Health Care Reform

3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3000 • FAX 202-541-3166

WHAT'S WRONG WITH THE SENATE HEALTH CARE BILL ON ABORTION?

A response to Professor Jost

The United States Conference of Catholic Bishops supports authentic health care reform, but opposes the bill approved by the Senate (H.R. 3590), primarily due to its serious flaws on abortion and conscience rights. In our judgment, the House-approved health care reform bill (H.R. 3962) follows indispensable and longstanding federal policies on abortion funding and mandates, and conscience rights on abortion, while the Senate bill does not.[1]

Circulating online and on Capitol Hill is a new analysis by Timothy Stoltzfus Jost of the Washington and Lee University School of Law, claiming the opposite – that there are no "significant differences" between the House and Senate bills on abortion.

If the House leadership believes that to be true, it should substitute the House language on abortion for the Senate language when it makes other changes, because this will win new support for the bill from pro-life Democrats who prefer the House language without (in the leadership's view) any change in policy.

In our judgment, however, the Jost analysis is wrong in most of its major claims. The Senate bill's major flaws are as real as ever and must be addressed. As approved by the Senate, this bill:

- Provides for direct federal funding of elective abortions in community health centers,
- Provides federal subsidies for health plans that cover such abortions, violating longstanding federal policy under the Hyde amendment and similar laws,
- Will force families to choose between their health needs and their consciences on abortion, by forcing all enrollees in many health plans to pay a separate fee solely for other people's abortions,
- Fails to apply longstanding federal policy on the conscience rights of pro-life health care providers to the new funding provided under this bill.

Prof. Jost's key claims are quoted and critiqued below.

Jost: "The Senate bill, like the House bill, prohibits the use of premium affordability tax credits or cost-sharing reduction payments to pay for abortions that are not covered by Medicaid (i.e. abortions in cases of rape and incest or in cases of physical threat to the life of the mother)."

[1] See the USCCB's one-page summary of problems in the Senate bill, our 13-page detailed comparison of the bills, and our one-page chart providing a side-by-side comparison, all available at www.usccb.org/healthcare. None of these analyses require any change after reviewing the Jost analysis.

Response: This is false in two ways. First, the House bill actually prohibits the use of these credits for such abortions (Sec. 265 (a)), while the Senate bill allows these credits to be spent on any abortions that are eligible for funding under the annual Hyde appropriations rider (Sec. 1303 (b)(2)). Second, the House bill, unlike the Senate bill, follows Hyde and all other longstanding and current federal laws in prohibiting use of federal funds for elective abortions *and* for overall health plans that cover such abortions. Even Prof. Jost has acknowledged, in his writings opposing the Stupak amendment to the House bill, that it simply "extends to all health services funded under the Act the prohibition found in the current Hyde Amendment."[2] To the extent that the Senate bill is weaker than Stupak it is also weaker than Hyde and other current laws, and therefore violates the status quo on federal abortion funding.

Jost: "The Senate bill… requires the Office of Personnel Management to assure that at least one of the multi-state plans does not cover non-federally-covered abortions."

Response: Yes, but until now *all* the plans regulated by the Office of Personnel Management (i.e., the plans offered to federal employees) have been required to exclude such abortions. Allowing *all but one* of the federally subsidized health plans in each area to cover abortion is a serious departure from the status quo. So the Senate bill, unlike the House bill (which forbids any federally subsidized plan to cover elective abortions), violates longstanding federal policy and practice.

Jost: "The Senate bill, like the House bill, provides that qualified health plans may not be required to provide abortion as an essential service."

Response: In fact the bills are not identical in this respect. Under the House bill, the federal government may not require these plans to provide elective abortions *at all* (Sec. 222 (e)); under the Senate bill, the government may not require the plans to provide such abortions *as an "essential health benefit"* (Sec. 1303 (b)(1)). The difference is that under the Senate bill, the government *may* require abortion under another rubric, such as the bill's new, distinct mandate to cover "preventive" services for women (Sec. 2713 (a)(4)).

Jost: "The Senate bill, like the House bill, leaves federal funding for other programs, such as the Medicaid, Medicare, and Federally Qualified Community Health Centers subject to the Hyde amendment, as they have been for decades. It provides no funding for new programs that cover abortions…"

Response: The Senate bill authorizes *and appropriates* billions of dollars in new funding -- outside the scope of the appropriations bills covered by the Hyde amendment and similar provisions -- to fund services at (for example) Community Health Centers (Sec. 10503).

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[2]Timothy Jost, "The House Health Reform Bill: An Abortion Funding Ban and Other Late Changes," November 9, 2009, *Health Affairs Blog*, at http://healthaffairs.org/blog/2009/11/09/the-house-health-reform-bill-an-abortion-funding-ban-and-other-late-changes/.

