

THE POLITICAL ADVANTAGE OF MEDICARE ADVANTAGE

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Federal entitlement programs are in the crosshairs. The Congressional Budget Office has projected that the Tax Cuts and Jobs Act,¹ passed into law in December 2017, “increases the total projected deficit over the 2018–2028 period by about \$1.9 trillion.”² Following passage of the law, House Speaker Paul Ryan (R., Wisconsin) made it clear Republicans believed cuts needed to be made in Medicare and Medicaid, saying “that’s really where the problem lies, fiscally speaking.”³

Conservative business leaders have expressed similar thoughts, with Jamie Dimon, chair of JPMorgan Chase – a major beneficiary of tax cuts – stating, “The real problem with our deficit is the uncontrolled growth of our entitlement programs.”⁴

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1. Pub. L. No. 115-97, 131 Stat. 2054 (2017).

2. CONG. BUDGET OFFICE, THE BUDGET AND ECON. OUTLOOK: 2018 TO 2028 (2018).

3. Nathaniel Weixel, *Ryan Eyes Push for ‘Entitlement Reform’ in 2018*, THE HILL (Dec. 6, 2017), <http://thehill.com/homenews/house/363642-ryan-pledges-entitlement-reform-in-2018>. Ryan has retired, citing the failure to achieve entitlement reform as his biggest regret. See Alex Moe & Rebecca Shabad, *Paul Ryan, Bidding Congress Goodbye, Says Nation’s Problems Are ‘Solvable If Our Politics Will Allow It’*, NBC (Dec. 19, 2018), <https://www.nbcnews.com/politics/congress/paul-ryan-bidding-congress-goodbye-says-nation-s-problems-are-n950001>. However, his party can be expected to continue to pursue such cuts.

4. Michael Hiltzik, *Conservatives and Business Leaders Worried About the Deficit Take Aim at Social Security and Medicare*, L.A. TIMES (Apr. 9, 2018), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-deficits-entitlements-20180409-story.html>. For 2018, the major Wall Street banks saw their tax rate lowered by one-third of what they paid in 2016. See Jim Tankersley, *Banks Are Big Winners From Tax Cut*, N.Y. TIMES (Jan. 6, 2018), <https://www.nytimes.com/2018/01/16/us/politics/banks-are-big-winners-from-tax-cut.html>. Such demagoguery from Dimon and others ignores the fact that, with an aging society, we are barely sustaining our existing long-term care system due to inadequate Medicaid funding.

In June 2018, House Republicans unveiled a plan calling for \$537 billion in Medicare cuts, with cuts to Medicaid as well.⁵ All told, “Changes to Medicaid and other health programs would account for \$1.5 trillion in savings.”⁶ Prior efforts by the Republican Congress to repeal the Affordable Care Act (ACA)⁷ would have also significantly cut the social safety net that predates the ACA.⁸ In large part due to the tax cuts enacted by President Trump, Medicare’s trust fund is projected to run out of money by 2026.⁹

Almost 60 million Americans rely upon Medicare.¹⁰ With over 6 million Medicare beneficiaries, California has the most residents on Medicare – Florida (4.35 million) is in second place.¹¹

But not *all* of Medicare is necessarily at risk. As one writer noted in *Forbes*, “Ryan’s staff includes former executives at the health insurance lobby, America’s Health Insurance Plans who will bring the industry closer to any legislative discussions about the future role of Medicare Advantage in entitlement talks.”¹²

Indeed, there is one potential cost-savings target that is sacrosanct to both political parties – Medicare Advantage. How did this costly private insurance option become untouchable? A history of how we got here is helpful. It is a story that proves bipartisanship isn’t dead.

The Massachusetts’ health care reform enacted under then-Republican Gov. Mitt Romney is commonly looked at as the antecedent of the ACA (or “Obamacare”), with its private insurance model.¹³

5. Erica Werner, *House GOP Plan Would Cut Medicare, Medicaid to Balance Budget*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/business/wp/2018/06/19/house-gop-plan-would-cut-medicare-social-security-to-balance-budget/?utm_term=.7198df47eb64.

6. *Id.*

7. Pub. L. No. 111-148, 124 Stat. 119 (2010).

8. See, e.g., Brendan Williams, *Sen. Cassidy Plans to Bring Down Medicaid*, THE HILL (Sept. 18, 2017), <http://thehill.com/opinion/healthcare/351177-sen-cassidy-plans-to-bring-down-medicaid>.

9. See Robert Pear, *Medicare’s Trust Fund Is Set to Run Out in 8 Years*, *Social Security*, 16., N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/us/politics/medicare-social-security-finances.html>.

10. See *Medicare Enrollment Dashboard*, CTR. FOR MEDICARE & MEDICAID SERVS. (Aug. 2018), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Dashboard/Medicare-Enrollment/Enrollment%20Dashboard.html>.

11. See *id.*

12. Bruce Japsen, *If Congress Cuts Entitlements in 2018, Medicare Advantage Enrollment Will Soar*, FORBES (Dec. 28, 2017), <https://www.forbes.com/sites/brucejapsen/2017/12/28/if-gop-cuts-entitlements-in-2018-medicare-advantage-enrollment-soars/>.

13. See Ryan Lizza, *Romney’s Dilemma*, NEW YORKER (June 6, 2011), <https://www.newyorker.com/magazine/2011/06/06/romneys-dilemma>.

