantee of liberty to its citizens can protect them from actions of the federal government that would violate that liberty.

This is currently an open question. There are cases in which federal courts have noted that the application of a federal statute could result in a violation of certain freedoms secured under state constitutions. In several of these cases, the courts required the government to come up with a sort of alternative structure that would respect the state constitutions – but in each of those cases there were also usually indications from Congress that they wanted to avoid violating state constitutional freedoms. In the case of the individual health insurance mandate, it would seem clear that Congress is not concerned with respecting state constitutional protections. This would set up a battle under the U.S. Constitution's Supremacy Clause.

The Supremacy Clause, found in Article VI, reads as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

Of course, the central question here will be just how the courts will apply this language. The answer may not be as simple as it seems. Despite the text's indication that state laws and constitutions are subject to federal laws and treaties, a look into history shows that several important Founders rejected the idea that Congress could always enforce laws deemed unconstitutional by the states. When in 1798 Congress passed the Alien and Sedition Laws, which made it a criminal offense to publicly criticize certain government officials, James Madison—widely known as the Father of the Constitution—and Thomas Jefferson—author of the Declaration of Independence and the sitting Vice-President—drafted the Kentucky and Virginia Resolutions, in which those states rejected the constitutionality of the acts.[19] The U.S.

[19] Madison later said that, in his opinion, these resolutions were primarily useful as tools through which the power of Congress could be called into question—though not necessarily nullified. He believed that similar resolutions would signal to other states the potential necessity of modifying the current system of government to eliminate further abuses.

Supreme Court was not called upon to resolve the question of whether states could legitimately deny congressional authority in this way, but up until the Civil War different states repeatedly adopted similar measures.[20]

Without any directly applicable judicial precedent, some legal scholars have attempted to guess at how the justices might be inclined to resolve such a conflict between state constitutional liberties and federal laws. One of my colleagues, Clint Bolick, a co-founder of the Institute for Justice and the current leader of a constitutional litigation center at the Goldwater Institute in Arizona, has noted a recent judicial trend in which the Supreme Court has shied away from allowing federal laws to trump state constitutional requirements. This might well signal that the justices are inclined to protect freedoms enshrined in state constitutions, but the only way we will be sure is if the U.S. Supreme Court is presented with a direct conflict. The Health Care Freedom Amendment, if adopted by the people of this state, could provide just such a conflict.

Summing Up

Should Congress ultimately pass a health care reform bill along the lines of the one currently being debated, I think it will take 2-3 years for a case evaluating the constitutionality of the individual health insurance mandate to reach the U.S. Supreme Court. The likely scenario is that a whole host of lawsuits will be filed in every federal circuit. The federal district courts are likely to deal with the issues quickly, render a decision, and kick the cases up to the circuit courts. Once the circuit courts have weighed in on the constitutional issues, the Supreme Court will choose the set of facts on which it will base its consideration of the law. Keep in mind that it doesn't have to take the *first* case to get resolved by a circuit court, although it only takes four justices agreeing in order to get a case in front of the Supreme Court.

When the issue gets in front of the Court, I believe that proponents of the mandate (in other words, the Solicitor General) will have to satisfactorily answer at least two vitally important questions if they are to win a majority: 1) If the Commerce Clause permits Congress to force individuals to purchase goods and services that they do not want, where is the limit of that power - if, indeed, a limit can be articulated?, and 2) Is Congress's interest in (potentially)

[20] Indeed, South Carolina's attempted nullification of a tariff passed by Congress in 1832 nearly sparked secession and armed conflict.

lowering the cost of health insurance premiums sufficiently compelling as to justify forcing individual citizens against their will to associate with others and to divulge to them all sorts of private information about one's health?

I believe, based on the current composition of the Supreme Court, that the individual health insurance mandate would probably be found unconstitutional, either as a violation of the Commerce Clause or the individual right to privacy. I cannot see any of the four conservative-leaning justices (Roberts, Alito, Scalia, or Thomas) approving such a mandate as an exercise of the Commerce Clause, nor can I see any of the four liberal-leaning justices (Stevens, Ginsburg, Breyer, and Sotomayor) disapproving the mandate. The deciding factor, then, will be whether Justice Kennedy will go for or against it, and I believe that will largely depend on how the Solicitor General articulates what limits might remain on congressional authority if the mandate is approved.

A more interesting question is how the justices might vote on the question of whether the right to privacy precludes the imposition of an individual health insurance mandate. Justices Thomas and Scalia have both rejected the notion that there *is* any such right to be found in the constitution, making it unlikely that they would rely on this right to strike down legislation as unconstitutional. On the other hand, several of the more liberal justices have previously written passionately about the importance of the right to privacy. It is possible that the privacy question might result in a majority of justices voting to strike down the mandate, but with Scalia and Thomas dissenting on this point.

