Healthcare Reform: A Pro-Life Perspective and a Pro-Life Response

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ABSTRACT: The Congress passed, and President Obama signed into law, a broad-ranging reform of America's healthcare system, the Patients Protection and Affordable Care Act (PPACA) in March 2010. The bill nearly failed to pass the Congress, however, because of concerns about its possible anti-life effects. In the end, pro-life Democrats in the House of Representatives, whose votes were essential to passage of PPACA, accepted President Obama's promise to ensure PPACA was not anti-life. This article will (1) critically examine the process by which PPACA was passed, and (2) evaluate whether the "compromise" that emerged to save the bill respected pro-life concerns. The material in this article was presented to UFL in June 2010. Subsequently, there have been a number of developments – particularly with the implementation of the reform and with the content and enforcement of the "preventive services" mandate – that are not chronicled in this article.

IN MARCH 2010 there were two signing ceremonies related to healthcare reform. First, on March 23, 2010 President Barack Obama signed an historic healthcare reform bill, the Patient Protection and Affordable Care Act (PPACA). In the end, passage of the bill depended upon resolving the issue of abortion funding. In exchange for their votes for the bill, President Obama promised pro-life Democrats in the House that he would issue an executive order to restrict abortion funding in healthcare reform. Then, on March 24, 2010 President Obama issued the executive order.

Long before the President attached his signature to the PPACA and to the executive order, he made two promises regarding abortion and healthcare. At a Planned Parenthood Action Fund event in July 2007, then-candidate Obama stated, "In my mind, reproductive care is essential care, basic care, so it is at the center, the heart of the [healthcare] plan that

I [will] propose."[1] The next day, an Obama spokesman confirmed that "reproductive health services" included abortion.[2]

Then, on September 9, 2009 (after an August recess that will be remembered for its boisterous town hall meetings), President Obama addressed a Joint Session of Congress to outline his vision for a healthcare bill and to clear up any "misunderstandings" about the current proposals.[3] It is of particular note that President asserted: "And one more misunderstanding I want to clear up – under our plan, no federal dollars will be used to fund abortions, and federal conscience laws will remain in place."[4]

The promises made to Planned Parenthood and to Congress (and to the American people) contradict one another. One does not have to be a trained philosopher to understand the basic tenet that something cannot both be and not be at the same time: healthcare reform cannot both have abortion as an essential component, *and* omit it. The question, therefore, is this: which promise did President Obama fulfill? Was abortion a part of the healthcare plan or not?

This paper will first explain the state of the law regarding abortion and federal funding prior to the enactment of PPACA. Second, because healthcare reform originated in the House of Representatives, the paper will give brief treatment to abortion-funding in the original House bill, which did not become law. Third, the paper will examine the provisions of the Senate bill that has now become law. In the fourth section, the paper will discuss final passage of PPACA and evaluate the executive order signed by President Obama. Finally, this paper will look at the pro-

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[1] Barack Obama before Planned Parenthood Action Fund, July 17, 2007, transcribed by Laura Echevarria, accessible at: http://lauraetch.googlepages.com/ barackobamabeforeplanned parenthoodaction video available at www.imoneina million.com/video.php?candidate=obama_ speech.

[2] Mike Dorning's article appeared in the *Chicago Tribune* on July 18, 2007.

[3] At the time of the President's address, two bills had been approved by Congressional committees. H.R. 3200 in the House and S. 1796 in the Senate. Neither bill, however, was ever voted on by the entire chamber.