When Romney signed health care reform in 2006, he did so in a place that stands out in Revolutionary history: Boston's Faneuil Hall. He was led in by a fife-and-drum corps with enormous signs by the stage stating "Making History in Health Care."¹⁴

Later that day, Romney touted what he called "a Republican way of reforming the market. Because, let me tell you, having thirty million people in this country without health insurance and having those people show up when they get sick, and expect someone else to pay, that's a Democratic approach."¹⁵

Bitterness persisted in Republican circles. During the 2012 Republican presidential nomination process, former House Speaker Newt Gingrich stated of Romney: "As governor, when he signed RomneyCare, who did he say was his No. 1 collaborator? Ted Kennedy."¹⁶

In September 2013, the ACA-opposing *Wall Street Journal* editorialized it didn't "need any lectures about principle from the Heritage Foundation that promoted RomneyCare and the individual mandate that is part of ObamaCare. Or from cable TV pundits who sold Republicans on Mitt Romney despite RomneyCare."¹⁷

Yet, in fact, the truest antecedent of the ACA may have been a program signed into law under President Clinton when Gingrich was speaker. At a time when Clinton was famously "triangulating"¹⁸ with the advice of Republican adviser Dick Morris,¹⁹ the Balanced Budget Act of 1997²⁰ created what were called Medicare + Choice or Part C plans offered through private insurers, with the initial objective that payments would be less than fee-for-service Medicare.²¹ Clinton set the nation's largest single-payer health care system on the road toward privatization, lauding, in his signing statement,

14. *Id.*

15. *Id.*

16. MJ Lee, *Newt: Mitt Will Take 1/3 of Delegates*, POLITICO (Mar. 13, 2012), <https://www.politico.com/story/2012/03/newt-mitt-will-take-1-3-of-delegates-073926>.

17. Editorial, *The Cruz Campaign Against ObamaCare*, WALL ST. J. (Sept. 23, 2013), <https://www.wsj.com/articles/the-cruz-campaign-against-obamacare-1379978812>.

18. See Garry Wills, *The Clinton Principle*, N. Y. TIMES (Jan. 19, 1997), <https://www.nytimes.com/1997/01/19/magazine/the-clinton-principle.html>.

19. See, e.g., Alison Mitchell, *Stung by Defeats in '94, Clinton Regrouped and Co-opted G.O.P. Strategies*, N.Y. TIMES (Nov. 7, 1996), <https://www.nytimes.com/1996/11/07/us/stung-by-defeats-in-94-clinton-regrouped-and-co-opted-gop-strategies.html>.

20. Pub. L. No. 105-33, 111 Stat. 251 (1997).

21. See, e.g., Sandi Christensen, *Memorandum to Interested Parties Regarding Medicare+Choice Provisions in the Balanced Budget Act of 1997* (Nov. 12, 1997), https://www.cbo.gov/sites/default/files/105th-congress-1997-1998/reports/1997_11_12_choice.pdf.

“structural reforms that will give Medicare beneficiaries more informed choices among competing health plans.”²²

Originally this was a gambit to attract more providers to Medicare, particularly in under-served rural areas. But Clinton’s work would become supersized under President George W. Bush, morphing into Medicare Advantage plans under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.²³ The new floor for such payments was “100% of fee-for-service (FFS) payments made for persons enrolled in traditional Medicare.”²⁴

In a 2008 study, the Commonwealth Fund estimated Medicare Advantage plans offered through insurance company intermediaries were 12 percent more expensive than care paid for directly by the federal government by traditional fee-for-service (FFS) Medicare, for an average extra payment \$986 a year higher.²⁵ It noted that “overpayment of private plans presents a threat to Medicare’s efficiency—contravening the original reason for including a private plan option in Medicare.”²⁶ Instead, “[t]hese extra payments, which represent a drain on the federal budget, could otherwise be used to reduce the nation’s deficit or to offset the costs of Medicare policy improvements.”²⁷

In his 2009 health care speech to a joint session of Congress, speaking on behalf of what would eventually become his signature accomplishment, President Obama stated that “[t]he only thing this plan would eliminate is the hundreds of billions of dollars in waste and fraud, as well as unwarranted subsidies in Medicare that go to insurance companies – subsidies that do everything to pad their profits and nothing to improve your care.”²⁸ At last, there would be an effort to reign in Medicare Advantage.

The issue was discussed early in the development of the ACA before the Senate Finance Committee. Ron Pollack, the executive director of Families USA, testified on May 5, 2009 before the Finance Committee about the perverse incentives of Medicare Advantage:

22. William J. Clinton, *President, Statement on Signing the Balanced Budget Act of 1997* (Aug. 5, 1997), <http://www.presidency.ucsb.edu/ws/index.php?pid=54506>.

23. Pub. L. No 108-173, 117 Stat. 2066 (2003).

24. Cong. Research Serv., *Overview of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003* (2004).

25. Brian Biles et al., *The Continuing Cost of Privatization: Extra Payments to Medicare Advantage Plans Jump to \$11.4 Billion in 2009*, COMMONWEALTH FUND (May 24, 2009), <https://www.commonwealthfund.org/publications/issue-briefs/2009/may/continuing-cost-privatization-extra-payments-medicare-advantage>.

26. *Id.*

27. *Id.*

28. *Obama’s Health Care Speech to Congress*, N.Y. TIMES (Sept. 9, 2009), <https://www.nytimes.com/2009/09/10/us/politics/10obama.text.html>.

We keep on talking about a level playing field, but we have seen something exactly the opposite with respect to the Medicare program. We do not have a level playing field. As we have learned from MedPAC, the payments to the private plans in Medicare Advantage are considerably larger than it would be for somebody who stayed in traditional Medicare.²⁹

A “Medi-Scare” effort aimed at seniors began immediately, some of it facilitated by the government’s own vendor Humana in mailings to Medicare Advantage enrollees.³⁰ The U.S. Centers for Medicare and Medicaid Services ordered Humana to desist such communications, given that they could be understood by beneficiaries as “official communications about the Medicare Advantage program.”³¹ An angry Sen. Mitch McConnell (R., Kentucky) took to the Senate floor to denounce what he called a “gag order,”³² and the Obama Administration backed down.³³ Kentucky-based Humana and its founder, David Jones Sr., are major campaign benefactors for McConnell, and millions in donations from Humana and Jones have gone toward the McConnell Center at the University of Louisville.³⁴

According to a fiscal analysis provided to House Speaker John Boehner (R., Ohio) in July 2013, the reduction in Medicare Advantage rates would save the federal budget \$156 billion from 2013 through 2022.³⁵ In evaluating the ACA just prior to its being signed in to law, the Congressional Budget Office estimated “enrollment in Medicare Advantage plans in 2019 would be 4.8 million lower than we project under current law.”³⁶

29. *Roundtable Discussions on Comprehensive Health Care Reform Before the Subcomm. on Fin.*, 11th Cong. 101 (May 5, 2009), <https://www.finance.senate.gov/imo/media/doc/489523.pdf>.

