

Should Virginia Create a Health Insurance Exchange?

**Remarks by
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Good morning, members of the Virginia Joint Commission on Health Care. I am very pleased to be with you today. My name is Michael F. Cannon. I am the director of health policy studies at the Cato Institute, a libertarian think tank in Washington, D.C.. The mission of the Cato Institute is to promote the principles of individual liberty, limited government, free markets, and peace. I am also a 30-year resident of the Commonwealth of Virginia and a product of Virginia public schools, from elementary through graduate school.

Background

The most important health policy issue facing the Commonwealth is the fate of the health care law that President Barack Obama signed last year. That law is already increasing the cost of health insurance by as much as 30 percent in some cases, and will cause even greater premium increases in the years to come.

When that law takes full effect in 2014, it will set in motion several important changes. States are already struggling to pay for their current Medicaid programs. Starting in 2014, this law will add to those burdens with enormous unfunded mandates. The law's so-called "individual mandate" will compel nearly all Americans to purchase a nominally private but government-designed health insurance policy. Those who fail to comply will face penalties including fines and/or imprisonment. Finally, the law's health insurance "Exchanges" are scheduled to become operational in 2014. These new government bureaucracies would enforce the law's regulations that will drive up health insurance premiums, and would distribute hundreds of billions of taxpayer dollars to private health insurance companies, thereby driving up the national debt.

The Health Care Law's Future Is in Doubt

Supporters introduced the first draft of President Obama's health care law in Congress in June 2009. A bipartisan majority or plurality of the American people have consistently opposed it ever since. A mere [38 percent](#) of the public supports the law. Opposition is highest among likely voters. Officials representing 28 states and both political parties have filed suit to overturn the law. One of the two major political parties has committed itself to wholesale repeal.

A bipartisan majority of the General Assembly enacted legislation to block the enforcement of any such law in Virginia. The Commonwealth is suing the federal government (so far successfully) to have the individual mandate declared unconstitutional, and has further asked the courts to strike down the entire act. In a similar case filed by 26 states and many private plaintiffs, a federal judge has struck down the entire law. These and other constitutional challenges are currently before federal appellate courts. Legal experts predict the U.S. Supreme Court will ultimately rule on the law's constitutionality sometime in the summer of 2012.

Should Virginia Create a Health Insurance Exchange?

Against this backdrop, the most immediate question facing state officials is whether to create a health insurance Exchange. In the remainder of my remarks, I will explain why, whether one opposes or supports this law, the responsible course is not to create an Exchange.

I am continually surprised by how many people around the country mistakenly believe the new law requires states to create an Exchange. To be clear: *Virginia is under no obligation to create a health insurance Exchange*. The authors of the health care law knew full well that such a requirement would be unconstitutional. Instead, the law *asks* states to do the heavy lifting of creating these bureaucracies, offers them considerable sums of money, and as a fallback position allows the federal government to create an Exchange if a state declines to do so.

For state officials who have taken the position that the federal health care law is unconstitutional, this should be an easy decision. Virginia officials, like state officials nationwide, take an oath to protect not just their own state's Constitution, but also the Constitution of the United States. They are therefore oath-bound to use all legal means to block a law that they believe violates the U.S. Constitution. The same duty, then, that obliges them to sue to overturn the health care law also obliges them not to implement it. To implement this health care law, such as by creating an Exchange, would be to violate their oath of office.

Regardless of whether one supports or opposes this law, however, the simplest and most powerful reason not to create an Exchange is this: there is no money. Neither the Commonwealth nor the federal government has money to waste on new government agencies that might be repealed or overturned tomorrow. Every dollar that Virginia spends on an Exchange is a dollar it cannot spend on roads, education, or police. The Exchange planning grant that Virginia has already received, and any federal additional funds the Commonwealth may receive, are adding to the nation's debt burden and bringing the United States closer to a Greek-style debt crisis. The fiscally responsible option, which many states have exercised, is to send that money back to Washington and to refuse any additional funds.

Exchange advocates counter that Virginia must act now to ensure local control of Virginia's health insurance market. This argument has even persuaded some who oppose the law that they should create an Exchange as a way of hedging their bets in the event the law remains on the books. Yet this strategy rests on two faulty assumptions.

The first is that creating an Exchange will give Virginia officials more control over Virginia's health insurance market. A recent Obama administration [missive](#) explains that the

new law “authorizes [the federal government] to ensure that States with Exchanges are substantially enforcing the Federal standards...and to set up Exchanges in States that elect not to do so *or are not substantially enforcing related provisions.*” (Emphasis added.) In other words, the promise of local control is a mirage. The law allows the federal government to commandeer any Exchange that falls short of full compliance with federal dictates. Creating its own Exchange will not allow Virginia to control its own health insurance markets. In the end, there is no such thing as a state-run Exchange.

The second faulty assumption is that creating an Exchange will not affect whether the law remains on the books. For several reasons, creating an Exchange would entrench the law and make it less likely to be repealed or overturned.