[4] President Obama's address may be found in its entirety at www.whitehouse.gov/ the_press_ office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care/.

life response to healthcare reform.[5]

FEDERAL LAW AND POLICY ON ABORTION FUNDING

Throughout the healthcare debate, proponents of the bills misled the public about the abortion-funding provisions. Initially, they invoked the Hyde Amendment, a yearly rider to the Labor, Health and Human Services (LHHS) Appropriations bill[6] by stating that the amendment already prohibited funding abortion through healthcare reform. For example, during the August recess, at the Organizing for America National Healthcare Forum, President Obama attempted to assuage pro-life concerns by stating, "There are no plans under health reform to revoke the existing prohibition on using federal taxpayer dollars for abortions. Nobody is talking about changing that existing provision, the Hyde Amendment. Let's be clear about that. It's just not true."[7]

However, whether "anyone was talking about changing...the Hyde Amendment" was irrelevant. The Hyde Amendment (hereafter, sometimes, "Hyde") simply does not apply to PPACA. The Hyde Amendment forbids states from using *certain* federal funds for abortions except when the mother's life is endangered or the pregnancy is the result

[5] There are other anti-life elements of the Senate bill that this paper does not address, but that demand a pro-life response to protect all life under PPACA. These include a failure to protect conscience comprehensively, and required "comparative effectiveness research" that may be used to deny essential care. *See* AUL Legal Staff, "Life Concerns in Senate Healthcare Bill," December 16, 2009, http://www.aul.org/2009/12/life-concerns-in-senate-health-care-reform-bill/.

[6] Named after its original author, Rep. Henry Hyde, the Hyde Amendment was first enacted in 1976 and requires Congressional approval every year. In the 1980 case *Harris v. McRae*, the Supreme Court held that the Hyde Amendment was constitutional, and that the Social Security Act does not require *states* participating in the Medicaid program to fund "medically necessary" abortions for which there is no federal reimbursement under the Hyde Amendment. The Court rejected claims that the federal restriction on abortion funding was invalid as a denial of due process, equal protection, freedom of religion, or as an establishment of religion in violation of the First Amendment. 448 U.S. 297 (1980). The most recent renewal of the amendment as included in the Omnibus Appropriations Act, 2009 (H.R. 1105), was signed into law March 11, 2009 (PL 111-8).

[7] Full remarks by the President are available at www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-the-Organizating-for-America-National-Health-Care-Forum/.

of rape or incest.[8] (It also requires that states cover abortions that meet the federal exceptions.)

However, the Hyde Amendment has a limited application – it only applies to funds authorized through the LHHS Appropriations Act. Each of the proposed bills, including the Senate bill that has now become the law, bypassed the LHHS Appropriations process, and thus bypassed the Hyde Amendment.[9] Thus, the question whether proponents of the health care reform wanted to "change Hyde" was wholly irrelevant.

Another tactic proponents of the bills employed was to distort Hyde's scope. For instance, they claimed that the accounting separation that was ultimately adopted was enough to respect Hyde's "principles."[10] However, this "accounting separation" merely requires insurance companies receiving federal funds to create an account from which they will pay for abortions, containing funds collected directly from citizens or their employers and not from government subsidies. But note: however convincing one may (or may not) find this "accounting mechanism" to be

[8] See Guttmacher Institute, "State Policies in Brief: State Funding of Abortion Under Medicaid" (as of JULY 1, 2009). The following is a breakdown of current state funding of abortion, from the Alan Guttmacher Institute: 32 states and the District of Columbia follow the federal standard and provide abortions only in cases of life endangerment, rape, and incest; 4 of these states also provide state funds for abortions in cases of fetal abnormality; 3 also provide state funds for abortions that are necessary to prevent grave, long-lasting damage to the woman's physical health; 17 states use state funds to provide all or most "medically necessary" abortions not covered under the federal standard; 4 of these states provide such funds voluntarily; 13 do so pursuant to a court order; 1 state covers abortions only in cases of life endangerment, in apparent violation of the federal standard.

[9] The final Senate bill, now the law, creates affordability credits to purchase health insurance through state exchanges for individuals earning up to 400% of the federal poverty level. Although they are called "tax credits," insurers would receive the subsidies directly through the Department of the Treasury. Section 1412. These federal dollars are not subject to annual appropriation.