30. See Dawn Teo, *HHS Investigates Medicare Providers’ Massive Misinformation Campaign*, HUFFINGTON POST (Nov. 21, 2009), https://www.huffingtonpost.com/dawn-teo/hhs-investigates-medicare_b_293891.html.

31. *Id.*

32. *McConnell Blasts Government Over ‘Gag Order’ on Private Health Care Provider*, FOX NEWS (Sept. 23, 2009), <https://www.foxnews.com/politics/mcconnell-blasts-government-over-gag-order-on-private-health-care-provider>.

33. Robert Pear, *Medicare Officials to Let Insurers Warn Recipients About Pending Health Bills*, N.Y. TIMES (Oct. 16, 2009), <https://www.nytimes.com/2009/10/17/health/policy/17health.html>.

34. Manu Raju & John Bresnahan, *McConnell’s Ties to Humana Founder*, POLITICO (Sept. 10, 2013), <https://www.politico.com/story/2013/09/mitch-mcconnell-humana-founder-096509>.

35. Douglas W. Elmendorf, Letter to John Boehner (July 24, 2012), https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/costestimate/43471-hr6079_0.pdf.

36. CONG. BUDGET OFFICE, COMPARISON OF PROJECTED ENROLLMENT IN MEDICARE ADVANTAGE PLANS AND SUBSIDIES FOR EXTRA BENEFITS NOT COVERED BY MEDICARE UNDER CURRENT LAW AND UNDER RECONCILIATION LEGISLATION COMBINED WITH H.R. 3590 AS PASSED BY THE SENATE (2010), <https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/macomparisons.pdf>.

Contrary to Republican hysteria, that was hardly tantamount to the elimination of this option for seniors. Traditional fee-for-service Medicare, the promise made in 1965, would always be available as the alternative. In any event, obituaries for Medicare Advantage proved premature.

In the first 2012 debate between Obama and his challenger Mitt Romney, in which the president was famously listless,³⁷ Obama fended off charges that the ACA cut Medicare.³⁸ Romney stated that “the idea of cutting \$716 billion from Medicare to be able to balance the additional cost of ‘Obamacare’ is, in my opinion, a mistake.”³⁹ Obama characterized it as \$716 billion “we were able to save from the Medicare program by no longer overpaying insurance companies, by making sure that we weren’t overpaying providers.”⁴⁰

Romney kept on the attack, asserting “we have 4 million people on Medicare Advantage that will lose Medicare Advantage because of those \$716 billion in cuts. I can’t understand how you can cut Medicare \$716 billion for current recipients of Medicare.”⁴¹

Obama sought to change the subject, and deflect the attack, by assailing Romney for wanting to offer a private voucher alternative to compete with Medicare, which would allow insurers to target “the younger and healthier seniors . . . leaving the older, sicker seniors in Medicare.”⁴²

Later, Obama asserted that, were the ACA repealed, “the primary beneficiary of that repeal are insurance companies that are estimated to gain billions of dollars back when they aren’t making seniors any healthier.”⁴³

The point the president was seeking to make was that Medicare Advantage plans make vast sums of money. In fact, relative to Romney’s voucher proposal, he did make that point: “Medicare has lower administrative cost than private insurance does, which is why seniors are generally pretty happy with it. And private insurers have to make a profit. Nothing wrong with that; that’s what they do.”⁴⁴

37. See, e.g., Maeve Reston, *When Romney Trounced Obama*, CNN (Sept. 26, 2016), <https://www.cnn.com/2016/09/25/politics/obama-debate-election-2012/index.html>.

38. See *Transcript of the First Presidential Debate*, N.Y. TIMES (Oct. 3, 2012).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* Ironically, even House Republicans would bank on these savings in their budget, while assailing Democrats for “cutting” Medicare Advantage. See, e.g., John Tomasic, *Gardner Fact Check: He and Udall Voted for Same Medicare ‘Cuts’*, COLORADO INDEP. (Apr. 17, 2014), <https://www.coloradoindependent.com/147062/gardner-fact-check-he-and-udall-voted-for-same-medicare-cuts>.

43. *First Presidential Debate*, *supra* note 38.

44. *Id.*

The president was palpably suffering cognitive dissonance. It was hard for him to defend savings from Medicare Advantage, advancing the argument that private insurers were price-gouging, when he had turned over the lives of so many Americans under age 65 to private insurers.⁴⁵

In fact, a major supporter of the ACA, the American Association of Retired Persons, is basically a giant insurance broker – offering its own Medicare Advantage plan through UnitedHealth Group.⁴⁶ According to a class action lawsuit filed in May 2018 in U.S. District Court in Connecticut, “[f]or the year ending December 31, 2016, AARP, Inc. reported that it earned \$598,500,640 in ‘royalty’ income from UnitedHealthcare Insurance Company across all insurance products, up from \$561,894,830 in 2015.”⁴⁷

Obama won re-election. Yet he won a battle only to concede the war. On April 1, 2013 – April Fool’s Day – it was learned that the Obama Administration blinked in following through on its plan to squeeze Medicare Advantage for savings. As *POLITICO* described it, “The insurance industry chalked up one of its greatest political victories in recent memory . . . as the Obama administration reversed course on a proposal to cut Medicare Advantage rates.”⁴⁸

Instead of a 2.3 percent cut the Administration planned a 3.3 percent increase.⁴⁹ The difference meant billions of dollars. Insurer stocks soared on the news. As the *Washington Post* reported: “Monday afternoon was a really great time to be a health insurance plan.”⁵⁰ The Securities and Exchange Commission (SEC) would subpoena a K Street lobbyist for Humana, whose stock jumped 9.2 percent that day, over the leak of this hot

45. *Id.*

46. *See* Class Action Complaint, *Dane v. UnitedHealthcare Ins. Co.*, No. 3:18-cv-00792 (D.Conn. May 9, 2018).

