Our Objective

We seek to decouple Social Security from Medicare so that you make the choice whether to use private or public insurance for your health needs. Our goal is to restore the freedom to choose your insurance without penalty.

Taxpayers would save money with fewer Medicare enrollees, yet the Federal Government opposes our lawsuit. The Federal Government refuses to allow Brian Hall and his fellow plaintiffs to disenroll from Medicare, Part A, unless they surrender their Social Security benefits and *repay* all the benefits received to date!

We are fighting for freedom through litigation while Senator Jim DeMint and Representative Sam Johnson have sponsored *legislation* that, if passed, would achieve the same freedom we seek.

Your support of The Fund for Personal Liberty in the form of donations helps us fight for freedom in the Court of Law. Your support in the form of editorials and letters to the editor helps us promote freedom in the Court of Public Opinion.

Your contributions are tax deductible. The Fund for Personal Liberty is a nonprofit, non-partisan 501(c)(3). Your donation will be used, "To take all legitimate action to further the defense of the rights of individuals who are suffering from legal injustice as a result of denials and restrictions of their fundamental rights to obtain the health care of their choice and to assist such individuals in protecting rights guaranteed to them under the Constitution and laws of the United States.

Medicare Lawsuit
The Fund for Personal Liberty
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Medicare Lawsuit

Your Body.
Your Health.
Your Choice.

The **Medicare Lawsuit** seeks to restore the freedom of retirees to choose between private and public health insurance by decoupling Medicare from Social Security. In addition to freedom, this has the added benefit of helping reduce federal spending on Medicare.

Background

The *statutes* enacted by Congress and signed into law by the President show no intent to punish people who wish to opt-out of Medicare, Part A, by forcing them to repay all of their previously received Social Security and Medicare benefits and forcing them to forgo Social Security in the future.

However, in 1993, employees of Health and Human Services modified the Procedure Operations Manual (*POMS*) to explicitly force Social Security enrollees to enroll in Medicare, Part A.

On October 8, 2008, *plaintiffs* Hall, Randall and Rogers, with the help of *attorney* Kent Masterson Brown filed the original *complaint* in the US District Court of Washington, DC. After an exciting flurry of *nation-wide media* two more plaintiffs, Kraus and Armey, joined the lawsuit.

John Kraus's documentation of a multi-year attempt to opt-out of Medicare combined with Brian Hall's upcoming birthday warranted filing a revised complaint. Brian Hall requested a restraining order to prevent the government from forcing him into Medicare as a condition of receiving Social Security benefits.

Current Situation – Rulings

US District Court Judge Collyer ruled against the request for a restraining order and the government argued that the case should be dismissed for lack of standing because plaintiffs had not exhausted administrative remedy. On September 29, 2008, Judge Collyer gave three plaintiffs standing. Additionally, she found that *exhaustion of administrative remedy* would be futile.

The government, with "infinite" resources, continued to delay the final ruling by filing a "Motion to Reconsider, or in the Alternative, for Discovery Pursuant to Rule 56(f)." The Motion to Reconsider the Motion to Dismiss was a blatant delay tactic designed to exhaust the plaintiffs and encourage them to discontinue the lawsuit. However, the Motion for Discovery only added to the plaintiffs' resolve.

The government argued that if only the plaintiffs were *questioned and educated*, they would understand that their misgivings for enrolling in Medicare were unfounded and based on lack of understanding.

Final Ruling in US District Court

On **November 17, 2010**, **Judge Collyer** held a hearing to clarify several points in preparation for the Motions for Summary Judgment. Based on the *hearing transcript*, it seemed Collyer seriously questioned the government's line of argument regarding the mandatory nature of participating in Medicare.

In a stunning apparent reversal, March 16, 2011, Judge Collyer's *final ruling* found in favor of the government and ruled that an "entitlement could be a requirement".

Denying Social Security benefits to Americans who have paid payroll taxes their entire life because they wish to avoid a government insurance program creates a *de facto* individual mandate to participate in Medicare. It also denies the freedom of contract and choice to all but the wealthiest retirees.

Next Step – US Appeals Court

Win or lose, it was inevitable that the lawsuit would proceed to the US Appeals Court. It was only a matter of which party would file the appeal.