[10] Comments made by proponents of healthcare reform were often vague so as to imply that either the Hyde Amendment already applied to healthcare reform, or that the healthcare reform bills mirrored the principles of Hyde. See, for example, comments made by Nancy Pelosi about the final Senate bill, "Law prevents federal funding; federal law prevents federal funding of abortion. There is no federal funding of abortion in this bill." Kathryn Lopez, "Re: 'You Lie!'," *National Review*, February 26, 2010, http://www.nationalreview.com/corner/195549/re-you-lie/kathryn-jean-lopez.

in fulfilling Hyde's principle that federal (i.e., taxpayer) funds should not go to paying for abortions, it completely ignores the second principle embodied in Hyde. The Hyde Amendment *expressly* prohibits the use of federal funds *for insurance plans* that cover abortion. The text of the Hyde Amendment states:

> None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for health benefits coverage that includes coverage of abortion.[11]

Thus, Hyde's principles prohibit two things: both "direct" and "indirect" abortion-funding with federal dollars. It is the principle against indirect funding that is violated by permitting federal credits to support insurance plans that cover abortion.

At the time of the healthcare reform debate, no government health plans covered elective abortion. It was not provided in Medicaid, the Federal Employees Health Benefits Program, the State Children's Health Insurance Program, or other programs. Thus, it must be emphasized, the status quo prior to the PPACA was that (1) we do not use tax dollars to pay for abortions *and* (2) we do not use tax dollars to pay for health insurance plans that include abortion coverage.[12]

It is perhaps not cynical to think that the misleading messaging about Hyde and healthcare reform was not due to oversight or misunderstanding.[13] It seems clear proponents of the bills intended to

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[11] §507(c). §507(b) prohibits the direct funding of abortion, "None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion."

[12] For example, in the Federal Employees Health Benefits (FEHB) program, the government contributes to premiums of federal employees in order to allow them to purchase private health insurance. The Financial Services and General Government Appropriations bill that provides funding for the FEHB program has annually prohibited these government contributions from being used towards insurance plans that cover abortion since 1983 (with the exception of 1993-1995).

[13] Eventually, President Obama sought to clarify that by "our plan" (in his address to Congress) he did not mean the actual proposals in Congress, but his "own" plan. http://www.cnsnews.com/news/article/56109 This would be astounding if true – why speak about what "our plan" would do when (a) the plans everyone is talking about are Congressional plans and (b) the details – or existence – of the President's personal "plan" had never been announced? Further, the context of President Obama's statement does not support his assertion. The statement came

deceive the American public, who largely oppose government funding of abortion.[14]

ABORTION FUNDING IN THE HOUSE BILL

As will be explained in detail in the next section, the relevance of the original House bill is extremely limited, for a new bill was substituted for it in the Senate. However, it is relevant in this respect: it set the pro-life standard for healthcare reform.

When it was introduced in the House of Representatives on October 29, 2009, the Affordable Healthcare for America Act (H.R. 3962) allowed private health insurance plans that cover elective abortion to receive government subsidies and explicitly allowed the HHS Secretary to include *all* abortions in the public option.[15] However, this was corrected on November 7, 2009 when the Stupak-Pitts amendment passed in the House (on a vote of 240-195, with 64 Democrats voting for the amendment.)[16]

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in a carefully planned speech to a joint session of Congress. Furthermore, the assertion came in a segment of the speech dedicated to "clearing up misunderstandings."

[14] A CNN/Opinion Research Corporation survey in November 2009 indicated that 61 percent of the public opposes using public money for abortions. *See* http://articles.cnn.com/2009-11-18/politics/abortion.poll_1_public-option-abortion-issue-health-insurance?_s=PM:POLITICS.

[15] Section 222(e)(3).