Either way, it is my opinion that the Supreme Court is likely to find that an individual health insurance mandate violates the provisions of the U.S. Constitution. While the Supreme Court is thus unlikely to reach the question of whether the Health Care Freedom Amendment would be seen as an additional bulwark for liberty, the adoption of this amendment (and others like it in our sister states) would at a minimum offer the potential for a case that would test the boundaries of state sovereignty under our current constitutional system.

Testimony to Senate Public Health Welfare Committee and
House Health and Human Services Committees - February 9, 2010

Dear Members of the Joint Committee:

It is an honor and a privilege to say a few words to you today. My name is Dr. Ira Stamm. I am a psychologist who has been taking care of patients for forty-four years. I am also a seven year survivor of prostate cancer. I am here today not as a psychologist, cancer survivor, or advocate. I am here today as a teacher and educator.

For twenty-three years from 1972-1995 I treated patients at the Menninger Clinic here in Topeka. During that time and since then I have observed and studied the factors that led Menninger to close its doors in Topeka and move to Houston in 2003. The Menninger story serves as a cautionary tale for health care reform and should be studied and understood by those who are writing health care policy.

We have in health care today a whole host of silos that operate independently of one another. There is Medicaid - which is underfunded. There is Medicare - which will run out of funds in several years. There are a number of commercial health insurance companies who vary in their commitment and loyalty to Main Street versus Wall Street. There is also CHAMPUS, Tricare, the Veterans Administration Health Care System, the Indian Health Care System, and so on. Each of these play an important role in health care - but they do not talk to each other. This is a little like growing up in a family where neither the children or parents ever speak to one another.

No less a conservative thinker than former Speaker of the House Newt Gingrich has looked at the problem of healthcare and concluded as follows:

- The health and healthcare system is broken.
- Repairing and reforming won't work.
- The health and healthcare system must be transformed.

(www. healthtransformation.net)

A common objection to the plans for reform being developed in Washington, DC is that they may require every American to purchase or to acquire health care insurance. If a person has an infection they will take penicillin. If an individual wants to run in the marathon, he or she will need to buy a pair of sneakers. And if every citizen in America is to have health care with equal access, affordability, and outcomes, then every American needs to participate in an insurance plan.

This is not a political issue. It is a fundamental fact of insurance and healthcare economics. For Americans to have the lowest possible insurance premiums, every American needs to be in the insurance pool. Premiums paid by the young and the healthy offset the expenses incurred by caring for the sick, elderly, and disabled.

For my testimony today, I am leaving with you written copies of Issue XIV of my newsletter The Kansas Health Care Reformer. This October 2009 issue addresses the concept of mandates and other ideas that are the focus of the health care dialogue and debate. I hope you find it informative.

Thank you,

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THE KANSAS HEALTH CARE REFORMER

A Newsletter of Observation, Inquiry, and Comment:
Consensus and Contrarian Points of View

Written by: Ira Stamm, Ph.D., ABPP
Topeka, Kansas – Issue XIV – October 26, 2009

SPECIAL EDITION

A Glossary of Health Care Reform

As the final draft of heathcare legislation is written over the next several months, both Congress and the consumer are faced with an almost overwhelming array of concepts, ideas, and proposals. Some of these ideas are good, some are flawed in their current edition but can be fixed, and some are terminally flawed. There are also some ideas about health care and health care reform never discussed openly in the Congressional arena. This Special Edition of the Kansas Health Care Reformer lists and elaborates on these central ideas.

Universal Coverage – this means that every American citizen has access to affordable, quality health care. No one is left out.

The recent bill passed by the Senate Finance Committee guarantees coverage to 94% of Americans but not all. Put yourself in the place of a family member or a health care provider who has to tell a loved one or a patient that they cannot be treated for their illness because they are in the 6% of Americans not included in health care reform.

Single Payor System – one entity collects premiums, issues subsidies to those who cannot afford to purchase insurance, and pays claims to doctors and hospitals. Most countries that have universal health care pay for it with a single payor system although some countries combine private insurance with public funding. Medicare is the clearest example of a single payor system that covers 30/40 million Americans. A single payor system reduces medical expenditures by eliminating the 20-50% of every health care dollar that has little or nothing to do with medical care.

Guaranteed Issue – this means that anyone who applies for health insurance will be granted a policy regardless of their age or health status. Pre-existing conditions will not preclude a person from having health insurance.

Community Rating – this means the insurance pool includes everyone, the young and healthy, and the old and infirm. The larger the insurance pool the lower the average premium.

