THE CENTER FOR THE
MORAL DEFENSE
OF CAPITALISM

May 1, 2002

Donald S. Clark, Esq.
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W., Room 159-H
Washington, D.C. 20580

Re: Comments of the Center for the Moral Defense of Capitalism to the proposed Consent Agreement and Order in *In Re Obstetrics and Gynecology Medical Corporation of Napa Valley, a corporation; Bryan Henry, M.D., R. Bruce Scarborough, M.D., and Anthony King, M.D., individually, and as officers of said corporation; Dario Gambetta, M.D., Jerome Solomon, M.D., and Cheryl Henry, M.D., individually,* File No. 011-0153

Dear Mr. Clark:

On April 5, 2002, the Federal Trade Commission (FTC) entered its proposed Consent Agreement and Order to Cease and Desist (Consent Agreement) in *In re Obstetrics and Gynecology Medical Corporation of Napa Valley, et al*., (OGMC) File No. 011-0153. The Center for the Moral Defense of Capitalism (CMDC) files these Comments in response to the terms of the proposed Consent Agreement.

Introduction

CMDC is a District of Columbia non-profit corporation organized to promote the social welfare of the nation by presenting a moral foundation for individualism and economic freedom to the public, policymakers and the judiciary. CMDC provides analysis of human affairs through the application of Ayn Rand's philosophy of Objectivism.

At the center of CMDC's mission is our argument that all human action must be voluntary, free of coercion, and that the initiation of physical force must be banished from all human relationships. We believe in a just government that acts as an agent of its citizens, charged with the sole mission of employing *retaliatory* physical force against the *initiation* of physical force.

CMDC has consistently opposed the application of federal antitrust laws through litigation and administrative action on the grounds that these laws are unconstitutional. We have argued that antitrust laws are unconstitutional because (1) they are non-objective in that they fail to provide individuals and businesses with clear, concise guidance necessary to avoid sanctions under the law; and (2) they require the government to *initiate* force against innocent citizens.

With respect to the case against OGMC and the physician respondents, CMDC finds that there is nothing in the public record presented by the FTC that justifies the remedies set forth in the Consent Agreement. First, we believe that the respondents did not violate the law as stated by Congress. Second, we believe the FTC's actions and underlying regulations are *per se* unconstitutional, because they violate the rights of OGMC and the physician respondents. Third, we believe the terms of the Consent Agreement will substantially harm competition by undermining the free exchange of medical services in Napa County, California. Finally, we believe that the FTC's combined efforts to prevent physicians from collectively bargaining with health plan operators is contrary to the public interest.

The respondents did not violate Section 5 of the Federal Trade Commission Act

The Consent Agreement was the result of an FTC complaint (Complaint), which charged the respondents with violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (2001). However, at no point in the Complaint does the FTC present any facts to sustain that allegation under the terms set forth in the statute itself.

15 U.S.C. § 45 (a), as amended, provides that, "[u]nfair methods of competition in or affecting commerce…are hereby declared unlawful." While Congress failed to clearly and concisely define what acts constitute "unfair competition", § 45 (n) does offer a minimal standard of proof to be used by the FTC in cases arising under the statute, namely that an allegedly illegal act is one that is, "likely to cause *substantial injury* to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition (italics added)."

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The commonly accepted legal definition of "injury" is a, "damage or wrong done to another's person, property, reputation, or rights…No action at law is maintainable without a legal injury."[1] Paragraph 19 of the Complaint alleges four specific consequences of the respondents' actions, but none of the consequences legally injure the rights of consumers or *any* individuals. For example, the FTC alleges that, as a result of OGMC's formation, "[p]rices for physician services have increased." Even if that is the case, there is nothing in California or federal law which grants any consumer the right to a specific price level for obstetrical and gynecological services. There is no cause of action sustainable under California or federal law which would enable a consumer to recover damages from any of the respondents here for the mere act of charging a fee for rendering of services or, as was the case here, for attempting to negotiate such fees voluntarily.

The FTC alleges, in Paragraph 18 of the Complaint, that OGMC's actions rendered Napa Valley Physicians' Plan, Inc. (NVP), an independent practice association (IPA), unable to provide an adequate supply of obstetricians and gynecologists to health plan operators in the Napa County market. Again, while this may be factually true, there is nothing within California or federal law which grants NVP or any other IPA the right to involuntarily obtain the services of obstetrical or gynecological professionals. There is no law which compels OGMC and the physician respondents named to provide such services to NVP or any other IPA. Unless the members of OGMC have violated a voluntary contractual agreement with NVP—and the Complaint makes no such allegation—there is no legal injury upon which to sustain a Section 5 allegation against OGMC and the physician respondents.

