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Abortion and Conscience Problems in Health Care Reform Bills (Or: What's Wrong with the Capps Amendment?)

By mid-October 2009, Congressional committees had reported five different bills on health care reform. *None* of these bills adequately reflects current longstanding federal policies on abortion funding and mandates and on conscience protection in health care.

Three bills (from the House Ways and Means, House Education and Labor, and Senate Health committees) establish broad requirements for basic benefits in health plans (e.g., physicians' services, outpatient services) that federal courts since 1973 have construed to include abortion unless the legislation clearly specifies otherwise. Under such broad categories, the Medicaid statute was funding 300,000 abortions a year until Congress passed the Hyde amendment in 1976 to end such funding. **In the same way, these three bills will mandate and fund elective abortions without having to mention abortion.**¹

Two bills, approved by the House Energy and Commerce and Senate Finance committees, take a different approach. They include language sponsored in House committee by Rep. Lois Capps (D-CA). The Capps amendment, developed by members who support federal abortion funding, was advertised as a "compromise" that reflects current laws such as the Hyde amendment.

The reality is just the opposite. The Hyde amendment, and parallel provisions in other federal laws, bar federal funding of (1) most abortion procedures, and (2) health benefits packages that include such abortions.² **The Capps amendment violates the first policy in its "public option" health plan, and violates the second in its subsidies for private health plans.**

Public Option: The House Energy and Commerce bill creates a government-run health plan (the "public option"), sponsored and managed by the Secretary of Health and Human Services, to compete with private health plans nationwide. (The current Senate Finance bill does not include a public option.) The Capps amendment allows each entity offering a plan to decide whether to cover elective abortions; so the HHS Secretary, who will offer the public option, may mandate that it cover unlimited abortions, in direct contradiction to all other federal programs. **These abortions will then be paid for entirely with federal funds.** Purchasers will pay the federal government for health coverage, and the government will use these federal funds (along with a federal tax subsidy for those who qualify) to pay for abortions.

Subsidies for Private Plans (found in both House and Senate versions of Capps): Contrary to the Hyde amendment and similar laws, federal subsidies will help expand abortion coverage nationwide by supporting private health plans that cover unlimited abortions. Federal dollars will help pay the administrative and other overall expenses of such plans.

The Abortion Surcharge: To create the illusion that federal funds will not be supporting abortion, the amendment creates a distinct abortion surcharge, a fee of at least \$1 a month that

each purchaser of a plan *must* fund solely with his or her premium dollars to cover all abortion procedures that are ineligible for federal funding in a given year under the annual Hyde amendment. (Federal funding for many years has been only for cases of rape, incest or danger to the mother's life.) **Instead of forcing pro-life Americans to fund elective abortions with tax dollars, then, the federal government will work with insurers to make them pay for these abortions specifically and directly with their premium dollars.** Those who object to funding abortion will be told they could have chosen another plan – even if no plan without elective abortions meets their family's budget and health needs. Oddly, families will be freed from having to pay the abortion surcharge only if Congress in a given year rescinds the annual Hyde amendment – because then all abortions will be subsidized by everyone, through their taxes.

Government Abortion Mandate: The Capps amendment does state that each region of the Exchange must have at least one plan without elective abortions. However: (1) It also requires that each region have at least one plan with such abortions. This is an unprecedented new federal mandate for private plans to cover abortions that every federal program for decades has excluded; the government would promote unlimited abortions by proxy. (2) The one plan excluding abortions may fail to meet families' needs in other ways. (3) Like the funding policy above, this mandate will track the annual fate of the Hyde appropriations rider. If abortion supporters in Congress succeed in eliminating the Hyde amendment from a subsequent year's appropriations bill, *every* private health plan sold to people needing federal subsidies could include unlimited abortions, which all purchasers (and all taxpayers) will be forced to subsidize.

Conscience Rights and Preemption of State Laws: On these important issues the Capps amendment includes some helpful language, but also has deficiencies that depart from current law and need to be corrected: (1) The legislation will not preempt state laws regarding abortion coverage or procedural requirements for abortions. However, it may still preempt state laws protecting conscience rights, or restricting or prohibiting abortion (e.g., laws against partial-birth abortion). (2) The legislation forbids health plans in the Exchange to discriminate against health facilities that do not provide abortions. However, it also forbids them to “discriminate” against health facilities that perform abortions, which could force pro-life health plans for the first time to include abortion facilities in their networks. (3) Beyond the specific context of abortion, no pending bill reflects current federal laws on conscience rights (e.g., see the conscience exemption from the contraceptive mandate in the health program for federal employees).

Much-needed health reform should not be a vehicle for abandoning or weakening federal policies on abortion and conscience. These bills must be amended to reflect longstanding current policies. On funding, for example, inserting the language of the Hyde amendment into these bills would ensure that no one who opposes abortion is forced to pay for other people's abortions in federally subsidized plans. This solution would not prevent insurers from covering abortion in their non-federally-funded plans, or from selling abortion coverage as a supplemental policy funded by the private dollars of those who choose it.

¹ The Senate Health bill does mention abortion in its very inadequate “conscience” provision. It completely protects those who favor abortion; but providers may refuse to perform abortions only for “moral or religious” reasons, and only if there is no “emergency” (a term left undefined); it offers no protection against coerced abortion referrals.

² See “Current Policy on Federal Abortion Funding: What is the Status Quo?”, www.usccb.org/prolife/issues/healthcare/abortionfunding.pdf.