The author, Malcolm Gladwell, has helped us to understand that at its inception the concept of health insurance was based on the concept of community rating. Large groups of people would be clustered together to spread the risk and cost of health care over that population.

Gladwell further explains that over time the insurance industry has shifted away from community rating to an actuarial model of insurance. In the actuarial model each group applying for health insurance is assigned a premium based on the projection of health/sickness for the next year of that group alone. The group may have 10, 50, 1000, or 100,000 employees. In this model a small business group with fifty employees that has several employees with costly illnesses will see the premium skyrocket. If instead those employees and that business was part of a large community pool of millions of insureds, the premiums would remain stable.

Mandate to Purchase/Have Insurance – This is an economic issue that has become a political issue. The only way to maximize the size of the insurance pool and to have the lowest average premiums possible is to require that everyone be included in a national insurance pool (have insurance.)

If this is left as optional, the young and healthy are likely to opt out. This leads to the process of adverse selection, i.e., the process where only those with chronic or serious illness purchase insurance.

The Association of Health Insurance Plans (AHIP) created a firestorm when the day before the Senate Finance Committee was to vote on its plan, AHIP released a report suggesting if the insurance risk pool was smaller than written into an earlier version of the bill, insurance premiums would be greater. They are correct in this. Unfortunately, the timing of their report on the eve of a key vote in the Senate, made the report seem self-serving and political in its intent.

Medical-Loss Ratio – this is the percent of every health care dollar that is spent on health care itself versus how much is spent on administration, marketing, salaries, profit, etc. One critic notes that several years ago the medical-loss ratio for one large insurance company was at 95% - i.e., 95% of every dollar went to pay doctors and hospitals for providing health care. The current medical-loss ratio for that same company is now 80%. This reflects a significant decrease in the per cent spent on health care itself. The decrease in the medical loss ratio by the insurance industry as a whole is used by those who argue that the insurance companies are focusing more on profits and less on patient care.

The administrative costs for Medicare are 1.9% and for Medicaid 5-6% or less. These figures are used to support the argument that commercial insurance takes a large amount out of each health care dollar. A study of the five largest health insurance companies revealed that in 2008 these companies spent 18% of every premium dollar on administrative expenses, marketing, and profits.

Evidence based medicine – medicine has acknowledged the importance that medical decisions made by the doctor should be based on scientific evidence, that is, data that shows what is best for the patient and produces the best outcome for the patient.

As an example, for more than a decade there was no long-term outcome data to help the cardiologist decide whether to insert a stent in a blocked artery or to refer the patient for open heart surgery. The doctor's decision was often based solely on his/her clinical judgment which was influenced by the setting(s) in which the physician trained.

While there is no substitute for the doctor's judgment, today the cardiologist has available to him/her excellent outcome studies to think about as he guides the patient towards a decision about which medical procedure to undergo.

At the same time there is a danger in relying too heavily on evidence based medicine. In mental health one study touted the success of cognitive behavioral therapy over psychodynamic therapy in treating depression. Upon closer inspection of the study it was noted that the therapists in the study using cognitive behavioral therapy treated the patient by reading a protocol from a manual. The therapists using psychodynamic therapy were first year psychiatric residents. Practitioners of psychodynamic therapy know that it takes years and years of training to become an effective therapist. Yet one national managed care company is poised to make cognitive behavioral therapy its standard of care for the treatment of depression. This would be a dangerous precedent.

Evidence based health care reform – borrowing from the concept of evidence based medicine, I have advocated that health care reform be evidence based. Rather than rely on political rhetoric or ideological beliefs, health care policy should be crafted on what is realistic and likely to work. This should be based on research and scientific studies.

Global Payment versus Fee-for-Service – in most parts of the country payment is made on a fee-for-service basis. The patient sees the doctor or undergoes a lab test or surgery. The doctor/lab/hospital submits a claim for the service to the insurance company. Critics argue that the financial incentive to the doctor is to provide more care and tests whether that care is really needed or not.

Several decades ago Health Maintenance Organizations introduced the capitation model of reimbursement. The doctor or HMO is given a finite dollar amount per patient per month to provide all the needed medical care for that patient. At the end of the year if the amount spent on the patient is less than the capitation amount, the doctor makes a profit. However, if the patient's medical expenses exceed the capitation amount, the doctor loses money.

Global payment is a form of capitation. The doctor, or hospital, or health care system is given a set dollar amount for treatment of the patient in a given year. Just as fee-for-service can lead to over treatment, capitation or global payment can lead to under treatment.