Paragraph 14 of the Complaint accuses the respondent of using an economic boycott, "in order to *coerce* Napa Valley Physicians to meet the physician respondents' demands for higher fees for services (italics added)." If indeed the respondents had used coercion to obtain their objectives, they would arguably be guilty of a crime warranting government action. But the Complaint does not allege any acts that would constitute coercion Instead the FTC falsely concludes that there was coercion without demonstrating an understanding of the concept itself.

[1] GILBERT LAW DICTIONARY 157 (1997).

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"Coercion" is defined as a, "threat, intimidation, or force used to pressure a person to act against her will, *e.g*. coercing another criminal act by threatening her with bodily harm or death."[2] The FTC never establishes, let alone proves, that OGMC and the physician respondents used threats, intimidation or force to obtain its objectives. Rather they voluntarily withheld their services from NVP as part of an overall negotiation with NVP to obtain compensation terms satisfactory to the OGMC physicians. Doing so did not violate the rights, life or liberty of NVP.

As a matter of law, coercion exists only where one party compels or induces a second party to act against their self-interest by threatening injury, property damage, or harm through some other underlying criminal act. Such was not the case here, and in fact the use of labor boycotts has traditionally not been defined as coercion when the boycotting party voluntarily does so for their own benefit.[3]

What the FTC fails to acknowledge—or even recognize—is the distinction between *political* power and *economic* power. The latter is what the respondents have, while it is the FTC which possesses the former. OGMC's economic power derives from the value of the services contributed by its member physicians on a voluntary basis. In contrast, the FTC derives its power from the political use of force.

In the absence of any coercion or other illegal conduct on the part of OGMC and the physician respondents, CMDC believes that requiring the immediate dissolution of OGMC and the placing of the physician respondents under FTC supervision for twenty years, as mandated by the Consent Agreement, is unwarranted, unjustified, and constitutes a manifest injury to the respondents.

The FTC's actions are *per se* unconstitutional

Since the FTC has failed to demonstrate any illegal conduct on the part of OGMC and the physician respondents, the Commission's actions to adopt the Consent Agreement is *per se* unconstitutional, since the Agreement itself was derived from the government's *initiation* of force against innocent individuals.

[2] GILBERT LAW DICTIONARY 48 (1997).

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The Consent Agreement requires the immediate dissolution of OGMC (section III-C) and enjoins the physician respondents from collectively negotiating on their own behalf with any IPA or health plan operator (Paragraph II-A). These provisions effectively deny the respondents the right to use, and benefit from, their own property. Furthermore, by denying OGMC its legal existence and the physician respondents their right to voluntarily associate and contract, the FTC violates the respondents' liberty.

Had the individual respondents been factory workers seeking to form a union for collective bargaining purposes, the FTC would not have brought forth a Complaint. Indeed, federal law both permits and encourages manual and semi-skilled laborers to form unions, and the government grants many such organizations a form of monopoly power which compel business owners to negotiate with them.[4] The underlying difference between labor unions and OGMC is found in 15 U.S.C. § 17, which exempts labor unions from the antitrust laws on the grounds that, "[t]he labor of a human being is not a commodity or article of commerce." Since the antitrust laws contained in Title 15 apply to commercial acts, removing human labor from the definition of "commerce" is necessary to create a loophole for unions to operate lawfully under Congress's antitrust scheme.

By prosecuting OGMC, the FTC is forced to acknowledge that the labor of physicians *is* a commodity or article of commerce outside the exclusionary zone of 15 U.S.C. §17. That being the case, the question becomes: What is the nature of the commodity of physician labor? CMDC argues that physician labor—like any commodity—is private property morally entitled to legal protection by the government.

The FTC clearly does not share this view. Not once in the Complaint or Consent Agreement does the Commission acknowledge or address the rights of the respondents with respect to their property. The Commission's sole stated concern is the "rights" of consumers, which in this case are non-existent. Consumers have no rights in this case, because they have no lawful claim upon the property of the physician respondents, either through contract or law.

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[3] *See*, *e.g.*, N.Y. PENAL LAW § 135.60-75 (Gould 2001) (state criminal statute defining crimes of coercion in the second degree, coercion in the first degree, and the affirmative defenses to such charges.)
[4] *See*, *i.e.*, 29 U.S.C. § 158 (a) (2001).