[16] The 64 Democrats voting for the Amendment were Reps. Jason Altmire (PA), Joe Baca (CA), John Barrow (GA), Marion Berry (AR), Sanford Bishop (GA), John Boccieri (OH), Dan Boren (OK), Bobby Bright (AL), Dennis Cardoza (CA), Chris Carney (PA), Ben Chandler (KY), Travis Childers (MS), Jim Cooper (TN), Jim Costa (CA), Jerry Costello (IL), Henry Cuellar (TX), Kathy Dahlkemper (PA), Artur Davis (AL), Lincoln Davis (TN), Joe Donnelly (IN), Mike Doyle (PA), Steve Driehaus (OH), Brad Ellsworth (IN), Bob Etheridge (NC), Bart Gordon (TN), Parker Griffith (AL), Baron Hill (IN), Tim Holden (PA), Paul Kanjorski (PA), Marcy Kaptur (OH), Dale Kildee (MI), James Langevin (RI), Daniel Lipinski (IL), Stephen Lynch (MA), Jim Marshall (GA), Jim Matheson (UT), Mike McIntyre (NC), Charlie Melancon (LA), Michael Michaud (NE), Alan Mollohan (WV), John Murtha (PA), Richard Neal (MA), James Oberstar (MN), David Obey (WI), Solomon Ortiz (TX), Tom Perriello (VA), Collin Peterson (MN), Earl Pomeroy (ND), Nick Rahall (WV), Silvestre Reyes (TX), Ciro Rodriguez (TX), Mike Ross (AR), John Salazar (CO), Heath Shuler (NC), Ike Skelton (MO), Vic Snyder (AR), Zack Space (OH), John Spratt (SC), Bart Stupak (MI), John Tanner (TN), Gene Taylor (MS), Harry Teague (NM), Charlie Wilson (OH).

Named after Representatives Bart Stupak (D-MI) and Joe Pitts (PA), the amendment accurately extended "the principles" of the Hyde Amendment to the healthcare reform bill.[17] The Stupak-Pitts Amendment provided that no funds authorized or appropriated under the bill could be used to pay for any abortion or to cover any part of the costs of any health plan that included coverage of abortion (except when the mother's life was in danger or the pregnancy was the result of rape or incest). After the Stupak-Pitts Amendment was added, the bill passed the House on a vote of 220-215.

Pro-abortion House members were infuriated that the bill included the Stupak-Pitts Amendment. The Democrat's chief deputy whip in the House, Rep. Debbie Wasserman Schultz (D-FL), stated in an MSNBC interview, "I am confident that when it comes back from the conference committee that that language won't be there. And I think we're all going to be working very hard, particularly the pro-choice members, to make sure that's the case."[18] Rep. Diana DeGette (D-CO) was also adamant, "We're not going to let this into law."[19]

Abortion Funding in the Senate Bill

The final Senate bill, H.R. 3590, passed on December 24, 2009.[20] The bill, which is now the law, violates longstanding federal policy and the principles of the Hyde Amendment by allowing federal subsidies to be applied to insurance plans that cover abortion. Other provisions of the bill could be used to mandate abortion coverage by Exchange plans and even

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[17] As included in the Omnibus Appropriations Act 2009 (H.R. 1105), signed into law March 11, 2009 (PL 111-8), (§507(a)) Americans United for Life has provided a comparison of the Hyde Amendment to the abortion funding provisions of the House-passed and Senate-passed bills that is available at http://www.realhealthcarerespectslife.com/wp-content/uploads/2009/10/Comparison1.pdf.

[18] Michael O'Brien, "Senior Democrat is 'confident' that Stupak amendment will be stripped," *The Hill*, November 9, 2009, http://thehill.com/blogs/blog-briefing-room/news/66969-senior-dem-confident-stupak-amendment-will-be-stripped, video available at http://www.youtube. com/watch?v=VLeoJxVsq1Y&feature=player_embedded.

[19] Alec MacGillis, "Abortion an obstacle to health-care bill," *The Washington Post*, November 9, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/11/09/AR2009110902194.html.

[20] Text available at http://www.govtrack.us/congress/billtext.xpd?bill=h111-3590.

require *all* insurance providers to cover abortion. In addition, the Senate bill provides that if the Hyde Amendment ever fails to be renewed, federal funds may pay *directly* for abortion.