Given the possibility of over treatment with fee-for-service versus under treatment with global payment, the patient will probably fare better in a fee-for-service model. Underestimating health care costs with capitation is likely to lead to less treatment and a worse outcome for the patient. On the other hand, the payor fares better in a capitatated model because the payor's at risk expense for the year is known at the outset.

Tort-Reform –there is confusing data about this. Some reformers view tort reform as the Holy Grail to reducing medical costs. One study shows that the cost of malpractice claims is less than 0.4% of all medical costs. Even eliminating all malpractice claims would not significantly alter the cost of health care.

Another study suggests that the cost of practicing defensive medicine contributes to 8% of the total cost of health care. Doctors, fearing a potential malpractice claim down the road, order expensive tests. Some tort reform might help with these concerns.

A third study shows that 95% of patients who do have a valid malpractice claim against their doctor never file a claim. Only 5% of patients with a valid claim file one. The study revealed that the 95% who do not file claims have a good relationship with their doctors. A good relationship with the patient is the best defense against a malpractice claim.

The 5% of patients who filed claims had a poor relationship with the doctor. This suggests that the issue of tort-reform is a red herring in the health care debate. If doctors work to maintain a good working alliance and relationship with the patient, they can significantly reduce their exposure to malpractice claims.

Insurance Fatigue and the Call for a Public Option – the crucible of the current health care debate is whether to include a Public Option in national health care reform. The current health care system is a mixture of public and private insurance: Medicare, Medicaid, CHAMPUS, Tricare, self-insured, and commercial insurance.

Some proponents of health care reform would expand the role of commercial insurance once funding is in place to insure the 47 million uninsured Americans. I will not list the litany of complaints against the commercial insurance industry. Inclusion of a public option is thought by many as the single best way to introduce true competition into the marketplace and to force commercial insurers to be more responsible in fulfilling their contractual obligations to consumers.

Some decades ago the concept of compassion fatigue was introduced into medicine. Compassion fatigue refers to the wear and tear on health care providers and other caretakers over time. The compassion that providers have at the beginning of their careers can erode bit by bit under the stress of years and years of caring for others.

Insurance fatigue refers to the national fatigue that has set in amongst consumers and providers after years and years of struggling with the commercial health insurance industry. More than sixty per cent of consumers favor a public option as an alternative to commercial insurance and three out of every four doctors favor a similar alternative.

Rationing of Health Care and Death Panels – one of the congressional bills provides funds for the doctor to spend time talking with the patient about end of life options. Each of us needs to prepare a living will and a healthcare power of attorney. When we enter the hospital for a medical procedure we are asked whether we want to sign a "Do Not Resuscitate" form in case we experience cardiac arrest or some other medical crisis.

Some critics of health care reform have taken this legislative language out of context to suggest that health care reform will lead to rationing or panels of doctors who will decide whether to offer a patient an end of life procedure. Health care costs in the last six months of life do consume 80% of health care expenses.

Lost in this criticism is the fact the current commercial insurance system already makes extensive use of rationing. This can and sometimes does lead to the death of the patient. Patients are routinely denied access to care by the insurance company under the guise that a procedure is not "medically necessary." A former lieutenant governor of Kansas testified to a committee of the Kansas legislature about his experience with a national insurance company.

The lieutenant governor's wife had stage four cancer. Her only chance for survival was to undergo a stem cell transplant available at a medical center in Nebraska. The insurance company denied the procedure (which costs about 100K) on the basis that the procedure was experimental and therefore excluded from the insurance policy. The insurance company ignored the fact that this procedure is an approved procedure under Medicare.

This former State of Kansas leader described further his treatment by the insurance company. He was told that he would have ten minutes at the appeal review to present his case to the insurance company and that his attorney could not be present.

Anyone who thinks that rationing could be any worse under a public option or public sponsored health care plan has not been listening carefully to the thousands of stories shared by policyholders of commercial insurance.

Unequal Distribution of Income and Wealth in Healthcare – Unless congress passes a remedy in the next several months, Medicare will reduce payment to physicians by 21% as of January 1, 2010. Across the board reductions like this fail to recognize the unequal distribution of income in health care. Primary care physicians, who spend the most time with patients and are the backbone of the health care system, earn 175-225K a year. Specialists such as surgeons, cardiologists, radiologists, etc. earn 400-800K+ a year.

Our health care system pays more to those who perform diagnostic tests and procedures and less to those who provide primary care. Executives in healthcare are rewarded even more handsomely. The CEOs of most hospitals earn 500K plus. One hospital CEO was paid 16 million dollars. Executives of insurance companies, pharmaceutical companies, and medical device companies are paid millions of dollars each year.