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To accept the FTC's position with regard to the respondents, one would have to adopt the belief that physicians are executors of a public trust, where medical skills are transferred to doctors with the understanding that they will be used solely for the benefit of the "consumers" of health care. Such a collectivist interpretation would be wholly consistent with the FTC's mission under federal antitrust law, which place the vague interests of said consumers—an indefinite class—above the clearly delineated property rights of individuals.

The existence of the physician respondents' property rights are easily demonstrated. A doctor, like any other productive individual, owns the fruit of his labor by the virtue that he alone created it. In the case of an obstetrician-gynecologist (ob-gyn), it takes years of effort & study before one is able to practice their trade professionally. To become an ob-gyn, an individual must complete a minimum of eight years of postsecondary education, obtaining both a four-year baccalaureate degree and a four-year doctorate of medicine. Following medical school graduation, a new doctor wanting to be a ob-gyn must complete a four-year clinical residency in the field, and some continue beyond that for three years as an ob-gyn fellow.

None of these requirements are easy. The American Association of Medical Colleges reports that of the 34,859 applicants to U.S. medical colleges in 2001, only 16,365—less than half—ended up matriculating at an accredited medical school. The average matriculated student had an undergraduate GPA of 3.60 (out of 4) and an average combined score of 29.6 (out of 35) on the Medical College Admissions Test. Keep in mind that approximately 95% of the students who matriculate in 2001 will likely not end up specializing in obstetrics and gynecology. Of the over 20,000 students who applied for residencies in 2002, 1,138—about 5.5%—were matched to an ob-gyn program. Even graduating students who express an interest in an ob-gyn residency are not guaranteed a match in the field, as each individual residency program has its own distinct set of requirements for applicants.[5] UCLA's Kern Medical Center, for example, has an ob-gyn residency program which requires a minimum medical school GPA of 3.0 and three letters of reference just to get an interview.

[5] *See* http://www.aamc.org

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Given the investment that goes into becoming a ob-gyn, it is ridiculous to argue that the professional skills of these physicians are not their property. A physician does not exploit others to gain his abilities, but instead uses his mind to engage in productive achievement. Such labor forms the basis of private property, and as such, the government has a legal and moral obligation to protect the rights of physicians to commercially use their talents.

Protection of property rights are at the heart of the Constitution. Contrary to the collectivist practices of FTC antitrust enforcement, the Constitution is predicated upon the reciprocity of individual rights. The moral foundation for this belief comes from the Declaration of Independence's statement that rights are endowed to the *individual*, and that governments are "instituted among men" for their protection. The Constitution provides the legal mechanism for carrying out the Declaration's principles, as the Constitution presupposes the moral acceptance of individual rights as the organizing principle of society and its governance.

Article IV, Section 2 states that, "The citizens of the each State shall be entitled to all Privileges and Immunities of citizens in the several states." This clause was designed by the framers to ensure that the federal and state governments provided the same protection of rights for all individual citizens. Section 1 of the Fourteenth Amendment further expounds upon this concept, declaring that no person shall be deprived of, "life, liberty, or property without due process of law," and furthermore, no person may be denied, "equal protection of the laws."[6]

The FTC's actions here represent a *per se* violation of both the Privileges and Immunities Clause and the Fourteenth Amendment. In order to sustain its claim that the respondents acted to harm competition, the FTC is forced to segregate physicians as a class and assign them a lesser degree of rights than another class, consumers and health plan operators. The Consent Agreement would forbid physicians from engaging in full, voluntary negotiations with parties seeking their medical services, which gives the adverse parties a competitive advantage in fact and law, since, after all, *consumers* have the right to collectively bargain—via health insurance—without restriction. By enforcing the terms of the Consent

Agreement, the FTC would violate the reciprocal rights of both parties—since consumers and health plan operators would not have to respect the physicians' property rights—which puts the FTC's actions in direct violation of the government's obligations under Article IV and the Fourteenth Amendment.

The proposed Consent Agreement will harm competition

Even if the FTC's actions had adequate basis in law, the structural remedy advanced in the Consent Agreement does nothing to protect competition. Quite the opposite, the injunctive provisions of Paragraph II will serve to undermine the ability of physicians to compete within the marketplace.