Oral Arguments are scheduled for **October 13, 2011**, before a three-judge US Appeals Court panel in Washington, DC. The case will be argued and considered *de novo* meaning "from the beginning," "afresh," or "anew." Each side will have 30 minutes to argue their case for a total of one hour before the judges. The hearings are open to the public and it is our hope that those who are interested will attend.

www.TheFundForPersonalLiberty.org

Reference Material

Main Website:
http://www.thefundforpersonalliberty.org
Timeline:
http://thefundforpersonalliberty.org/about/medicare-lawsuit/medicare-lawsuit-timeline-with-documents/ The timeline links to the legal briefs and depositions filed by plaintiffs and the government.

Title of Lawsuit: *Hall v. Sebelius* Action No. 1:08-cv-01715-RMC

The Statutes

http://thefundforpersonalliberty.org/2010/05/medicare-lawsuit-quick-reference/
Citations of the statutes and POMs are included in the quick reference. Links to all of the statutes cited in the legal briefs are to the Cornell Law site.

Both the Social Security and Medicare Acts state that the app-lication for Social Security benefits and Medicare are voluntary and that applications for each program are not dependent upon the other.

TITLE II – FEDERAL OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE BENEFITS
Social Security Act, 42 USC §§ 401 *et seq*.,
specifically, but not limited to, 42 USC §§ 402 and 426,
and the Medicare Act, 42 USC §§ 1395 *et seq*.,
specifically, but not limited to, 42 USC §§ 1395, 1395a, 1395b, 1395i-2 and 1395o

The POMS

The Social Security and Medicare Acts created a safety net for retirees over the age of 65. Under those enactments enrollment was, and always has been, voluntary. In 1993, unelected bureaucrats created policies that made Social Security benefits contingent upon enrollment in Medicare, Part A – thus making enrollment in Medicare, Part A, mandatory.

The Procedure Operations Manual, or POMS, was modified through bureaucratic process and without required "notice" and "comment" rule-making requirements, a violation of the federal Administrative Procedure Act. The policies are enforced as though they are law.

HI 00801.002 Waiver of HI Entitlement by Monthly Beneficiary
A. INTRODUCTION
Some individuals entitled to monthly benefits have asked to waive their HI entitlement because of religious or philosophical reasons or because they prefer other health insurance.
B. POLICY
Individuals entitled to monthly benefits which confer eligibility for HI may **not** waive HI entitlement. The only way to avoid HI entitlement is through withdrawal of the monthly benefit application. Withdrawal requires repayment of all RSDI and HI benefit payments made.
http://policy.ssa.gov/poms.nsf/lnx/0600801002
HI 00801.034 Withdrawal Considerations
A. POLICY
To withdraw from the HI program, an individual must submit a written request for withdrawal and must refund any HI benefits paid on his/her behalf as explained in GN 00206.095 B.1.c.
An individual who filed an application for both monthly benefits and HI may:

- withdraw the claim for monthly benefits without jeopardizing HI entitlement; **or**
- withdraw the claim for **both** monthly benefits and HI.

The individual may **not** elect to withdraw only the HI claim.
An individual who filed an application for HI only may withdraw the claim at any time (see HI 00801.002).
Note: Even though a NH may withdraw a claim for monthly benefits and HI for HI only, the NH's aged spouse (or other aged auxiliary) retains HI entitlement unless the spouse (or auxiliary) also specifically elects to withdraw the application for HI.
B. REFERENCE
See GN 00206.020 for a complete discussion of withdrawal considerations.
http://policy.ssa.gov/poms.nsf/lnx/0600801034

The Plaintiffs

Brian Hall is a retired civil servant who now farms hay in Virginia. He could use the Federal Employees Health Benefit system, but is instead forced into Medicare because he enrolled in Social Security. Brian Hall, like his fellow plaintiffs, worked and paid his taxes for more than forty years and wishes to collect his Social Security benefits, but wants to make his own health care decisions free from government interference. So, he does not want to enroll in Medicare, part A.

Lew Randall is a CATO Institute board member and has intentionally not enrolled in Social Security in order to avoid being automatically enrolled in Medicare. He is satisfied with his high deductable private plan in which he enrolled years ago.

Norm Rogers is a retired entrepreneur who saw his own parents suffer from Medicare policies in their last years of life. When they were residing in an elderly care home, their long-time primary care physician was unable to visit them because Medicare did not reimburse enough for their physician to afford the visits. Norm Rogers has not enrolled for Social Security benefits in order to avoid Medicare.