47. *Id.* A conservative critic argues that AARP makes money by denying seniors with preexisting conditions “Medigap” coverage – stating “the next time a liberal Democrat wants to get on his or her high horse and attack conservative policy on pre-existing conditions, ask why they support AARP making \$4.5 billion in profits by denying care for individuals with disabilities.” Christopher Jacobs, *How AARP Made Billions Denying Care to People with Pre-Existing Conditions*, *FEDERALIST* (Oct. 11, 2018), <http://thefederalist.com/2018/10/11/aarp-made-billions-denying-care-people-pre-existing-conditions/>. Effectively this income source makes AARP, a self-styled advocacy group for seniors, mute on all consumer protection issues involving Medicare Advantage, which are not inconsiderable in number.

48. Jennifer Haberkorn & Brett Norman, *CMS Reverses Course on Cuts*, *POLITICO* (Apr. 3, 2013), <https://www.politico.com/story/2013/04/insurance-medicare-advantage-cuts-health-care-089569>.

49. *See id.*

50. Sarah Kliff, *How Insurers Flipped a Medicare Pay Cut into a Pay Raise*, *WASH. POST* (Apr. 2, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/04/02/how-insurers-flipped-a-medicare-pay-cut-into-a-pay-raise/?utm_term=.26190f46422b.

political intelligence just 18 minutes before the end of the trading day.⁵¹ The formal announcement by the federal government occurred post-trading.⁵² The lobbyist, Mark Hayes, had worked for the Senate Finance Committee's Republicans, under Sen. Charles Grassley (R., Iowa), as their health policy director and chief health counsel.⁵³

One poignant explanation for this gift to insurers surfaced in a chronology of the leak reported by the *New York Times*: "Mark Hayes sends an email to an analyst at Height Securities, indicating a deal has been hatched to increase Medicare Advantage rates in order to smooth the confirmation of Marilyn Tavenner as the new head of Medicare."⁵⁴ Yet, despite their enthusiasm for investigating the Obama Administration, House Republicans refused to comply with a SEC subpoena for a staff member accused of having leaked the rate information to Hayes.⁵⁵

A bipartisan coalition of more than 100 members of Congress had joined insurance industry lobbying on the issue.⁵⁶ In an editorial on this lobbying – "The Liberal Medicare Advantage Revolt" – published prior to the Administration's decision to reverse course, the *Wall Street Journal* had written, "[a] big political story this year is likely to be Democrats turning on their White House minders as the harmful and unpopular parts of the Affordable Care Act ramp up."⁵⁷

Chortling, the editorial concluded, "we thought it would be a cold day in The Villages of central Florida before Democrats came out for a private version of Medicare. Paul Ryan, call the White House."⁵⁸

Following the capitulation, another *Journal* editorial exulted over "the spectacle of Democrats beseeching HHS not to nuke a program they voted to

51. Tom Hamburger & Dina ElBoghdady, *SEC Subpoenas 'Political Intelligence' Firms in a Case of Leaked Information*, WASH. POST (May 1, 2013), https://www.washingtonpost.com/business/economy/sec-issues-subpoenas-to-political-intelligence-firms-connected-to-leaked-information/2013/05/01/43121794-b290-11e2-bbf2-a6f9e9d79e19_story.html?utm_term=.b4a034e5e625.

52. *Id.*

53. *See id.*

54. Julie Creswell, *Tip on Medicare Spurs Insider Trading Investigation*, N.Y. TIMES (Nov. 14, 2014), <https://www.nytimes.com/2014/11/15/business/tip-on-medicare-spurs-insider-trading-investigation.html>.

55. *Id.*

56. Sandhya Somashekhar, *U.S. to Boost Rather Than Cut Payments to Health Insurers*, WASH. POST (Apr. 1, 2013), https://www.washingtonpost.com/national/health-science/us-to-boost-rather-than-cut-payments-to-health-insurers/2013/04/01/7423c3a0-9b16-11e2-9a79-eb5280c81c63_story.html?utm_term=.8e4530e14551.

57. *The Liberal Medicare Advantage Revolt*, WALL ST. J. (Mar. 29, 2013), <https://www.wsj.com/articles/SB10001424127887323501004578388980625858300>.

58. *Id.*

nuke as part of ObamaCare.”⁵⁹ Wryly, the editorial observed that “[t]he political options under ObamaCare usually come down to change for the worse or change for the much worse, so be thankful for small mercies.”⁶⁰

The year 2014 was supposed to ease the way into larger Medicare Advantage cuts. Based on the Administration’s retreat, reacting to a panicked Congress, it seemed clear there would not be the political will to accomplish this.

Indeed, the cycle repeated itself in April 2014. As a *USA Today* editorial opened, “[h]ere we go again. Insurance companies and members of Congress are trying to scare seniors”⁶¹ The editorial noted that “[f]orcing Medicare Advantage plans to live with little or no subsidy over government Medicare is entirely fair, but you wouldn’t know it from the howling by Congress, where 273 members of the House and Senate from both parties have signed letters demanding that upcoming cuts for 2015 be suspended.”⁶²

An October 2014 *New York Times* article highlighted significant deficiencies uncovered in Medicare Advantage plans, including failures in half of all audited cases to adequately or correctly explain denials of service to beneficiaries or providers.⁶³ In 61 percent of audited cases insurers improperly denied prescription drug claims.⁶⁴ Although the federal government imposed fines, they were laughably-low (“more than \$500,000” for Aetna’s “widespread and systemic” mismanagement of drug claims) and no deterrent – any insurer could easily absorb them as the cost of doing business.⁶⁵ Small wonder “[f]ederal officials expressed frustration that they were seeing the same kinds of deficiencies year after year.”⁶⁶ None of the members of Congress who had run to the defense of Medicare Advantage rates were quoted criticizing these insurers’ practices.⁶⁷

But this is the same as it ever was. A May 2013 *Washington Post* story reported that Medicare Part D prescribing practices were going unregulated

59. *Comparative Dis-Advantage*, WALL ST. J. (Apr. 2, 2013), <https://www.wsj.com/articles/SB10001424127887323296504578397201792485508>.