Introduced by the majority leader Sen. Harry Reid (D-NV), the bill initially permitted federal abortion funding in the public option and allowed federal subsidies to apply to insurance plans that covered abortion.[21] Under an amendment added by Sen. Barbara Mikulski (D-MD), *all* insurance plans – even those that do not participate in the new exchanges – must provide coverage for "preventive care" for women.[22] The determination of what is "preventive care" is left to an administrative agency, the Health Resources and Services Administration (HRSA). Lacking a statutory definition of "preventive care" that excludes abortion, HRSA is free to include abortion as "preventive care." In which case, under the new law, all insurance plans, *not just those providing coverage in the exchanges*, would be required to provide abortion coverage.

Some abortifacients, such as Intrauterine Devices (IUDs) and Plan B (the so-called "morning after pill"), are classified by the Food and Drug Administration (FDA) as contraception, even though they can kill an embryo by preventing implantation. The FDA is also considering approval of the drug *ella* as contraception, even though the drug can kill an embryo *after* implantation.[23] There is already a push for HRSA to include "contraception" as "preventive care."[24] Doing so would create a mandate for *all* insurance companies to provide coverage for these abortifacients.[25]

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[21] Text available at http://democrats.senate.gov/reform/patient-protection-affordable-care-act.pdf.

[22] Text of the amendment available at http://mikulski.senate.gov/_pdfs/BAI09N48.pdf.

[23] The FDA approved *ella* on August 13, 2010.

[24] *See* Jorge Dreweke, "Contraception Should be Among Women's Preventive Health Services that are Covered Without Cost," *Guttmacher Institute Media Center*, June 3, 2010, http://www.guttmacher.org/media/nr/2010/06/03/index.html, and Sarah Kliff, "Free birth control under healthcare?," *Politico*, June 1, 2010 http://www.politico.com/news/stories/ 0510/37980.html.

[25] AUL has submitted a comment to the HHS interim final rule for group health plans and health insurance issuers relating to coverage of preventive services under. AUL's comment notes that it would be inappropriate to require group health plans and health insurance issuers to cover elective abortions or abortifacients, including the recently-approved drug ella. Comment available at

An amendment offered by Sen. Lisa Murkowski (R-AK) to ensure abortion would not be classified by the government as "preventive care" or as a "preventive service" was defeated by a vote of 41 to 59. A bipartisan amendment was offered by Senators Ben Nelson (D-NE), Orrin Hatch (R-UT), and Bob Casey Jr. (D-PA) to prevent federally funded abortion (similar to the Stupak-Pitts Amendment that was added to the House bill), and ensure no provision of the bill could be used to create an abortion mandate (responding to concerns about the Mikulski amendment). The amendment effectively failed when it was tabled on a vote of 54-45. Since amendments in the Senate were defeated that would have ensured preventive care did not include abortion, it is clear pro-abortion forces intend it should.

On December 19 2009, the Manager's Amendment to the Reid bill changed the abortion language regarding federal insurance subsidies and purported to be a compromise.[26] The language of the Manager's Amendment, which would go on to become the law, requires an accounting separation of funds by insurance plans that cover abortion and that receive federal dollars.[27] An insurance company offering abortion coverage must keep the dollars they receive from the government in a separate account from the dollars they use to pay for abortions.

This deviates from the federal government's policy not to subsidize insurance plans that cover abortion, whether federal dollars will directly *or indirectly* fund the abortion procedure. In fact, the Senate bill's accounting separation[28] actually mandates that every person who participates in the exchanges and whose insurance plan covers abortion must now pay a minimum of $12 per year *directly* in order to fund abortion. Every enrollee in such a plan (or their employer on their behalf) must write a separate check, for no less than $12.00 per year, for elective abortion coverage, even if that enrollee never intends to have an abortion or opposes abortion on moral grounds.

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http://www.aul.org/wp-content/uploads/2010/09/Americans-United-for-Life-Comment-on-OCIIO.9992.pdf.