By way of contrast, the Secretary of the US Department of Health and Human Services who oversees Medicare and Medicaid was paid a salary of $191,300 in 2008.

The healthcare reform movement has avoided having the difficult conversation about whether it is moral and proper to become wealthy from the pain and suffering of others. It has also ignored the related question (being asked more openly these days of the banking and financial industry) – is there Greed in health care – and if so what can/should be done about it? Should the executive of a national insurance company be allowed to retain 1.6 billion dollars in stock options after he is dismissed from the company while thousands of insureds were denied full access to their health care benefits while he was CEO of the company?

Federal Regulation of the Health Insurance Industry – recent testimony by consumers before several Congressional committees highlighted the obstacles insurance companies place in the way of consumers trying to access their policy benefits. These obstacles include: gate keeping/utilization review; medical necessity; and rescission. A study by the California Nurses Association revealed that three of the largest insurers in California denied 30 per cent or more of all claims in the first six months of 2009.

The FDIC regulates the banking industry, the SEC regulates the stock and bond markets, but no Federal agency regulates the commercial health insurance industry. The Department of Health and Human Services regulates only Medicare and Medicaid. President Obama has proposed increased regulation of the financial markets and increased consumer protection. This regulation and protection should extend to health insurance, as well.

State by State Opt Out or Opt In – one of the compromises being considered by Congress is to offer a public option but to let each state opt in or opt out of the public option. This is a dubious solution to a complex problem. In conservative and Republican states such as Kansas it is unlikely that the Kansas legislature would choose to opt in. In Kansas 198 citizens die each year from the lack of health insurance. The opt out/opt in proposal is likely to do little to reverse this tragedy.

How to Pay for Health Care Reform - the proposals drafted by congress offer different combinations of ways to pay for health care reform. One approach is to take money

from Medicare Advantage. Another approach is to reduce Medicare payments to doctors and hospitals. A third approach is to tax expensive insurance plans or to remove the tax advantage employers receive for offering health insurance. All of these approaches have their pluses and minuses.

Any system to pay for health care reform that robs Peter to pay Paul will probably not work. One critic notes the irony that taking money out of Medicare to pay for health care reforms contradicts the commonly known fact that Medicare will run out of money in 2017.

America may need to look to other countries as to how they finance their healthcare. Although I am not an economist it is as clear to me as clear can be that taking the unneeded and wasted dollars out of a commercial insurance health care system might give us a fighting chance to pay for health care in a deficit neutral way.

This may mean transforming our health care system into a single payor plan – this is the solution embraced by most other countries that provide universal health coverage. This solution has more to do with the economic reality of healthcare than political or ideological preference.

To pay for universal coverage there may need to be an across the board increase in income taxes combined with a national sales tax. We pay a federal tax every time we put a gallon of gas in our cars. I believe that most Americans would be much more willing to pay a tax for guaranteed cradle to grave health care than they are willing to pay for other taxes.

The "Silo" Problem in Healthcare - It is widely known that in some companies different parts of the company do not talk to each other or co-ordinate their efforts on behalf of the goals and objectives of the company. Marketing, finance, and manufacturing may operate independently of each other as though they worked in separate silos.

The Federal government has a similar problem with silos. In healthcare, Medicare, Medicaid, CHAMPVA, Tricare, the VA Health System, the Indian Health System, etc. all operate in separate silos independent of each other. Truly transformational change in American healthcare would bring these separate programs under one roof. The administrative cost savings alone would be significant – enough to provide health care to many uninsured Americans.

The Moral Imperative for Health Care Reform – Len Nichols, Ph.D., a health care economist for The New America Foundation writes and talks about the idea of "gleaning" from the Book of Leviticus in the Old Testament. Gleaning is the idea that when the farmer harvests the wheat from the field, he or she sets aside 10% of the harvest for the widow and orphan.

Nichols suggests that a modern day interpretation of gleaning would apply to health care and health care reform. It may be our moral obligation to set aside 10% of our national wealth to provide health care for all our citizens. I would add that if the only way to attain this objective is to include a public option in health care reform, then this should be done.

The Kansas Health Care Reformer is written by Ira Stamm, Ph.D., and distributed at no cost to interested consumers. Ira welcomes your feedback about the content of each issue. He can be reached at istamm@cox.net. (If you prefer not to receive future issues, please let him know – and he will delete your name from the mailing list.)

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SENATE CHAMBER

DAVID B. HALEY
SENATOR
FOURTH DISTRICT
WYANDOTTE COUNTY

FEBRUARY 9, 2010

IN OPPOSITION TO PASSAGE OF :

Senate Concurrent Resolution 1626 : " Health Care Freedom " Amendment

BEFORE THE JOINT COMMITTEE MEETING of

The SENATE PUBLIC HEALTH & WELFARE and

The HOUSE HEALTH & HUMAN SERVICES COMMITTEES

Senator Barnett and fellow members of the Senate committee; Representative Landwehr and former fellow Members of the House committee...Good Afternoon.