60. *Id.*

61. *Trim Medicare Advantage subsidies: Our View*, USA TODAY (Apr. 2, 2014), <https://www.usatoday.com/story/opinion/2014/04/02/medicare-advantage-obamacare-cuts-editorials-debates/7222695/>.

62. *Id.*

63. Robert Pear, *U.S. Finds Many Failures in Medicare Health Plans*, N.Y. TIMES (Oct. 12, 2014), <https://www.nytimes.com/2014/10/13/us/us-finds-many-failures-in-medicare-health-plans.html>.

64. *Id.*

65. *Id.*

66. *Id.*

67. *See id.*

because “officials at the Centers for Medicare and Medicaid Services say the job of monitoring prescribing falls to the private health plans that administer the program, not the government.”⁶⁸ The *Post* noted that “Congress, under heavy lobbying by the drug industry, opted for a payment pipeline for drugs, not another layer of bureaucracy.”⁶⁹ The federal government simply paid private insurers a fixed amount per enrollee and then lets insurers run the program.⁷⁰

In 2015, Marilyn Tavenner, President Obama’s head of the U.S. Centers for Medicare and Medicaid Services (CMS) – whose tenure had been quite obliging to the insurance industry – left the federal government to run the health insurance industry’s lobbying group.⁷¹ As the *New York Times* reported then, “Asked about her priorities, Ms. Tavenner said she wanted to protect Medicare Advantage, the program under which private insurers manage care for more than 30 percent of the 55 million beneficiaries of Medicare.”⁷²

In March 2017, the U.S. government joined a California whistleblower’s lawsuit against the Medicare Advantage plan offered by insurance giant UnitedHealth Group (and AARP), accusing it of fraudulently gaming risk scores to make patients look sicker.⁷³

Yet the Trump Administration was accused of skewing its 2019 draft of the publication “Medicare and You,” to be mailed to 43 million households, in order to denigrate fee-for-service Medicare and elevate Medicare Advantage.⁷⁴ As one columnist noted:

The most troubling criticism concerns a description of prior authorization requirements - the annoying procedure found in many health insurance plans that forces enrollees to run meaningless paperwork gauntlets before an insurer agrees to cover a specific procedure or service.

68. Tracey Weber et al., *Dangers Found in Lack of Safety Oversight for Medicare Drug Benefit*, WASH. POST (May 11, 2013), https://www.washingtonpost.com/national/health-science/dangers-found-in-lack-of-safety-oversight-for-medicare-drug-benefit/2013/05/11/067a10ae-b8ec-11e2-aa9e-a02b765ff0ea_story.html?utm_term=.6fe483598e97.

69. *Id.*

70. *See id.*

71. Robert Pear, *Head of Obama’s Health Care Rollout to Lobby for Insurers*, N.Y. TIMES (July 15, 2015), <https://www.nytimes.com/2015/07/16/us/ex-medicare-chief-marilyn-tavenner-top-lobbyist.html>.

72. *Id.*

73. Fred Schulte, *Justice Department Joins Second Lawsuit Against UnitedHealth*, NPR (Mar. 28, 2017), <https://www.npr.org/sections/health-shots/2017/03/28/521691406/justice-department-joins-second-lawsuit-against-unitedhealth>.

74. Mark Miller, *Ideology Threatens to Trump Facts in Official Medicare Handbook*, REUTERS (May 24, 2018), <https://www.reuters.com/article/us-column-miller-medicare/ideology-threatens-to-trump-facts-in-official-medicare-handbook-idUSKCN1IP2Z9>.

The handbook actually describes the restriction as a *benefit*, rather than a mandatory hurdle for Advantage plan members that is not required in original Medicare.⁷⁵

This far removed from the cost-control promises of the ACA, Medicare Advantage looks like a runaway train. Indeed, in its last rate-setting, for 2017, the Obama Administration flew the white flag, proposing a 1.35% baseline rate increase, resulting in a 3.55% revenue increase overall.⁷⁶ Letters from 369 members of Congress were credited with averting what was to be, under the ACA, the final year of baseline rate cuts for Medicare Advantage.⁷⁷

And things have only gotten more politically advantageous for Medicare Advantage. As a *Forbes* article noted, “CMS’s Communications Plan for 2018 Open Enrollment encouraged placing ‘a renewed emphasis on Medicare Advantage.’ CMS Administrator Seema Verma has shown her strong support for the program by issuing a 3.4% rate increase in reimbursement payments to Medicare Advantage for 2019, *nearly double the rate initially proposed*.”⁷⁸ Verma, a former health insurance consultant accused of blending public and private roles,⁷⁹ has gone so far as to make her preference for Medicare Advantage clear on Twitter – posting on May 9, 2018: “As you know, Medicare Advantage is playing an ever-increasing and

75. *Id.* (emphasis added). Trump has had a fraught relationship with health insurers. He has decried Democrats’ “pet insurance companies[.]” Carolyn Y. Johnson, *Trump Scrapped a Key Obamacare Payment. Here’s What Comes Next.*, WASH. POST (Oct. 13, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/10/13/how-trumps-big-health-care-decision-could-play-out/?utm_term=.f5cb2f0306db. He has also claimed, “I’m never going to get campaign contributions, I guarantee you that, from the insurance companies” – although he received \$853,814 in insurance company contributions in 2016. Jonathan D. Salant, *Trump Claims Democrats Got Most Insurance Donations. He’s Wrong.*, N.J. COM (Oct. 17, 2017), https://www.nj.com/politics/index.ssf/2017/10/biggest_recipients_of_insurance_dollars_are_not_wh.html.

76. Bob Herman, *CMS Proposes 1.35% Medicare Advantage Rate Hike for 2017*, MODERN HEALTHCARE (Feb. 19, 2016), <http://www.modernhealthcare.com/article/20160220/MAGAZINE/302209976>.