John Kraus is a retired civil servant who attempted to opt out of Medicare using the administrative process of appeals. His documentation of a four-year ordeal clearly showed that the government has no desire to allow retirees to take responsibility for their health care.

Richard Armey is a retired congressman from Texas. He was in office when the offending changes to the procedure manual were made by bureaucrats. He wishes to have the changes reversed so that we can obtain insurance on our own terms.

The Attorneys

Kent Masterson Brown practices law from Lexington, Kentucky. He specializes in issues (including constitutional issues) arising out of the regulation of the health care industry and the administration of the Medicare and Medicaid programs.

Frank Northam practices law from his office at Webster, Chamberlain and Bean in Washington, DC. He is the firm's chief litigator and handles cases in federal and state courts throughout the nation. He has collaborated with Mr. Brown over decades.

The Original Complaint

http://thefundforpersonalliberty.org/about/medicare-lawsuit/about-the-lawsuit/ Lays out the original arguments of the lawsuit. Over the past three years the lawsuit's scope has been narrowed to exclude the plaintiffs' motivation for wishing to be excluded from Medicare.

Nation-Wide Media

Editorials have appeared in many publications over the past three years including the *Wall Street Journal, The Washington Times, Washington Examiner, San Francisco Examiner, New York Post, Boston Herald, Free Republic, Dakota Voice, American Thinker, Las Vegas Review-Journal, TheHill.com, KaiserHealthNews.com, ElderLawAnswers.com,* and *Health Freedom Watch.* Links to those editorials may be found at http://thefundforpersonalliberty.org/about/medicare-lawsuit/news-and-views/

Exhaustion of Administrative Remedy

From the Opinion Denying the Government's Motion to Dismiss made September 29, 2009:

> Plaintiffs' failure to exhaust their remedies is fatal to their claims unless the Court determines the exhaustion requirement should be excused.

and

> Exhaustion may be excused where "an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law"

concluding:

> In the present case, Plaintiffs bring just such a challenge. They challenge the SSA's policy, as stated in the POMS, requiring individuals wishing to withdraw from Medicare Part A also to withdraw their application for monthly Social Security benefits and repay any benefits previously received. As previously discussed, this policy is not found in the Social Security Act or federal regulations, as Defendants allege, but was apparently created by the SSA and expressed in its POMS. As Plaintiffs note, there are no facts unique to any of their claims that would allow the SSA to reach a particular decision for one Plaintiff and a different decision for another, or that should be put on the record to later assist this Court. (concluding that "requiring exhaustion here would be futile because, given the nature of the claims presented, agency expertise would provide no benefit to the judicial resolution of this case."). Therefore, exhaustion of remedies is

futile for Messrs. Hall, Kraus, and Armey and will be excused.

http://thefundforpersonalliberty.org/pdf/090929-Opinion-Denying-Motion-to-Dismiss.pdf

Questioned & Educated

The government asked the court for discovery so that they could fully question the plaintiffs. The proposed depositions covered a wide range of topics including financial health, ability to choose providers, list of anticipated providers, list of anticipated hospitals, plaintiffs' experiences as inpatients, and the experiences of the spouses.

The proposed depositions were another blatant attempt to delay a decision and to throw a red herring at the case. The real matter at hand is whether the POMS contradict the statutes. The plaintiffs' motivations for not enrolling in Medicare are unimportant.

http://thefundforpersonalliberty.org/pdf/100527-42-2-Def-Declaration-of-B-Kennedy.pdf

Hearing Transcript

The transcript of the **November 17, 2010,** hearing includes the government's argument that those who are entitled to Social Security are entitled to Medicare at the age of 65 and that the entitlement constitutes a requirement.

The Judge asks,

> "Yes, but it also says, at 42 16 U.S.C. 426, that everybody who has attained the age of 65 is entitled to Social Security benefits, and in conformity with regulations of the Secretary, files an application for hospital insurance benefits, can get Medicare.
>
> And what the Secretary has done is make an application for Social Security into an application for Medicare, and the question is, "Can the Secretary, as a result of that convenience, thereafter say, 'You can't get out of Medicare?'" That's the question. It's not at all a question of entitlement. That is a red herring.
>
> The question is, "Can the Secretary force people who don't want Medicare, to stay in Medicare or else repay Social Security benefits?" which is an entirely different program.

