RESPONSE OF CAROL TOBIAS,
PRESIDENT, NATIONAL RIGHT TO LIFE COMMITTEE

August 4, 2014

QUESTION FROM SENATOR GRASSLEY: *During the hearing, Senator Blumenthal suggested that S. 1696 contains an exception to protect current laws against government funding of abortion. Do you agree with Senator Blumenthal on this point? If not, please explain why.*

There is no such exception in S. 1696. There are a number of federal laws that limit funding of abortion under various federal programs. The majority of states also have in place laws that exclude elective abortion from various government entitlement programs that provide coverage of medical services in general, or of "family planning" services in particular. Most of these laws would be subject to legal attacks based on the provisions of S. 1696.

Section 4(d) of S. 1696 is a "Limitation" that incorporates four exceptions to the prohibitions contained elsewhere in the bill; these are summarized in endnote no. 6 of my written testimony. One of these exceptions is for "insurance coverage of abortion." This language would apparently shield from S. 1696-based legal attacks those state laws, now enacted by half of the states, that limit coverage of abortion under health insurance plans sold on the Obamacare exchanges. ((Most of these laws were enacted in response to a provision of Obamacare, 42 U.S.C. §18023(a), although some states had enacted such laws even before enactment of Obamacare.)) However, there is no reason to suppose that laws such as the Hyde Amendment would be protected by this reference to "insurance coverage of abortion." The Hyde Amendment is a limitation attached to the annual Department of Health and Human Services appropriations bill, which prohibits funds that flow through that bill from paying for abortions or for health plans that cover abortions, except in cases of rape, incest, or to save the life of the mother. The most important single effect of the Hyde Amendment is to prevent federal reimbursement for elective abortions, or for health plans that cover elective abortion, under Medicaid. But Medicaid is not an "insurance" program as the term is usually used in federal or state law – it is a government health-care entitlement program. It is not at all clear that courts would find that entitlement programs such as Medicaid fall within the scope of what is covered by the phrase "insurance coverage of abortion," especially in view of other language in S. 1696 that instructs the courts that "in interpreting the provisions of this Act, a court shall liberally construe such provisions to effectuate the purposes of the Act." The purposes of the act are clearly to remove impediments to access to abortion, explicitly defined by S. 1696 to include any government policy that increases the costs of abortion to an individual, even indirectly. Thus, any ambiguity will be resolved by nullifying the laws

that impede access to abortion, such as the Hyde Amendment and its state-level counterparts.

The ambiguity is, of course, by design. It is clear that the drafters of S. 1696 wish to keep the door open to attack the Hyde Amendment and the similar laws, in effect in most states, that prohibit government funding of elective abortions under entitlement programs such as Medicaid. If they had really wished to shield such laws from the prohibitions in S. 1696, they could easily have included unambiguous language to do so. Indeed, the antecedent to the "Women's Health Protection Act," which was the "Freedom of Choice Act" (FOCA), when it was approved by the Senate Committee on Labor and Human Resources on April 29, 1993, contained an unambiguous exception for state laws limiting government funding of abortion, which read: "Nothing in this Act shall be construed to . . . prevent a State from declining to pay for the performance of abortions."

Even if, for the sake of argument, one were to accept the notion that the laws that limit Medicaid coverage of abortion would be considered laws dealing with "insurance coverage of abortion," there are other existing prohibitions on government funding of abortion that nobody could argue have anything to do with "insurance coverage," and that clearly would be subject to legal attack and invalidation under S. 1696. To cite just two examples at the federal level: (1) The Helms Amendment of 1973, a provision of the Foreign Assistance Act of 1973 [22 U.S. Code §2151b(f)(1)] prohibits U.S. foreign aid funds for development from being expended for abortion. (2) A major federal "family planning" program, Title X of the Public Health Service Act, contains a provision enacted in 1970 that states, "None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." [42 U.S.C. § 300a–6.]

Thus, it is quite clear that S. 1696 would result, at a minimum, in federal taxpayer funding of abortion through both the major domestic family planning program and through U.S. foreign aid programs.