I present this vocal and written testimony to insure that credible opposition is duly noted and recorded to this, and other, Resolutions before the Kansas Legislature this Session (2010).

By now you have heard from vocal proponents as to the opinion that Kansas should attempt to disenfranchise itself from United States Presidential and Congressional mandates; pleas for Kansas' sovereignty and other such far flung notions of revolutionary seditionism.

First let me TOO state that I understand many of their anguish(es). It seems that it was only yesterday that I, David Haley, devoutly desired that a Washington, D.C. mob cease from sending their expensive mandates for unproductive public educational goals or stop depleting Kansas' militia and immediately stop sending our men and our women and our heavy equipment supported by our tax dollars to some foreign soil for an undefined military purpose. I honestly wished we, Kansas, could tell

COMMITTEE ASSIGNMENTS
ASSESSMENT & TAXATION
JUDICIARY REAPPORTIONMENT
PUBLIC HEALTH & WELFARE

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JOINT COMMITTEE ASSIGNMENTS

Senate Public Health and Welfare
Date: 02/09/10
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the U.S.President and U.S. Congress" NO, Washington, we are NOT going to do what you bade us do because it is expensive, ill conceived, immoral...D.C. you are WRONG!"

So today, though I believe that health care access, without breaking a family's bank account, for all Americans, irrespective of social or of economic condition, is a fundamental right that we, as a civilized and as a progressive country...as the greatest country on the face of the planet...should desire for ALL of our fellow citizens, at least I can honestly share with the proponents, who seemingly do NOT share this belief, that I do "feel their pain."

But, my appeal today is to my fellow members of the "Health" related aspect of these two committees. If you have some grief with Washington D.C. mandates to our State and to others, find another way or another place to hash it out and don't let it be as a member of a committee obstensibly formed to PROMOTE a healthier Kansas. The sad irony of voting FOR this SCR is that whether or not you agree with the POLITICS of the anticipated federal health reform bill; whether or not you think it will cost more or less or whether or not you think our congressional delegation is doing a good job or not or whatever...the health reform bill coming out of D.C. in whatever form it comes, when it comes, WILL provide MORE Kansans with access to care and a means to pay for that care. Many, many Kansans will be the beneficiary from every study that I have read. And isn't that the objective of a member of a legislative "Health" committee person?

And so I plead with each reasonable member of this committee to "do no harm" to an effort to make our State healthier. One estimate suggests that Kansas receives approximately *six* times back in federal dollars than we pay, per annum, in federal taxes. For the benefit of so many, this is a sad and incomprehensible way for a "Health" committee to proceed. So, please. Join me in ignoring the politics and the grandstanding and the posturing of some of our colleagues for the greater good of the working men and women of our State who expect us to find compromise and to promote the common good.

Dave Haley (WY-4th)

("Just Say ' No" "...Wait... That federal policy didn't work either.)

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AMERICAN LEGISLATIVE EXCHANGE COUNCIL

ALEC

Prepared Statement

of

Christie Herrera
Director, Health and Human Services Task Force
American Legislative Exchange Council

submitted to the

Kansas State Legislature

February 9, 2010

Introduction

My name is Christie Herrera and I am the director of the Health and Human Services Task Force at the American Legislative Exchange Council, or "ALEC." ALEC is the nation's largest nonpartisan individual membership association of state legislators, with over 1,800 state legislator members from all 50 states and 77 members of Congress. In Kansas, 47 legislators are ALEC members. Since 2005, 22 states have enacted model legislation drafted by ALEC's Health and Human Services Task Force.

ALEC Commends Kansas SCR 1626

ALEC commends the introduction of Kansas Senate Concurrent Resolution 1626, which would preserve in the Kansas Constitution the right of patients to make their own health care choices. Specifically, the amendment would ensure that patients may pay directly for lawful medical services with their own money, and prohibit an individual or employer from being penalized for failing to purchase government-defined insurance. SCR 1626 is modeled after ALEC's own *Freedom of Choice in Health Care Act*, which has been filed or announced in 35 other states.

ALEC applauds SCR 1626 for three key reasons.

SCR 1626 Ensures Continued Access to Health Services

Citizens should have the right to pay directly for health care services with their own money. When government controls the dollars, they make treatment decisions based on what is best for government—and this usually leads to "cost containment" through rationing or waiting lists. Patients and doctors, not bureaucrats, should decide what is best for patients.