[26] Paul Kane, "To Sway Nelson, a Hard-Won Compromise on Abortion Issue," *The Washington Post*, December 20, 2009, http://www.washingtonpost.com/wp-dyn/content/ article/2009/12/19/AR2009121902383.html?hpid=topnews Pro-abortion Sen. Barbara Boxer (D-CA), helped craft the language.

[27] Section 1303 (b)(2).

[28] Section 1303 (b)(2)(B).

Perhaps even more importantly, the bill's limited funding restriction was designed to be eliminated. The bill ties its requirement for an accounting separation to the Hyde Amendment's *continued existence*.[29] Thus, if the Hyde Amendment is not renewed, the restriction on direct funding of abortion within the insurance exchanges lapses. Since the Hyde Amendment must be renewed yearly, it is vulnerable and not "settled" law.[30] The abortion lobby has made it no secret that eliminating the Hyde Amendment is its top priority.[31]

The Manager's Amendment, in part, purported to be a compromise because it allows a state to "opt-out" of funding abortion within its insurance exchange.[32] However, this changes the baseline from one under which federal law and policy, abortion will not even be indirectly federally subsidized, to one requiring states to take *affirmative* legislative action to prohibit federal healthcare funds from being applied to plans that provide abortion. The "opt-out" is also limited in effect. Taxpayer dollars from citizens within the opt-out states can still be used to pay for abortion-providing plans *in non-opt-out states*. Furthermore, the Mikulski amendment, described above, may eventually result in *all* insurance plans being required to cover abortion. Further, the limit on abortion funding is very narrow – there is no prohibition on direct funding of abortion *for other funds appropriated by the bill*, that is, the limit applies *only to the Exchanges*. Thus, all other funding streams under the bill are not covered by an abortion-prohibition. That includes the $9.5 billion appropriated for

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[29] Section 1303 (b)(1)(B).

[30] Despite what certain Democratic members of Congress such as Sen. Richard Durbin (D-IL) claimed, the Hyde Amendment is not settled law, but must be introduced and approved each year. Sen. Durbin's comment was made on *Hardball with Chris Matthews* (MSNBC TV, broadcast July 13, 2009) Transcript, www.msnbc.msn.com/id/31905856/ns/msnbc_tv-hardball_with_chris_matthews/. See Americans United for Life (AUL) Action, "The Vulnerable Hyde Amendment," www.realhealthcarerespectslife.com/?page_id=388#.

[31] Terry O'Neill, President of the National Organization of Women, on the 37th anniversary of Roe v. Wade stated in a blast email, "We stand stronger than ever in our commitment to…repeal the Hyde Amendment…"

[32] Section 1303(a).

Community Health Centers (CHCs),[33] and funds appropriated through the "high-risk pools."[34]

Failure to include a broad abortion-prohibition will prove deadly as courts have long interpreted general healthcare language to include abortion. Consider what originally happened with Medicaid. The legislation creating Medicaid did not mention abortion as a covered service. However, federal courts held that but for the Hyde Amendment, abortion *would* fall within "many of the mandatory care categories including 'family planning,' 'outpatient services,' 'inpatient services' and 'physician services.'"[35] These court decisions mean that without explicit language in healthcare reform legislation prohibiting abortion funding, mandatory abortion funding *will* be read into the law by the courts.

The changes to the underlying bill made by the Manager's Amendment were enough to gain the support of 60 Democrats in the Senate, and the bill passed on December 24, 2010.[36]

FINAL PASSAGE & THE EXECUTIVE ORDER

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[33] The Senate bill self-appropriated $7 billion in funding for CHCs. The reconciliation bill passed by the House and Senate increased that amount to $9.5 billion. H.R. 4872, Reconciliation Act of 2010, http://docs.house.gov/rules/hr4872/111_hr3590_engrossed.pdf.