77. *Id.*

78. Bob Blancato & Meredith Ponder Whitmore, *The Good News For Medicare Beneficiaries*, FORBES (Apr. 17, 2018) (emphasis added), <https://www.forbes.com/sites/nextavenue/2018/04/17/the-good-news-for-medicare-beneficiaries/#752b98706ca1>.

79. *See, e.g.*, Tony Cook, *Seema Verma, Powerful State Health-care Consultant, Serves Two Bosses*, INDY STAR (Aug. 25, 2014), <https://www.indystar.com/story/news/politics/2014/08/25/powerful-state-healthcare-consultant-serves-two-bosses/14468683/>; Robert King, *HHS Sued Over Seema Verma Conflict of Interest Concerns*, WASH. EXAMINER (Mar. 9, 2018), <https://www.washingtonexaminer.com/hhs-sued-over-seema-verma-conflict-of-interest-concerns>.

important role in delivering high-quality and cost-effective care to Medicare beneficiaries. #StrengtheningMedicare.”⁸⁰

In August 2018, Verma announced that Medicare Advantage plans – but not traditional Medicare – would be able to negotiate drug prices with pharmaceutical companies.⁸¹ Patient advocates are concerned, however, because the new policy requires “step therapy,” whereby a patient is forced to try a “preferred,” cheaper drug before a more expensive (and possibly more efficacious) one, regardless of a physician’s dispense-as-written prescription.⁸² As one article related: “‘Going through cancer treatment is hard enough,’ said Chris Hansen, president of the American Cancer Society Cancer Action Network. ‘Cancer patients should not be forced to ‘fail first’ on a drug that is known not to work for them before they are allowed to take the recommended treatment.’”⁸³

Certainly, Medicare Advantage lobbying is more powerful than ever. In a February 2018 press release, Allyson Schwartz, president and CEO of the Better Medicare Alliance, was able to crow about the “bipartisan endorsement of Medicare Advantage” by 363 members of Congress.⁸⁴ A failed candidate for governor of Pennsylvania in 2014, Schwartz is a former Democratic congresswoman.⁸⁵ During her gubernatorial campaign she ran

80. See Seema Verma (@SeemaCMS), TWITTER (May 9, 2018, 11:17 AM), <https://twitter.com/SeemaCMS/status/994280333938917376>.

81. See Press Release, Centers for Medicare & Medicaid Services, CMS Empowers Patients with More Choices and Takes Action to Lower Drug Prices (Aug. 7, 2018), <https://www.cms.gov/newsroom/press-releases/cms-empowers-patients-more-choices-and-takes-action-lower-drug-prices>. This is hardly giving patients “more choices.” Instead, it would allow MA insurers to require that “patients receive the most *preferred* drug therapy first and progress to other therapies only if necessary, as part of broader part of care coordination activities. Ensuring that patients receive the most *preferred* drug therapy first is known as ‘step therapy.’” *Id.* (emphasis added). In this context, “preferred” can be read as a euphemism for “cheapest.”

82. See, e.g., Jessie Hellman, *Patient Groups Rattled by New Medicare Power to Negotiate Lower Drug Prices*, THE HILL (Aug. 9, 2018), <https://thehill.com/policy/healthcare/401002-patient-groups-rattled-by-new-medicare-power-to-negotiate-lower-drug-prices>.

83. *Id.*

84. Press Release, Better Medicare Alliance, Medicare Advantage Earns High Bipartisan Congressional Support (Feb. 2, 2018), <https://www.prnewswire.com/news-releases/medicare-advantage-earns-high-bipartisan-congressional-support-300592949.html>. Those signing include Senate Minority Leader Chuck Schumer (D., New York), as well as rumored potential Democratic presidential candidates in Sen. Kirsten Gillibrand (D., New York) and Sen. Amy Klobuchar (D., Minnesota). See BETTER MEDICARE ALLIANCE, <https://bettermedicarealliance.org/congress> (last updated Aug. 7, 2018). From the state of Washington, the following Democrats signed: U.S. Sen. Maria Cantwell and U.S. representatives Suzan DelBene, Denny Heck, Derek Kilmer, and Adam Smith. See *id.*

85. Colby Itkowitz, *Rep. Allyson Schwartz’s Washington Résumé Doesn’t Excite Voters in Pa. Governor’s Race*, WASH. POST (May 19, 2014), https://www.washingtonpost.com/politics/rep-allyson-schwartzs-washington-resume-doesnt-excite-voters-in-pa-governors-race/2014/05/19/6c83a556-de7d-11e3-9743-bb9b59cde7b9_story.html?utm_term=.773e515b06de.

on the ACA, despite being disparaged as an “Obamacare frenemy” by progressives who noted how she sought to water down the ACA.⁸⁶

Upon Schwartz’s 2015 hiring, Wendell Potter, a former insurance executive turned industry critic,⁸⁷ wrote for The Center for Public Integrity that “[t]he health insurance industry took advantage of Washington’s infamous revolving door last week when it named former Rep. Allyson Schwartz of Pennsylvania, perceived by many to be a liberal Democrat, as the face of its latest K Street-operated front group.”⁸⁸

Since President Trump’s election, Schwartz has written that “[p]olicymakers agree that fee-for-service, the prevailing financing model in health care that rewards quantity of services provided, has resulted in a costly, fragmented health system that is really not a system at all.”⁸⁹

Schwartz provides a Democratic imprimatur for Trump Administration policy decisions like the step therapy requirement for Medicare Advantage, which she celebrated in a press release:

While we evaluate the details, we expect this policy change to offer additional tools for Medicare Advantage prescription drug (MA-PD) plans to manage drugs to get the most clinically effective and affordable options to beneficiaries.

We anticipate the prospect of encouraging patients to participate in medication adherence programs that will promote better health education and improved health outcomes.⁹⁰

Contrast Schwartz’s sunny take to that of Rachel Sachs in *Health Affairs*:

86. Jon Geeting, #PAGov: *Obamacare Frenemy Allyson Schwartz Running on Obamacare Now*, KEYSTONE POL. (Apr. 22, 2014), <http://www.keystonepolitics.com/2014/04/pagov-obamacare-frenemy-allyson-schwartz-running-obamacare-now/>.