Market competition is only possible in a capitalist system where voluntary action forms the basis for all commercial activity. The essence of competition, as Federal Reserve Chairman Alan Greenspan once observed, is, "taking action to affect the conditions of the market in one's own favor.[7]" Economic self-interest is the lifeblood of competition, yet the FTC proposes to bleed the well dry—to stop competition—by declaring economic self-interest to be insufficient grounds for actually competing, as is the case here.[8]

Under the Department of Justice-FTC *Statements of Antitrust Enforcement Policy in Healthcare (1996)* (Statements), the FTC has deemed the respondents' conduct *per se* illegal on the grounds that they engaged in "price fixing" (Statement 8-C-3). Paragraph 17 of the Complaint states that the decision of the physician respondents not to "clinically or financially" integrate their practice—by, among other things, declining to jointly share financial risk—makes their voluntary decision to collectively bargain for fees *per se* illegal.

By excluding all collective bargaining independent of practice integration from the FTC's definition of 'lawful competition', the Commission's policies act to prevent the voluntary exchange of services that form the basis of a capitalist economy. The FTC assumes that higher prices can never coexist

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[6] The framers were also adamant that the Constitution not permit "factions" of citizens to impose their interests over the rights of other citizens. *See, generally,* THE FEDERALIST NO. 10 (James Madison).
[7] Alan Greenspan, *Antitrust, in* CAPITALISM: THE UNKNOWN IDEAL 68 (Ayn Rand, 1966).
[8] *See* Complaint at Paragraphs 11, 17.

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with greater efficiency in production, yet it offers no conclusive analysis to support such a finding. As it stands, the Statements amount to speculation as to what might happen given a certain set of facts.

But just as the FTC argues that permitting OGMC to collectively bargain will increase costs without improving competitive efficiencies, CMDC argues that recognizing the right of doctors to freely negotiate their fees will lead to greater *production*. It should go without saying that individuals tend to be more productive when the potential for greater reward exists. Under the Consent Agreement, such potential will be drastically reduced, since any attempt by the physician respondents to obtain greater fees will be viewed by the FTC as an attempt to engage in illegal "price fixing".

The competitive analysis in Statement 8-C-3 states that IPA arrangements like that of OGMC are considered a "cartel" under the antitrust laws. Aside from the practical difficulty of describing a group of *six* physicians as a "cartel" within any context, the FTC clearly fails to understand the nature of economic power. Cartels never succeed in a free market, because consumers will always find substitutes for goods and services which are offered at an unreasonable price. Only if a cartel is accompanied by govemment action which denies market entry to such alternatives can such a cartel's scheme be maintained. In this case, the actions of OGMC and the physician respondents are not taking place with the support of government favor, nor are they acting independently of market forces. In the context of a free market, OGMC's activities presents no threat to "competition" or the market itself.

Such is the problem with employing a *per se* analysis, which excludes any consideration of the circumstances surrounding alleged anticompetitive activity. In this case, the FTC has only assessed the conduct of the *physicians* without examining the conduct of the other parties involved, and the nature of the marketplace itself. CMDC has already discussed, *infra*, how the Consent Agreement gives health plan operators unequal legal protection in relation to the physician respondents. This is not just the conclusion of CMDC, but also of the American Medical Association (AMA), which gave public comment to the FTC on October 20, 2000, in the matter of *In Re Alaska Healthcare Network, Inc.*, File No. 991-0103, which involved similar issues to the present case. The AMA rejected the FTC's claim that physician collective

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bargaining was inherently harmful to competition, and they specifically questioned the Commission's comprehension of the marketplace situation:

> "The application of a structural element in the [Alaska Healthcare Network] proposed settlement also indicates a continuing misapprehension by the FTC of the power physician joint ventures can wield in the marketplace. The focus on physician joint ventures is unwarranted and unfair, when compared to the consolidation of, and resources available to, the managed care entities with which they must contract."[9]

The AMA charged the FTC with promoting "coercion" on the part of managed care operators, insofar as the Commission was tying the hands of physicians by limiting their ability to collectively bargain, and the FTC's actions in this case would seem to further confirm the AMA's allegations.

The FTC has also erred in defining the relevant market and the barriers to entry in this case. The Commission has arbitrarily limited the scope of what constitutes the marketplace in this case to serve its own regulatory ends. What these arbitrary definitions generally lack is perspective from the *consumers* themselves. The FTC uses inflexible and arbitrary analysis to tell consumers what their market is without examining the actual commercial activity of the very people they are allegedly protecting.