- First, creating an Exchange lends the appearance of legitimacy to the law. The Obama administration heralds the creation of each new Exchange as proof that the law is gaining acceptance, and loudly interprets states accepting the federal grants available under the law in the same manner.
- Second, creating an Exchange undermines the credibility of state officials who are seeking to overturn the law. When these officials declare the law unconstitutional yet implement it and accept the funding it offers, the media are correct to diagnose hypocrisy. Such duplicity is already undermining the lawsuits seeking to overturn the law. In his most recent ruling, federal judge Roger Vinson wrote that the fact that some of the plaintiff states are implementing the law undercut their own argument that he should halt all implementation.
- Third, to create an Exchange is to create a taxpayer-funded lobbying group dedicated to fighting repeal. An Exchange’s employees would owe their power and their paychecks to this law. Naturally, they would join the fight to protect it.
- Fourth, Congress and the courts are less likely to eliminate actual government bureaucracies that have assembled dedicated constituencies than they are to eliminate theoretical ones. The more disruptive repeal would be, the less likely it becomes.
- Fifth, if these bureaucracies begin handing out billions of taxpayer dollars in 2014, the private insurance companies who receive those subsidies will plow much of the money back into fighting repeal.

The Obama administration is offering financial inducements to states to create Exchanges because the administration knows that every new Exchange helps them shield the law from Congress, the courts, and the American people. For opponents of the law, creating an Exchange is less a hedging-your-bets strategy than a sabotaging-your bets strategy.

Some opponents of the law, most notably the conservative Heritage Foundation, recommend that states create “market-friendly” (i.e., non-compliant) Exchanges that offer an “[alternative vision to ObamaCare.](#)” They will ultimately find this strategy self-defeating. As Thomas Jefferson [explained](#) more than 200 years ago: “The natural progress of things is for

liberty to yield, and government to gain ground.” Former Massachusetts Gov. Mitt Romney (R) proposed a “market-friendly” health insurance Exchange in 2006. By the time it returned to his desk, it had become the very market-unfriendly plan on which Congress modeled President Obama’s health care law. The “market-friendly” Exchange that former Utah Gov. Jim Huntsman (R) created in 2008 has also become increasingly less market-friendly. When Utah politicians saw that health insurance was [more](#) expensive inside their Exchange than on the open market, they imposed a series of taxes on consumers outside of the Exchange to prop up the health plans inside it. In the process, Utah unwittingly put in place the infrastructure for a federal Exchange: if Utah’s Exchange fails to comply with the health care law in 2014, the federal government will commandeer it or brush it aside.

There is simply no reason for Virginia to create any kind of Exchange. A top Utah Exchange official says, “[Nearly every Exchange function already exists in the private sector.](#)” Heritage Foundation scholars want an Exchange because they see it as a vehicle for enabling workers to purchase their own health plan using tax-free dollars from their employers. A Minneapolis company called [Bloom Health](#) is already giving workers that freedom, without any new government bureaucracies or regulations.

Finally, I encourage the Commission to be mindful of conflicts of interest surrounding the issue of health insurance Exchanges. The interests of those asking the legislature to create an Exchange may not line up with the interests of consumers. For instance, private health insurance companies are lobbying state legislatures nationwide to create health insurance Exchanges. This activism may be related to the fact that Exchanges are necessary for them to tap hundreds of billions of dollars of taxpayer subsidies. Similarly, insurance regulators and state health care officials across the country have urged their governors and legislatures to create an Exchange, which may stem from a fear that a federally administered Exchange would render them obsolete. Unfortunately, a state-run Exchange cannot save these state officials from obsolescence. Only repealing or overturning the health care law can do that.

Conclusion

Creating an Exchange does not make the best of a bad situation. It *makes* the bad situation.

The most responsible course for Virginia is to refuse to create an Exchange. Many governors, including Florida’s Rick Scott (R) and Louisiana’s Bobby Jindal (R) have already done so. Next, Virginia should send back to Washington whatever funds it has received under this law, as Oklahoma, Wisconsin, Florida, and other states have done. Virginia should send that money back with a message that if Congress is looking to cut federal spending, it should start with laws that federal courts have declared unconstitutional. At a minimum, Virginia should defer the question of creating an Exchange until the courts dispose of the constitutional challenges brought against this law. Legal scholars expect the U.S. Supreme Court to rule on this law in the summer of 2012. If the Court upholds the law, Virginia would have time to submit an Exchange plan to Washington by the 2013 deadline. If the Court voids the law, Virginia will be glad she waited.

In the meantime, there are other steps Virginia can take to make health insurance and medical care more affordable to consumers.

First, the General Assembly can permit Virginia employers and consumers to purchase health insurance licensed by other states. Wyoming, Maine, and Georgia have already given their residents this freedom. Enabling Virginians to purchase health insurance across state lines would expand choice and competition, and would reduce premiums by letting consumers avoid unwanted regulatory costs. As important, granting Virginians this freedom would not require any new government spending or the creation of any new government bureaucracies. Such legislation has been introduced in the General Assembly in the past, though it has been opposed by domestic insurers who prefer what they call a “level playing field” – i.e., where government blocks competition and Virginians have fewer choices.

Second, the General Assembly can make basic medical care more affordable for the poor by broadening the scopes of practice of mid-level clinicians such as nurse practitioners and physician assistants. One promising approach, similar to letting Virginians purchase health insurance across state lines, is to let clinicians licensed by other states practice in Virginia under the terms of their license but subject to Virginia’s malpractice laws. Reforms such as these would spur the growth of retail clinics and other innovations that bring quality medical care within reach for more low-income Virginians.

Third, the General Assembly can reduce unnecessary medical malpractice costs by giving patients and doctors the freedom to choose reforms such as caps on non-economic damages. In contrast to mandatory caps on damages, this approach would make medical malpractice reform available to those who need it most, but still allow others to enjoy broader malpractice protections.

Again, I am very pleased to be with you today, and I look forward to any questions you may have.

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