87. See Kate Pickert, *The Making of a Health-Care Whistle-Blower*, TIME (Sept. 8, 2009), <http://content.time.com/time/politics/article/0,8599,1920893,00.html>.

88. Wendell Potter, *Former Rep. Allyson Schwartz’s New Group, The Better Medicare Alliance, is Not What it Appears*, CTR. FOR PUBLIC INTEGRITY (Apr. 27, 2015), <https://www.publicintegrity.org/2015/04/27/17240/former-rep-allyson-schwartzs-new-group-better-medicare-alliance-not-what-it-appears>. As a 2018 *POLITICO* article noted, “Now the experts who constructed Obamacare are making way for, or refashioning themselves as, experts in dismantling Obamacare.” Joanne Kenen, *The One Big Winner of the Obamacare Wars*, *POLITICO* (July 7, 2018), <https://www.politico.com/agenda/story/2018/07/07/affordable-care-act-health-consulting-000680>.

89. Allyson Y. Schwartz, *In Medicare Fixes for ACA — Keep the Good Stuff*, THE HILL (Nov. 17, 2016), <https://thehill.com/blogs/pundits-blog/healthcare/306656-in-medicare-fixes-for-aca-keep-the-good-stuff>.

90. Press Release, Better Medicare Alliance, *Better Medicare Alliance Praises CMS Move to Lower Medicare Drug Prices* (Aug. 7, 2018), <https://bettermedicarealliance.org/newsroom/press-releases/better-medicare-alliance-praises-cms-move-lower-medicare-drug-prices>.

Requiring patients to “fail first” on a less expensive therapy before obtaining the one their doctor prefers may be harmful for their care, and at the very least it increases the administrative hurdles for both patients and providers. Relatedly, there are ethical concerns about the step therapy protocol’s intrusion into the doctor-patient relationship.⁹¹

Indeed, were Medicare Advantage plans state-regulated – like everyday health insurance – means might exist of safeguarding the patients’ rights. For example, even the law in conservative Mississippi provides that “[w]hen medications for the treatment of any medical condition are restricted for use by an insurer by a step therapy or fail-first protocol, the prescribing practitioner shall have access to a clear and convenient process to expeditiously request an override of that restriction from the insurer.”⁹² Sachs also questions “the legality of the proposal” as it bypasses the protection that exists for fee-for-service Medicare.⁹³

Indeed, there are serious questions about what Schwartz and other Medicare Advantage cheerleaders are selling.

By 2017, Medicare Advantage (MA) plans enrolled 32% of all Medicare beneficiaries, according to a government report to Congress.⁹⁴ Sophisticated insurers tend to “upcode” beneficiaries, resulting, in 2016, in 8% higher risk scores for MA beneficiaries than FFS.⁹⁵ As the report noted, “MA plans have had a financial incentive, since the current risk adjustment model was introduced, to ensure that their providers record all possible diagnoses because higher enrollee risk scores result in higher payments to the plan.”⁹⁶

As a consequence, payments to MA plans can be as high as 106% of what fee-for-service would charge.⁹⁷ The report notes, “By contrast, traditional FFS Medicare has lower administrative costs while offering beneficiaries an unconstrained choice of health care providers.”⁹⁸ Clever

91. Rachel Sachs, *Drug Pricing Policy: HHS Introduces Step Therapy In Medicare Advantage*, HEALTH AFFAIRS (Aug. 14, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180813.864351/full/>.

92. MISS. CODE ANN. § 83-9-36 (2018).

93. See Sachs, *supra* note 91.

94. MEDICARE PAYMENT ADVISORY COMM’N, REPORT TO THE CONGRESS: MEDICARE PAYMENT POLICY 353 (2018), http://www.medpac.gov/docs/default-source/reports/mar18_medpac_entirereport_sec.pdf?sfvrsn=0.

95. *Id.* at 355.

96. *Id.*

97. *Id.* at 364.

98. *Id.* at 357. For “efficiency and innovation” the report recommends that “MA plans need to face some degree of financial pressure and effective monitoring regulation, as the Commission recommends for providers in the traditional FFS program. One method of achieving financial neutrality is to link private plans’ payments more closely to FFS Medicare costs within the same market.” *Id.*

insurers also game the availability of “quality bonuses” by consolidating lower-rated plans under higher-rated ones.⁹⁹ For example, “UnitedHealth Group received bonus payments for 380,000 enrollees in plans that would not otherwise have been eligible for bonus payments. The contracts that included the 380,000 enrollees were consumed by a contract with 20,000 enrollees.”¹⁰⁰ All told, insurers “have used the consolidation process to move about 20 percent of MA enrollees from contracts in nonbonus [sic] status to bonus status.”¹⁰¹

The Trump Administration is moving to allow Medicare Advantage to offer benefits, like personal care services, that traditional Medicare does not. As a July 2018 *New York Times* article noted, “When Medicare’s open enrollment period begins on Oct. 15, the private insurers that underwrite Advantage plans — which already lure seniors with things traditional Medicare can’t cover, like eyeglasses, hearing aids and gym memberships — will be free to add a long list of new benefits.”¹⁰² Some worry this further skews the market away from FFS: “‘We have concerns about where all this is heading,’ said David Lipschutz, senior policy lawyer for the Center for Medicare Advocacy. ‘The scales really are being tipped in favor of Medicare Advantage, with unknown consequences.’”¹⁰³ In a *New York Times* letter, Joe Baker, president of the Medicare Rights center, wrote, “Limiting these enhanced benefits to only those enrolled in Medicare Advantage plans leaves the overwhelming majority of older adults and people with disabilities out in the cold and may create new headaches.”¹⁰⁴ He argued that “[b]enefits should never be limited to Medicare Advantage plans but should be offered to all people with Medicare equally.”¹⁰⁵

A 2017 study found “MA plans have raised copayments disproportionately more for services needed by high-need beneficiaries than for other services, thereby inducing unprofitable beneficiaries to voluntarily disenroll from their MA plans, mainly due to increased out-of-pocket costs.

