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Obamacare: Impact on Taxpayer Funding of Abortion

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The Patient Protection and Affordable Care Act (PPACA) will spawn a new wave of federal and state legislative debate—as well as judicial action—on abortion funding. Moreover, the executive order signed by President Obama on March 24 to limit federal abortion funding will have little or no effect on the new war over taxpayer-funded abortions.

Health Care Bill Ensures Turmoil. Public policy regarding the use of tax dollars to fund abortion has been stable for decades. The Hyde Amendment, which forbids taxpayer funding of abortion except in cases of rape, incest, or threat to the mother's life, has been attached to the appropriations bill for the Department of Health and Human Services (HHS) each year since 1976.

Congress has also blocked health insurance plans that fund elective abortions from participating in the Federal Employees Health Benefits Program (FEHBP), which offers roughly 250 private plan options to 4 million federal workers and annuitants.¹ Besides these two policies, Congress has adopted a series of other amendments that affect other federal programs in the same way.

After the U.S. Supreme Court upheld the constitutionality of the Hyde Amendment in 1980, the 50 states conducted their own debates on using state revenues to pay for the procedure. Litigation followed as well, as abortion funding proponents claimed that state constitutions contained abortion funding mandates not present in the U.S. Constitution. When all was said and done, 33 states had adopted strong abortion funding limitations, four

state legislatures decided to fund elective abortions, and 13 states were subjected to court rulings obliging them to fund abortions for lower-income residents with state tax dollars.²

The PPACA, notwithstanding President Obama's clarifying executive order of March 24, upsets the status quo and will lead to renewed battles over publicly financed abortion at both the federal and the state levels. The ensuing conflicts are likely to last for years.

Three Ways the Health Care Bill Roils the Abortion Debate. The PPACA will roil the abortion debate in three major ways: first at the federal level, then among the 50 states, and finally in the nation's courts.

1. Federal Abortion Funding Policy. The PPACA appropriates billions in new funds to community health centers, which exist in nearly every city in the country. The PPACA does not apply the Hyde Amendment to the community health centers' new funding stream. By Executive Order 13535, President Obama directed the Secretary of HHS to ensure that "longstanding regulations containing the Hyde language" are applied to future grants made to these centers.³

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The executive order also directed HHS and the Office of Management and Budget to segregate funds for state-based insurance exchanges. This policy prevents the PPACA's new "affordability tax credits" from paying for an insurance plan that covers elective abortion. The policy instead requires the insured to make a separate premium payment of not less than \$12 per year, which will be deemed to pay for the elective abortion coverage.

The Hyde Amendment now hangs by two tender threads. First, Congress may omit the annual Hyde Amendment from the HHS funding bill. Second, President Obama or his successor may quietly amend or repeal Executive Order 13535 with no further action by Congress.

The PPACA, moreover, establishes a new principle for heavy federal subsidies of insurance plans that cover elective abortion, subverting the principle now applied to federal employee plans, which are barred from covering elective abortions in any way.

To avoid these outcomes, Congress would have to adopt permanent Hyde Amendment legislation and a permanent FEHBP policy applicable to all federally subsidized insurance plans. A renewed congressional debate over this issue is now certain.

2. State Abortion Funding Policy. The PPACA gives each state the option to participate in the new subsidy-and-segregated-funds approach the law creates. As a consequence, every state in the nation—including the 33 states that currently limit involvement in publicly funded abortions—faces a legislative debate about its future policy.

In some states, multiple "markets" may exist, meaning in effect multiple exchanges. Under PPACA, unless the state first opts out, each of these markets must have at least one plan that offers coverage of elective abortions.

Even though the PPACA does not require the exchanges to be operating until 2014, several states, including Missouri and Tennessee,⁴ are already advancing bills that will bar from their exchanges insurance plans that cover elective abortions. These debates will now happen in all 50 states. This has already led one national pro-life organization to draft and circulate model legislation that bans abortion coverage from state exchanges.⁵

3. Abortion Funding Policy in the Courts. In defense of his decision to abandon his proposed permanent restriction on abortion funding under the PPACA, Congressman Bart Stupak (D-MI) cited his confidence that the PPACA's provisions will be interpreted as the equivalent of the Hyde Amendment because of the Obama executive order and a colloquy Stupak held with House Energy and Commerce Chairman Henry Waxman (D-CA) prior to the final adoption of the PPACA.⁶ This confidence is misplaced.

To the extent that Executive Order 13535 extends the Hyde Amendment to programs it did not explicitly cover in the PPACA, it may be vulnerable to judicial overruling. At the same time, one should not expect the Obama Justice Department to aggressively defend the President's position from legal challenges. Moreover, there is no legal imped-

1. U.S. Office of Personnel Management, "Federal Civilian Employment," September 2008, at <http://www.opm.gov/feddata/html/geoagy08.asp> (April 19, 2010); Anthem Blue Cross and Blue Shield, "Federal Employee Health Benefit Program," October 2009, at http://www.anthem.com/provider/nv/f5/s5/t1/pw_b130813.pdf (April 19, 2010).
2. Guttmacher Institute, "State Funding of Abortion in Medicaid," April 1, 2010, at http://www.guttmacherinstitute.com/statecenter/spibs/spib_SFAM.pdf (April 13, 2010).
3. President Barack Obama, "Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act," Executive Order 13535, March 24, 2010, at <http://www.presidency.ucsb.edu/ws/index.php?pid=87661> (April 16, 2010).
4. Stephanie Condon, "Battle over Abortion in Health Care Overhaul Moves to States," CBSNews.com, April 5, 2010, at http://www.cbsnews.com/8301-503544_162-20001789-503544.html (April 13, 2010).
5. Anna Wilde Mathews, "States Reignite Abortion Debate," *The Wall Street Journal*, April 8, 2010, at <http://online.wsj.com/article/SB10001424052702303591204575170280629165078.html> (April 13, 2010).
6. Representative Bart Stupak, "Why I Wrote the 'Stupak Amendment' and Voted for Health Care Reform," *The Washington Post*, March 27, 2010, A13.

iment preventing Obama—or any future President who will not have given his or her personal word—from unilaterally rescinding the executive order before it is even litigated.

Even more significant, many judges refuse to rely upon legislative history—including colloquies—in interpreting statutes, because unlike the plain text, legislative history is not voted upon and approved by a majority of Congress.

Justice Antonin Scalia has rightly derided the inconsistent and highly selective court practice of looking to legislative history as akin to looking over the heads of guests to find friends at a cocktail party—that is, judges can almost always find a friendly argument in a crowd and, conversely, ignore or downplay unfriendly ones.⁷

Finally, the unquestioned thrust of judicial interpretation of federal health statutes is that in the absence of the direct application of the Hyde Amendment as an expression of Congress's spend-

ing power under Article 1, Section 9, Clause 7 of the Constitution, those statutes would authorize reimbursements for elective abortion.⁸

Congress and the States Can Act. The continuation of decades-long public policy limiting tax subsidies for abortion will be possible only through new state and federal statutes. For the states, that means new laws barring the inclusion in the exchanges of any plan that offers elective abortions. At the federal level, the only effective measure is a comprehensive statute that covers all funds authorized or appropriated by Congress to federal agencies engaged in health care—that is, a permanent Hyde Amendment.

Until Congress and the states take these steps, the long truce over public funding of abortion is now officially broken.

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7. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia J., concurring, quoting Judge Harold Leventhal).

8. Robert A. Destro, letter to the Honorable Bart Stupak, March 20, 2010, at <http://www.nrlc.org/ahc/DestroLetterToStupakOnCommHealthCenters.pdf> (April 13, 2010).