[34] Until 2014, when state insurance exchanges begin, the Pre-Existing Condition Insurance Plan (PCIP) requires states to provide health coverage for individuals who have been uninsured for at least six months and have a pre-existing condition or have been denied health coverage because of a health condition, commonly referred to as "high-risk pools." The subsequent implementation of the "high-risk pools," covered by $5 billion in federal subsidies, confirmed that a comprehensive Congressional measure is necessary to ensure there will be no federal funding of abortion under the PPACA despite the Executive Order. See William Saunders, "Healthcare reform and executive order did not prohibit federal funding for abortion," *The Washington Post, Guest Voices*, July 30, 2010.

[35] *Planned Parenthood v. Engler*, 73 F.3d 634 (6th Cir. 1996), http://openjurist.org/73/f3d/634/ planned-parenthood-affiliates-of-michigan-v-engler-k-j. See also *Hope Medical Group for Women v. Edwards*, 63 F.3d 418 (5th Cir. 1995); *Little Rock Family Planning Services v. Dalton*, 60 F.3d 497 (8th Cir. 1995), cert. denied, 116 S.Ct. 777 (1996); *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), cert. denied, 116 S.Ct. 569 (1995).

[36] Vote results available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396.

On March 3, the White House announced its expectation that Democrats use the reconciliation process and push the Senate-passed bill through the House.[37] This unusual process was politically necessary for the Democrats because the election of Scott Brown on January 19, 2010 to replace the deceased Edward Kennedy, made the prospect of reconciling the House and Senate bills ,and then passing that amended bill in the Senate, impossible.[38]

With Brown's election, the Republicans had 41 votes in the Senate, breaking the Democrats' filibuster-proof majority. Since all the Republicans opposed the sweeping healthcare bills, they were not going to support a revised bill. Employing the usual process would require healthcare reform to begin anew, something polls reflected most Americans wanted.[39] Thus, it was "necessary" from the President's point of view for the House to pass the Senate bill. After the fact, to "amend" the Senate bill, the House could pass a "reconciliation bill," which would then go to the Senate for consideration. The reconciliation process, which was intended to pass budgetary changes to existing laws, is considered "privileged" in the Senate, meaning it is not subject to debate and therefore not subject to a filibuster.[40] Thus, the Democrats would only need 51 votes in the Senate to pass the reconciliation bill. There were several differences between the bill originally passed by the House and the Senate-passed bill that the President was asking the House to approve. However, the real stumbling block was abortion-funding.

Only hours before the House vote, in a stunning surprise to pro-life advocates, Rep. Bart Stupak (D-MI) and his group of six pro-life

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[37] Shailagh Murray and Lori Montgomery, "Obama calls for reconciliation to prevent filibuster on health-care reform," *The Washington Post*, March 4, 2010, http://www.washingtonpost. com wp-dyn/content/article/2010/03/03/AR2010030302213.html.

[38] "Brown Wins Massachusetts Senate Race," *CNN*, January 19, 2010, http://www.cnn.com/ 2010/POLITICS/01/19/massachusetts.senate/index.html?hpt=T1.

[39] Rasmussen national polls showed 54% of Americans opposed the proposed Senate bill on March 21, 2009 – a number consistent with polling results over the last several months. http://www.rasmussenreports.com/public_content/politics/current_events/healthcare/september_2009/health_care_reform.

[40] See Martin B. Gold, *Senate Procedure and Practice* (Lanham MD: Rowman & Littlefield Publishers, Inc., 2008), pp 153-55.

Democrats,[41] who had successfully led the effort to attach pro-life language to the original House-passed version of healthcare reform, announced that they would vote *for* the Senate bill. In return, President Obama promised to sign an executive order to apply the Hyde Amendment principles to the new legislation. Before the vote, in an exchange with Rep. Harry Waxman (D-CA), Rep. Stupak stated on the House floor that,

> Throughout the debate in the House, Members on both sides of the abortion issue have maintained that current law should apply. Current law with respect to abortion services includes the Hyde amendment. The Hyde amendment and other similar statutes to it have been the law of the land on Federal funding of abortion since 1977 and apply to all other healthcare programs – including SCHIP, Medicare, Medicaid, Indian Health Service, Veterans Healthcare, military healthcare programs, and the Federal Employees Health Benefits Program.
>
> The intent behind both this legislation and the Executive order the President will sign is to ensure that, as is provided for in the Hyde amendment, that healthcare reform will maintain a ban on the use of Federal funds for abortion services except in the instances of rape, incest, and endangerment of the life of the mother.[42]