Whether the program itself is "new" is irrelevant. These funds are new, and over the next five years they will be provided without being appropriated in the Labor/HHS appropriations act; therefore they are not covered by the Hyde amendment, which says only that funds "appropriated in this Act [the Labor/HHS appropriations act]" may not be used for elective abortions. Moreover, Community Health Centers are required *by statute* to provide all "required primary health care services," defined to include (among other things) "health services related to… obstetrics, or gynecology that are furnished by physicians" or other health professionals (42 USCS § 254b (b)(1)). Federal courts have long held that when a statute requires provision of health services under this or other broad categories, the statute must be construed to *include* abortion unless it explicitly *excludes* it. Thus, after the Supreme Court's *Roe v. Wade* decision of 1973 and before the first enactment of the Hyde amendment in 1976, the federal government was *required* to use federal funds to pay for about 300,000 abortions a year, although the Medicaid statute never mentions "abortion." See, e.g., *Planned Parenthood Affiliates of Michigan v. Engler*, 73 F.3d 634, 636 (6th Cir. 1996). It follows that the new funds appropriated by this bill over the next five years for these centers will be available for elective abortions, as nothing in this bill (or in any other law) prevents their use for this purpose.

Jost: [attempting to rebut the fact cited above]: "The Senate bill…provides that this funding is to be transferred to HHS accounts to increase funding for community health centers and does not provide for segregating these funds. Since all other HHS funding, including expenditures from trust funds, is subject to the Hyde Amendment, these funds cannot be used to pay for abortions."

Response: As discussed above, where the funds go *to* is irrelevant. What matters is what legislation the funds are appropriated *by*, and whether that legislation is covered by a provision like the Hyde amendment that prevents the funds from being used for elective abortions. In cases where it is not, as is the case here, federal courts have said the funds must be available for any abortion a physician says is appropriate. This statutory and judicial mandate can be expected to override any preference, however well-intentioned, of the centers or of the Secretary of HHS.

Jost: "The Senate bill like the House bill prohibits federal agencies and programs, and state and local governments that receive federal funding, from discriminating against health care providers or professionals on the basis of their unwillingness to provide, pay, provide coverage or refer for abortion. The House bill does so explicitly; the Senate bill by incorporating this prohibition from the Hyde Amendment."

Response: This claim is based on a confusion. The Senate bill references the annual Hyde amendment only to provide the list of abortions that are eligible or ineligible for direct federal funding each year. It does not reference any part of the separate Hyde/Weldon amendment to the annual Labor\HHS bill, on abortion nondiscrimination. No provision in the Senate bill, "implicitly" or otherwise, incorporates this longstanding and widely supported protection for conscience. The House bill applies this nondiscrimination policy to the funds provided under this Act (Sec. 259); the Senate bill does not, as the Senate rejected the House provision.

Jost: "No one will have to purchase abortion coverage under the Senate bill who does not want it, just as under the House bill."

Response: In fact the bills are very different on this point. Under the Senate bill, all but one plan in each exchange may cover abortion. Therefore many families will be forced to choose between a plan that best meets their health needs, and one that respects their conscience on abortion. The government, far from helping to protect them from this terrible dilemma, will make it worse by (a) providing federal subsidies for the plans that impose this on people, and (b) *requiring* any plan that covers these abortions to collect a regular extra payment, solely and specifically for elective abortions, from *every* enrollee in the plan regardless of their conscientious objection (Sec. 1303 (b)(2)(B)). The House bill, while allowing people who want abortion coverage to purchase it, ensures that the majority of Americans that do not want abortion in their health coverage can choose among plans without having to choose abortion; the Senate bill does not. This will be an especially tragic situation for lower-income Americans, who are most in need of assistance in getting health coverage and also generally strongest in opposing abortion.

Jost: "The Senate bill goes beyond the House bill in permitting the states to absolutely prohibit the sale of plans through the exchanges that cover abortion."

Response: Not true. The House bill also explicitly protects state laws prohibiting abortion coverage from being preempted by this legislation (Sec. 258 (a)).

Jost: "The Senate bill, but not the House bill, prohibits plans from advertising the separate cost of their abortion coverage. This provision is presumably intended to keep plans from competing with each other by making abortion coverage attractive."

Response: Actually what the Senate bill does is forbid issuers to give enrollees any real warning that on purchasing a plan they will be forced to pay for abortions; the inclusion of abortion may be mentioned *only* in the plan's fine print, along with all other benefits (Sec. 1303 (b)(3)(A)). The intent here, evidently, is not to protect consumers but to keep them in the dark.

NOTE: Prof. Jost notes rightly that the House and Senate bills include *some* provisions on abortion that are the same: for example, prohibiting qualified health plans from discriminating against providers or facilities within the plan because of their unwillingness to provide abortion; stating that this bill will not change *other* federal laws on conscience protection or willingness to provide abortion. These provisions are not part of the debate about the serious remaining problems in the Senate bill.

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