In this case, there are six physicians named as respondents, each of whom have staff privileges at either Queen of the Valley Hospital in Napa, California, or at St. Helena Hospital in Saint Helena, California, both located in Napa County. The combined population of these two cities is less than 80,000, and the cost-of-living and per capita income of both cities is well above the national average. Furthermore, in contrast to the FTC's claim that these six doctors combined constitute an ob-gyn monopoly[10], there are more than 200 doctors listed as practicing ob-gyn specialists within a 50 mile radius of both Napa and Saint Helena.[11] The Complaint and the Consent Agreement offer no evidence which shows that Napa County consumers have chosen to limit themselves to the six physician respondents when seeking obstetrical and gynecological services., and thus the FTC lacks an objective foundation from which to assert that consumers believe the respondents' actions to be contrary to their self-interest.

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[9] CMDC does not endorse all aspects of the AMA's comments in *Alaska Healthcare Network*, notably the Association's call for greater antitrust regulation of the managed care industry.

[10] *See* Complaint at paragraph 3. The FTC's claim that the six constitute "virtually all" of the ob-gyn staff at the two named hospitals is inconsistent with the hospitals' listing of at least three additional staff physicians in their respective directories.

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The FTC has argued that physician collective bargaining creates monopolies.[12] For a monopoly to exist, the alleged monopolist must have the ability to erect and maintain coercive barriers preventing competitors from entering the market. Once again, citing Chairman Greenspan:

> "The necessary precondition of a coercive monopoly is closed entry—the barring of all competing producers from a competing field. This can be accomplished only by an act of government intervention, in the form of special regulations, subsidies, or franchises. Without government assistance, it is impossible for a would-be monopolist to set his prices and production policies independent of the rest of the economy."[13]

A competitive market understands the difference between the *absence* of competition and the *impossibility* of competition. The former is a non-permanent condition which can be altered through free competition; the latter is a product of government intervention in the economy, as is the case with the FTC's antitrust enforcement activities.

There *are* significant barriers to entry in the marketplace of ob-gyn specialists in the Napa County, California, marketplace. It is the same barrier which exists in any class of physicians, which is the simple fact that the law does not permit just anyone to practice medicine. The State of California, like every other state in the Union, has created a legal monopoly within the medical profession that is restricted to only those individuals who are licensed by the states to practice medicine within their jurisdictions.

The process of educating a physician has already been described, *infra*, but in addition to the educational and professional standards that must be met, there are legal licensing burdens imposed by the state. California, like most states, requires an application and a battery of formal examinations to determine eligibility for a medical license. An applicant must be a graduate of an accredited U.S. or foreign medical school, and at a minimum must intern for a year after graduation to gain full rights under the law. In Fiscal Year 2000, the California Medical Board reported that there were 4,650 applicants for state medical licenses, of which approximately 4,000 were granted.

Even with this barrier to entry, the medical marketplace is still capable of producing competition, since medical licenses are generally granted based on merit, rather than political favor or arbitrary quotas.

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[11] Search of ob-gyn specialists was conducted via WebMD.com.
[12] *See, e.g.,* Testimony of the Federal Trade Commission before the Alaska House of Representatives on Alaska Senate Bill 37. (January 18, 2002) at 4.

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More importantly, the physicians themselves have no control over this barrier, which makes it irrational for the FTC to treat them as monopolists. The physician respondents may constitute the majority of practicing ob-gyn specialists in Napa County, but they are not responsible for that. The respondents have no demonstrable power to forcibly exclude other ob-gyn specialists from moving to Napa County and practicing medicine. All the respondents have done is attempt to leverage their position in the market to their advantage, or what a reasonable person would call "competition". Under the Consent Agreement, this will no longer be possible, since the FTC will forcibly substitute its judgment as to what the respondents' "legitimate" self-interests are.

The FTC has also failed to recognize the fact that it is, after all, the *physicians* which have created the very marketplace the FTC now plans to govern. Consider this hypothetical: Suppose the physician respondents in this case, rather than attempt to collectively bargain, decided instead to cease practicing medicine altogether. In such a scenario, would the FTC have prosecuted the respondents for illegally restraining trade by *refusing* to trade? And if not, how would the FTC justify such a decision, considering they prosecuted these same physicians for engaging in a supposedly illegal "boycott" of NVP by withholding services?

Just as competition requires a free market, a free market requires people willing to offer goods and services for trade. If nobody comes forth to offer a particular good or service, the market goes without it. Physicians, who are economic producers, establish the marketplace by making their services available for trade. The FTC, in contrast, clings to a false belief that *consumers* create the marketplace through their demand for services, hence their justification for enforcing antitrust laws *against* producers.