99. *See id.* at 380.

100. *Id.* at 381.

101. *Id.* at 384.

102. Paula Span, *Medicare Advantage Is About to Change. Here’s What You Should Know*, N.Y. TIMES (July 20, 2018).

103. *Id.* According to another account, “Lipschutz worries that the government has no way of overseeing the plan providers. ‘We don’t have the confidence that these guidelines will be implemented in the correct way or that regulators will be able to monitor them.’” Ana Veciana-Surez, *Medicare Advantage Plans are Very Popular. But Read the Fine Print Carefully.*, MIAMI HERALD (Oct. 18, 2018), <https://www.miamiherald.com/latest-news/article218583055.html>.

104. Joe Baker, *Medicare Advantage Perks*, N.Y. TIMES (Jul. 29, 2018), <https://www.nytimes.com/2018/07/29/opinion/letters/medicare.html>.

105. *Id.*

This allows MA plans to avoid the risk of enrolling unprofitable beneficiaries.”¹⁰⁶ In effect, to maximize profit, insurers are dumping what would be risk to them back onto the taxpayers.¹⁰⁷ And, as is not uncommon where insurers are involved, arbitrary claim denials bedevil consumers. As one columnist noted regarding federal findings:

The report found “widespread and persistent problems related to denials of care and payment in Medicare Advantage” plans, which usually are managed-care HMO or PPO plans. The Advantage payment model reimburses plans a pre-set amount per patient, and this may be incentivizing plans “to deny preauthorization of services for beneficiaries, and payments to providers, in order to increase profits,” concludes the report, which was conducted by the Office of Inspector General (OIG) at the U.S. Department of Health and Human Services.¹⁰⁸

Research at the University of California “found there is no evidence that MA enrollees have actually gotten any sicker relative to FFS beneficiaries” but suggested Medicare Advantage overpayments could be as much as \$200 billion.¹⁰⁹

Another 2017 study, based upon comprehensive 2010 data, discovered that Medicare Advantage insurer revenues were 30 percent higher than their healthcare spending, which was 25 percent lower for Medicare Advantage enrollees than for enrollees in FFS in the same county with the same risk score.¹¹⁰ In other words, in 2010 “our estimates from MA data indicate that their revenue exceeds their healthcare expenditures by \$177 (about 30%) per enrollee-month.”¹¹¹

106. Sungchul Park et al., *Service-Level Selection: Strategic Risk Selection in Medicare Advantage in Response to Risk Adjustment* 30-31 (Nat'l Bureau of Econ. Research, Working Paper No. 24038, 2017).

107. If risk pools are being skewed in this way, this raises serious questions about claims that MA beneficiaries have better outcomes than those on FFS.

108. Mark Miller, *U.S. Probe Shines Light on Medicare Advantage Claims Denials*, REUTERS (Oct. 18, 2018), <https://www.reuters.com/article/column-miller-medicare/column-us-probe-shines-light-on-medicare-advantage-claims-denials-idUSL2N1WX1MJ>.

109. Press Release, Michelle Brubaker, UC San Diego Health, Study: Medicare Could Overpay Medicare Advantage Plans by \$200 Billion Over Ten Years (Feb. 6, 2017), <https://health.ucsd.edu/news/releases/Pages/2017-02-06-medicare-could-overpay-medicare-advantage-by-200-billion.aspx>; see Richard Kronick, *Projected Coding Intensity in Medicare Advantage Could Increase Medicare Spending By \$200 Billion Over Ten Years*, HEALTH AFFAIRS (Feb. 2017), <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2016.0768>.

110. Vilsa Curto et al., *Healthcare Spending and Utilization in Public and Private Medicare* 24-25 (Nat'l Bureau of Econ. Research, Working Paper No. 23090, 2017).

111. *Id.* at 25.

As Austin Frakt, a health economist, asked in a *New York Times* column, “Why does the government pay Medicare Advantage plans so much more than it costs them to cover care?”¹¹²

In order to maintain the solvency of the Medicare program, and its 53-year-old promise to those 65-and-older, Frakt’s question is one members of Congress should be asking, instead of blaming the federal deficit upon the safety net for our most vulnerable citizens, or signing letters lauding insurers.¹¹³

112. Austin Frakt, *Medicare Advantage Spends Less on Care, So Why Is It Costing So Much?*, N.Y. TIMES (Aug. 7, 2017), <https://www.nytimes.com/2017/08/07/upshot/medicare-advantage-spends-less-on-care-so-why-is-it-costing-so-much.html>. More than just Medicare beneficiaries are at risk. The ACA has created incentives for insurers to also enter the Medicaid managed care market, with serious questions about benefits and costs that have largely gone unanswered. See, e.g., Brendan Williams, *Leap of Faith: Managed Care and the Privatization of Long-Term Care Services*, 30 LOY. L. REV. 438, 438 (2018). Since the completion of that law review article, the *Dallas Morning News* has run a multi-part investigation entitled “Pain & Profit” exploring many of the problems plaguing Medicaid managed care in Texas. See J. David McSwane & Andrew Chavez, *When a Giant Health Care Company Wanted to Save Money, A Foster Baby Paid the Price*, DALL. NEWS (June 3, 2018), <https://interactives.dallasnews.com/2018/pain-and-profit/part1.html>.

113. The same two parties that prop up MA rates also managed to come together in the Bipartisan Budget Act of 2018, and inflict severe Medicare cuts upon home health and nursing home care, where roughly 90% of all caregivers are women without the lobbying power of insurance companies. See Brendan Williams, *Stop Cheering the Budget Deal. It’s a Blow to Long-term Care and the Safety Net.*, USA TODAY (Feb. 15, 2018), <https://www.usatoday.com/story/opinion/2018/02/15/stop-cheering-budget-deal-its-ruinous-long-term-care-well-need-brendan-williams-column/337760002/>. In 2016, the average nursing home only had an average total margin of .7%, according to a federal report. See Medicare Payment Advisory Comm’n, *supra* note 93, at 205.