United States Senate

WASHINGTON, DC 20510

September 24, 2009

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

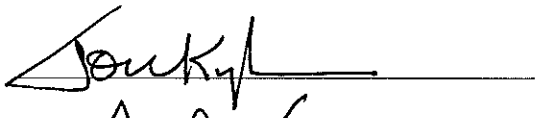
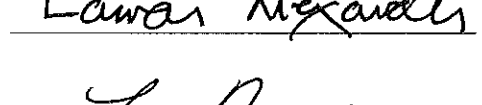
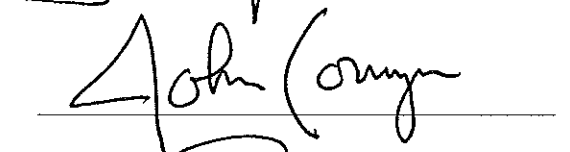
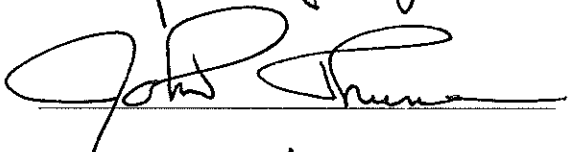
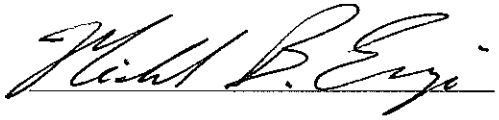
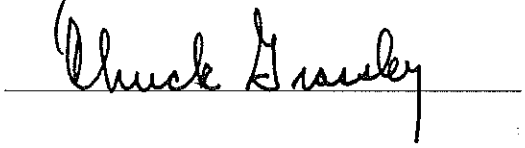
Dear Secretary Sebelius:

America's 11 million seniors enrolled in the Medicare Advantage program deserve to be informed of any potential actions that could be taken by the federal government that could have broad implications on the Medicare program. Medicare Advantage Plans and Prescription Drug Plans that provide services through the Medicare program have a constitutional right to provide information about these Medicare programs to their customers. Therefore, we hope you understand our grave concern with the recent Centers for Medicare and Medicaid Services directive barring all such providers from any and all communications of this kind with America's seniors. This gag order must be immediately lifted.

As the Supreme Court has repeatedly recognized, our constitutional tradition is one of "a profound commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Health plans, of course, have the right to speak on matters of public concern, a fundamental principle that your department, until recently, recognized and respected. Specifically, the Department of Health and Human Services (HHS) had previously noted that there was no legal authority to justify prohibiting a health plan "from informing its members of proposed legislation and exhorting them to express their opinions" about it. In fact, HHS had previously determined that shutting down communication of this sort "would violate basic freedom of speech and other constitutional rights of the Medicare beneficiary as a citizen."

Now, the Obama administration has reversed this longstanding HHS decision – in the midst of a critical debate about the future of health care services in our country – to shut down communication between private companies and America's seniors on an issue that has a direct impact on their health care. Your department has done this by imposing an industry-wide gag order without apparent justification or basis in law, contradicting your past public guidance and the plain language and spirit of the First Amendment, among the most sacred tenets of our democracy.

America's seniors and the health plans that serve them deserve to have their free speech rights respected. Their rights should not be subject to the whims of any administration, and the health plans that serve them should not be threatened with punishment if they speak out on a matter of public concern simply because the administration disagrees with their position.

Until your department rescinds its gag order and allows seniors to receive information about matters before Congress, we will not consent to time agreements on the confirmation of any nominees to your department or associated agencies.

Thank you for your consideration of this matter of such great importance to America's seniors.