The proposed Consent Agreement is adverse to competition because it only assesses the conduct of one party. If the FTC believes that a structural remedy of some kind is necessary to "preserve" competition, then why has the Commission not considered bringing an action to force the two hospitals to hire additional ob-gyn specialists in an effort to increase competition within the market? Alternatively, why

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[13] Greenspan, *Antitrust* at 68.

has the FTC not ordered the state of California to review its licensing requirements to ensure it isn't unfairly affecting the ability of individuals to gain licenses to practice medicine?

In fact, the kind of drastic structural remedy imposed by the Consent Agreement could impede efforts to make ob-gyn services more competitive by creating an additional, somewhat nebulous barrier to entry in the market. By placing the physician respondents under strict reporting (Paragraph VII) requirements and FTC oversight for the next 20 years (Paragraph IX), the FTC could easily discourage ob-gyn specialists in the future from relocating their practice to Napa County for fear that the "federal watchdog" will view their conduct with suspicion.[14] The FTC has used circumstances beyond the control of doctors as a pretext to engage in unwarranted and illegal persecution against a very small group of physicians, and the eventual consequences will likely be substantial harm to physicians, hospitals, health plan operators, and even consumers.

The proposed Consent Agreement is contrary to the public interest

The proposed Consent Agreement is not an isolated action, but the latest in a series of assaults on the rights of doctors by the FTC. In addition to this matter and the aforementioned *Alaska Healthcare* case, the Commission's Bureau of Competition has actively lobbied against proposed legislation in at least four states and the District of Columbia which would protect the lawful right of physicians to engage in voluntary collective bargaining.

Recently the Bureau of Competition's staff offered testimony to the Alaska Senate opposing proposed legislation which would offer limited protection of physician rights. The Bureau cited two main arguments for its blanket opposition to *any* physician collective bargaining: "(1) such legislation would likely harm consumers," and "(2) such legislation would not likely improve the quality of care." CMDC has already addressed the former argument, *infra*, and we take no position on the second argument, since it is speculative and the FTC offers no conclusive evidence to support its allegation.

[14] The AMA raised a similar argument in *Alaska Healthcare*.

It is notable that not once in 15 pages of analysis of the Alaska bill does the Bureau ever address the subject of the physicians' rights. The Bureau never even argues that physicians don't have property rights with regard to their work, nor do they offer a constitutional or legal justification for encouraging the continued abrogation such rights.

The Bureau does, however, offer a defense of the *government's* rights with respect to physician services. On page two of their Alaska testimony, the Bureau cites a consumer harm is created by physician collective bargaining in that, "the federal government would pay more for health coverage for its employees," and that government-financed health insurance such as Medicaid would also face increased costs. CMDC applauds the FTC's concern for the wise and efficient use of taxpayer funds in acquiring services, but that does not excuse or justify using coercion as a means of achieving such savings. Forcing doctors to surrender their right to collectively bargain cannot be justified in the name of "consumer harm" or governmental prerogatives absent constitutional authority.[15]

The FTC's heavy-handed approach to opposing physician rights appears designed to prevent *any* meaningful debate within the states and Congress over restricting or ending the Commission's efforts to prevent physician collective bargaining. Given the FTC's allocation of resources to dissolve an alleged 'cartel' of *six* physicians in one California county, it is clear that the Commission has yet to voluntarily acknowledge any limits to the scope of its antitrust jurisdiction.[16]

Although the physician respondents have decided to sign this Consent Agreement, CMDC cannot give moral sanction to what can only be described as an *involuntary* surrender of rights. Such an action is contrary to the public interest of the people of the United States, because to sanction the FTC's actions here would be a statement that individual rights are meaningless when they conflict with the political agenda of a government agency.

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[15] Taken to its extreme, the FTC's argument for denying physician property rights for the sake of public finances would violate the Fifth Amendment's prohibition on seizing private property without offering "just compensation."

[16] A bipartisan group of members of Congress have apparently recognized the need for setting some limits to the FTC's infringement of physicians' rights and have introduced H.R. 3897, a bill which would clarify the application of antitrust laws to physician collective bargaining.

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Conclusion

For the foregoing reasons, CMDC urges the FTC to reject the proposed Consent Agreement, and dismiss the case against OGMC and all physician respondents. In addition, CMDC would strongly advise the FTC to reconsider and rescind the DOJ-FTC *Statements of Antitrust Enforcement Policy in Health Care* in their entirety.

Respectfully Submitted,

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American Medical Association
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Representative Bob Barr