SCR 1626 Stops Health Mandates That Don't Work

It is important for people to have health insurance coverage, but a government requirement to purchase health insurance is ineffective, bureaucratic, and costly. In Massachusetts, a state that has imposed an individual and employer mandate since 2006, more than 1/3 of the uninsured still don't have coverage; health insurance costs 40% more than in the rest of the country; it's harder for the newly-insured to see a doctor; and legislators expect a $2-4 billion shortfall over the next decade.

SCR 1626 May Help Shield Kansas from a Federal Individual Mandate

SCR 1626 would render any state attempt to require an individual to purchase health insurance—or to forbid an individual from securing medical care outside of the required health care system—unconstitutional. The legislation may also cause a federalism clash if Congress passes a law with either of these provisions.

We recognize that the Supremacy Clause renders federal law as the law of the land. However, states may provide stronger protection of individual freedoms than the U.S. Constitution allows, and the federal government has limited recourse in violating those protections. In the case of federal-state conflict, courts must balance the competing interests—and recent Supreme Court cases have upheld the power of states to protect individual freedoms.

Misconceptions about SCR 1626

There are a few misconceptions about SCR 1626. Some say this legislation will block all federal health reform, which is not true. SCR 1626 would not attempt to block implementation of any federal law as long as the federal law does not require an individual/employer mandate, or forbid patients from paying directly for medical services. Citizens can still participate in the proposed public option, the national health insurance exchange, and the Medicaid expansion. They just can't be forced into those choices.

Another misconception is that supporting SCR 1626 will exacerbate the "free rider" problem in which people choose to not purchase health insurance and then demand free care in the emergency room (ER).

The problem is that free riders will continue to show up in the ER with or without an individual mandate. The Massachusetts data reveal that at best, an individual mandate didn't affect ER visits at all—and at worst, an individual mandate actually increased ER usage by 17%. And even if an individual mandate solved the "free rider" problem, we would still be paying for the newly-insured with subsidies to purchase the required insurance. Under both the House and Senate proposals, a low-income family of four would qualify for a $20,000 subsidy in the national health insurance exchange.

The Massachusetts example shows that an individual mandate alone will not decrease ER usage. One Massachusetts survey reported that although the newly-insured had "insurance coverage" on paper, 90% of them did not have access to care from a non-ER provider. Other reports indicate that average wait times to get appointments with doctors in Boston ranged from 21 days for cardiologists to 70 days for obstetrician-gynecologists. And the Massachusetts Medical Society reports that the average wait to see a primary care doctor is 36 days.

Lawmakers cannot artificially create a growing demand for care without other policies to encourage healthcare supply. And those reforms can be achieved without a bureaucratic, ineffective, and costly requirement to purchase health coverage.

Conclusion

With health reform talks accelerating at the state and federal levels, ALEC applauds SCR 1626 because it ensures that the cornerstone of any reform is the preservation and protection of patients' rights. We look forward to working with Kansas in the weeks ahead to develop this proposal. I would be pleased to answer any questions you might have at 202-742-8505 or christie@alec.org.

Legislative Testimony

February 9, 2010

Written Testimony before the Senate Health and Welfare Committee and the House Health and Human Services Committee
SCR 1626

Jeff Glendening, Vice President of Political Affairs
The Kansas Chamber

Thank you Chairman Barnett, Chairwoman Landwehr and members of the committee for the opportunity to voice the Kansas Chamber's support of SCR 1626 known as the Kansas Health Care Freedom Amendment.

Kansas currently ranks 32nd for business climate according to the non-partisan Tax Foundation and health care remains a top concern for the business community. Kansas business leaders in the Chamber's most recent annual CEO Poll responded that an important way to improve the profitability of their business is to manage their health care costs. Reducing the government-driven cost of doing business, such as addressing taxes, health care, workers' comp, unemployment compensation, burdensome regulation and tort reform was the number one growth strategy for our state according to the respondents.

When the business leaders were asked if they support the health care plan proposed by President Obama, an overwhelming 70% voiced their opposition with 64% being strongly opposed.

The free market and the right of individuals and businesses to make their own health care coverage decisions must be preserved. SCR 1626 allows Kansans the opportunity to dictate the direction of their health care.

Thank you again for the opportunity to convey the Kansas Chamber's support for SCR 1626.

THE KANSAS CHAMBER

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Senate Public Health and Welfare
Date: 02/09/10
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AMERICANS FOR PROSPERITY
KANSAS

Testimony in Support of SCR 1626
Senate Public Health and Welfare and House Health and Human Services
February 9, 2010

Mister Chair, Madam Chair, and Members of the Committees,

I am proudly before you today, representing the nearly 40,000 members of Americans For Prosperity-Kansas.