The judge continued to press for the statutory justification for the procedures put in place.

http://thefundforpersonalliberty.org/pdf/101117-Hearing-Transcript.pdf

District Court Final Ruling

Judge Collyer submitted a final ruling on **March 16, 2011** finding in favor of the government. The ruling, thirteen pages long, included the following passage:

> Plaintiffs argue that "entitled" to Social Security Retirement benefits does not mean "required to accept" so that "entitled" to Medicare Part A benefits does not mean "required to accept." While the Plaintiffs' plain-English reading of the word "entitled" has its attractions, in context the Medicare "entitled" does not actually mean "capable of being rejected." An individual is "entitled" to Social Security Retirement benefits only after he has worked the requisite quarters, attained age 62 (or more), and filed an application. See 42 U.S.C. § 402. There being no affirmative filing of an application necessary for a Medicare Part A entitlement, it is a different type of entitlement because of its automatic nature. The Medicare Part A entitlement is tied exclusively to the fulfillment of two requirements: (1) receiving Social Security Retirement benefits; and (2) being age 65 – the removal of either having the effect of disestablishing that entitlement.

Then the Judge concluded:

> Plaintiffs are trapped in a government program intended for their benefit. They disagree and wish to escape. The Court can find no loophole or requirement that the Secretary provide such a pathway.

http://thefundforpersonalliberty.org/pdf/110316-54-Memoranum-Opinion.pdf

Op-Eds

Shortly after the March decision, the ***Washington Examiner*** published **Dr. Susan T. Berry's** opinion editorial after which Representative Dan Burton of Indiana read the article into the Congressional Record on the floor of Congress.

From the op-ed:

» The judge stated that, in its arguments, the Obama administration "extols the benefits of Medicare ... and suggests that Plaintiffs would agree they are not truly injured if they were to learn more about Medicare, perhaps through discovery."

Note the familiar condescending Obama administration tone: Take the Medicare, and then find out what's in it. You'll like it when you do.

The judge also stated, "The parties use a lot of ink disputing whether Plaintiffs' desire to avoid Medicare Part A is sensible."

Translation: If Americans don't want government-run health insurance, well, they just don't have much sense. After all, the government knows what's best for them, they don't.

The full article is online at the Washington Examiner:
http://washingtonexaminer.com/opinion/op-eds/2011/03/judges-surprise-ruling-affirms-yet-another-federal-health-mandate

Oral Arguments

October 13,2011, Oral Arguments are to be held in Washington, DC in the Court of Appeals. Each side will argue their case for 30 minutes before a three-judge panel. To be kept abreast of updates or date changes, please subscribe at our website:
http://www.thefundforpersonalliberty.org

Legislation

"Retirement Freedom Act"

June 30, 2011 Senator Jim DeMint of South Carolina introduced a bill which gives seniors the ability to voluntarily opt-out of Medicare while still receiving Social Security payments. This bill would remove any possibility of misinterpretation of the statutes pertaining to enrollment in Medicare Part A. The text follows:

IN THE SENATE OF THE UNITED STATES

A BILL

To allow individuals to choose to opt out of the Medicare part A benefit.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Retirement Freedom Act".

SEC. 2. ALLOWING INDIVIDUALS TO CHOOSE TO OPT OUT OF THE MEDICARE PART A BENEFIT.

Any individual who is otherwise entitled to benefits under part A of title XVIII of the Social Security Act may elect (in such form and manner as may be specified by the Secretary of Health and Human Services) to opt out of such entitlement.

Notwithstanding any other provision of law, in the case of an individual who makes such an election, such individual—
(1) may (in such form and manner as may be specified by the Secretary) subsequently choose to end such election and opt back into such entitlement (in accordance with a process determined by the Secretary) without being subject to any penalty;
(2) shall not be required to opt out of benefits under title II of such Act as a condition for making such election; and
(3) shall not be required to repay any amount paid under such part A for items and services furnished prior to making such election.

"Medicare Beneficiary Freedom to Choose Act of 2011"

March 11, 2011 Representative Sam Johnson of Texas introduced HR-1051, a bill which would allow beneficiaries to opt-out of Medicare. The summary text follows:

> Medicare Beneficiary Freedom to Choose Act of 2011- Amends title XVIII (Medicare) to revise requirements for the use of private contracts by Medicare beneficiaries under which no Medicare claims shall be made. Requires any such contract to be in writing and signed by the Medicare beneficiary. Allows individuals to choose to opt out of the Medicare part A (Hospital Insurance), and makes them eligible for health savings accounts

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