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As we head into the final days of the health care reform debate, abortion has emerged as a central issue. It was always the intention of those in Congress who drafted the health care reform legislation that the law concerning abortion would simply be left as it has been, which is that federal funding cannot be used for abortions except in cases of rape, incest, or physical life endangerment of the mother. But American abortion politics are never simple, and both the House and Senate bills have been amended to clarify that federal funding will not be used to fund abortions.

It has become clear that the Senate bill must be the platform for health care reform going forward. Because the abortion provisions of the Senate bill cannot be changed through reconciliation (because they do not affect the revenues or outlays of the federal government), it is very important to understand how the Senate bill addresses abortion and how it compares with the House bill. A number of claims have been made in recent days about the Senate health care reform bill which are not accurate. Attached is what I believe to be a true comparison of the House and Senate abortion provisions. I am very familiar with these bills, and believe that their abortion provisions are essentially equivalent. The attached memorandum explains why.

Please let me know if I can provide any further information on this,

Sincerely,

A handwritten signature in black ink, appearing to read 'Timothy S. Jost', written in a cursive style.

Timothy S. Jost

## The House and Senate Bills on Abortion

Timothy Stoltzfus Jost

Professor, Washington and Lee University School of Law

- There are significant differences between the House and Senate bill, but the provisions governing abortion (Sec. 1303 of the Senate bill, pp. 2069-2078) are not among them. Both bills prohibit federal funding of abortions.
- 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).
- The Senate bill, like the House bill, prohibits qualified health plans from discriminating against providers or facilities because of their unwillingness to provide to pay, provide coverage, or refer for abortion. The Senate bill also requires the Office of Personnel Management to assure that at least one of the multi-state plans does not cover non-federally-covered abortions.
- The Senate bill, like the House bill, explicitly does not preempt any state laws regulating abortion
- The Senate bill, like the House bill, explicitly does not change federal law regarding conscience protection or willingness to provide abortion.
- The Senate bill, like the House bill, provides that qualified health plans may not be required to provide abortion as an essential service.
- 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, and indeed, specifically provides that funds authorized for the new school-based health center program cannot be used to pay for abortions.
- The Senate bill creates a new Community Health Center Fund to which it appropriates \$7 billion between 2011 and 2015. Last year community health centers provided prenatal, perinatal, and post-natal/post-partum care to 1 of every 8 children born in the United States, and community health centers are expected to play a key role in providing health care to Americans newly eligible for Medicaid under the legislation. Because this funding is not just authorized but also appropriated by the bill, it has been argued that it is not subject to the Hyde amendment provisions of the annual HHS appropriations act. The Senate bill, however, 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.
- 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.
- There are only four perceptible differences between the Senate and House bill in their treatment of abortion.

- First, the House bill under the Stupak amendment provides that if a health plan is purchased using federal support, abortion coverage must be purchased with private funds under a separate supplemental policy. The Senate bill also prohibits the use of federal funds to purchase abortion coverage, but takes a different approach. If federal premium credits or cost-sharing reduction payments are used to purchase a health plan, the plan must collect a separate privately-paid premium to cover the abortion coverage from the enrollee or enrollee's employer. The amount of the premium must fully cover the cost of the abortion coverage and may not take into account savings to the plan from the plan not having to pay for prenatal care, delivery, or postnatal care when abortions take place. The funds must be kept in a separate account used solely for abortion coverage. State insurance commissioners must ensure that health plans comply with the segregation requirements in accordance with generally acceptable accounting principles and circulars on funds management from the OMB and GAO. Concern has been expressed that plans might use accounting practices that, despite this oversight, allow them to subsidize abortion coverage from federal funds, but if they want to do this for some reason, they could also do it under the House bill. Requiring a separate abortion policy rather than a separate premium is an administrative technicality. It merely requires one more piece of paper. It has also been argued that employees of small businesses will be forced by their employers to pay for abortion coverage through the exchange, but under section 1312 of the Senate bill, an employer cannot choose a health plan for an employee, employees are free to choose their own plan within a tier of coverage specified by the employer. No one will have to purchase abortion coverage under the Senate bill who does not want it, just as under the House bill.
- Second, 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. That is, under the Senate bill, a state may prohibit not only plans that receive a public subsidy from covering abortion, they may also prohibit plans that do not receive a public subsidy but are sold through the exchange from covering abortion. The CBO estimates that 6 million Americans will purchase unsubsidized plans through the exchanges. The House bill does not explicitly allow the states to do this.
- Third, 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.
- Fourth, the Senate bill, but not the House bill, provides for \$25 million a year in grants to the states for assisting pregnant and parenting teens and women. These grants would go to institutions of higher learning, high schools, and community centers that offer pregnant and parenting teens and women the support that they need to get an education and to function.
- The Senate bill would cover 30 million uninsured Americans. 45,000 Americans die prematurely every year from lack of health insurance, according to a recent Harvard study. The Senate bill will save thousands of lives.