AFP supports passage of Senate Concurrent Resolution 1626 as it preserves the freedom of Kansans to make health care insurance decisions without being subjected to government mandates on individuals.

Over the last several months, Americans For Prosperity (AFP) has conducted grassroots meetings and bus tours throughout the country inviting feedback from hundreds of thousands of Americans on the topic of health care reform. This AFP sponsored Patients First initiative, resulted in the crafting of a petition entitled, *Hands Off My Health Care!*

The petition reads as follows;

> *I urge you to oppose any legislation that imposes greater government control over my health care that would mean fewer choices for me and my family and even deny treatments to those in need. Congress must not let government get between my family and my doctor.* ***Please protect patient freedom*** *and expand our health care options with real reforms – focused on patients, not on politics.*

More than 300,000 Americans, including more than 1,000 in Kansas, have signed the petition to date. This overwhelming number is indicative of the mindset of the majority of Americans. Rasmussen Reports released a poll on January 22nd showing that 58 percent of respondents opposed the plans before Congress and 61 percent want Congress to drop the issue altogether this year.

Contrary to what some opponents to the Health Care Freedom Amendment are saying, SCR 1626 would not deny any Kansan from being compelled to participate in a given plan. Instead, the legislation is designed to secure the fundamental right of Kansans to make their own health care decisions.

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Regardless of the individual liberty argument, individual mandates that the Health Care Freedom Amendment is designed to reject have proven to be non-effective anyway. More than 200,000 residents of Massachusetts are still uninsured an in fact, many of the uninsured have been exempted due to the exorbitant cost associated with the Massachusetts plan, costs that have increased by 42 percent since the individual mandate was enacted.

The Health Care Freedom Amendment is based on model legislation from the American Legislative Exchange Council (ALEC) and has already passed the Arizona legislature, where the measure will be on the general election ballot in November.

According to the ALEC website, the notion of "free" universal health care is hardly free at all. In addition to the failings of the Massachusetts plan, ALEC research points out that the state of Wisconsin proposed a single-payer health care plan that would have required all residents to enroll in a state administered plan. The plan ultimately failed due to estimates that indicated the new plan would represent 40 percent of the state budget and would result in a tax increase of more than $15 billion. Whether in Wisconsin, Massachusetts, or Kansas, taxpayers can't afford this kind of "free" health care coverage.

Most importantly, passage of SCR 1626 would go a long ways towards ensuring that Kansas citizens are safeguarded against the stripping of their individual freedoms.

Thank you for your consideration on this important matter.

Derrick Sontag
State Director

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Senate Public Health & Welfare Committee
February 9, 2010

SCR 1626 - Preserving health care and health insurance choices.

Chairman Barnett, vice chair Schmidt and members of the Senate Public Health & Welfare Committee, thank you for the opportunity to comment on SCR 1626 on behalf of our members. I am Leslie Kaufman, Executive Director of the Kansas Cooperative Council.

The Kansas Cooperative Council (KCC) represents all forms of cooperative businesses across the state -- agricultural, utility, credit, financial and consumer cooperatives. Approximately half of our members are farmers' cooperatives. Many of these farm supply cooperatives are members of the Agri-Business Benefit Group, Inc. (ABBGI).

ABBGI was formed by 9 participating cooperatives in 1983 to meet the health insurance needs of Kansas farmers' co-op employees and their families. ABBGI is a 501(c)(9) employee benefit trust.

Today, ABBGI provides a choice of three competitively priced medical plans. These plans include local and mail order prescription drug coverage, an HSA compliant medical plan and an optional dental plan. Seventy-nine Kansas farmers' cooperatives participate in the plan, now, with over 2100 employees taking part in the program. ABBGI affiliates with Blue Cross Blue Shield of Kansas and their network of providers.

For more than a quarter-century, the co-op family has been meeting the challenges to provide affordable, reliable health care options to cooperative employees through ABBGI. We saw a need many years ago and rose to meet that need. As our nation debates unprecedented changes to our national health care system, how ABBGI could be impacted under new proposals is of concern to our participating members. Thus, protecting individual and employer choices relative to health care programs is of critical interest to our members. As such, the Kansas Cooperative Council appreciates what we see as the intent of SCR 1626

We appreciate the opportunity to share our comments on SCR 1626. If you have any questions regarding our testimony or position on this bill, please feel free to contact me at 785-220-4068. Thank you.

Leslie Kaufman, Executive Director
Kansas Cooperative Council

Senate Public Health and Welfare
Date: 02/09/10
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