Rep. Waxman responded,

> [T]hat is correct. I agree with the gentleman from Michigan that the intent behind both the legislation and the Executive order is to maintain a ban on Federal funds being used for abortion services, as is provided in the Hyde amendment.[43]

However, while the Executive Order referenced the Hyde Amendment, it failed to apply its principles to PPACA. First, the Executive Order cannot

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[41]Attending the press conference where Rep. Stupak announced his decision to vote for the bill were five other Democrats who had previously objected to the abortion-funding language: Reps. Steve Driehaus (D-OH), Marcy Kaptur (D-OH), Nick Rahall (D-WV), Alan Mollohan (D-WV) and Kathy Dahlkemper (D-PA). Rep. Stupak stated that Rep. Joe Donnelly (D-IN.), who was unable to attend the press conference, would also vote yes. http://thehill.com/homenews/house/88143-stupak-dems-reach-abortion-deal-eight-or-nine-will-vote-yes.

[42] Congressional Record, Volume 156, Issue 43 (Sunday, March 21, 2010), http://www.gpo. gov/fdsys/pkg/CREC-2010-03-21/html/CREC-2010-03-21-pt1-PgH1854-2.htm.

[43] Ibid.

change or negate the *statutory* abortion-funding language. Executive orders can have only the "force of law" when they do not contradict the law on which they are based.[44]

Second, the Executive Order misleads when it says it applies and extends the Hyde Amendment to the new healthcare law.[45] The Hyde Amendment prohibits federal funding for abortion *and* federal funding for insurance plans that cover abortion.[46] The Order reiterates the false description of the Hyde Amendment as only applying to direct abortion funding and not to insurance plans that cover abortion.[47]

However, the Executive Order *does* apply the Hyde Amendment to new funds appropriated to Community Health Centers (CHCs).[48] This provision may be effective,[49] and that would be important because $9.5

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[44] The fact that statutes cannot be overridden by executive orders or regulations has been repeatedly affirmed by the United States Supreme Court. In 2006, the Supreme Court struck down an executive order issued by President Bush to invoke military commission jurisdiction over Hamdan because Congress had *impliedly* prohibited this action. *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006).

[45] Section 1 wrongly states that the Act maintains the Hyde Amendment restrictions. "The Act maintains current Hyde Amendment restrictions governing abortion policy and extends those restrictions to the newly created health insurance exchanges." Full text of the Executive Order is available at http://www.whitehouse.gov/the-press-office/executive-order-patient-protection-and-affordable-care-acts-consistency-with-longest.

[46] Supra note 11.

[47] Section 2 of the Order requires "strict compliance" with the language of the new law that is *inconsistent* with the Hyde Amendment. "I hereby direct the Director of the OMB and the Secretary of HHS to develop..., a model set of segregation guidelines for State health insurance commissioners to use when determining whether exchange plans are complying with the Act's segregation requirements, established in section 1303 of the Act, for enrollees receiving Federal financial assistance."

[48] Section 3 of the Executive Order states, "Under the Act, the Hyde language shall apply to the authorization and appropriations of funds for Community Health Centers under section 10503 and all other relevant provisions."

[49] However, there is precedent for a court to rule that without explicit statutory language prohibiting abortion funding, abortion must be covered. In healthcare legislation, where there is no statutory prohibition on abortion funding, courts have found implied Congressional intent to mandate abortion funding. Supra note 35. Courts have also held that an Executive Order cannot override Congress' implied intent. Supra note 44.

billion in new funding is available to CHCs. Pro-abortion groups have been campaigning to get abortions performed in such centers and to have Planned Parenthood clinics qualify to become CHCs.[50]

Nonetheless, the Executive Order fails to address broad mandates that may be used to force all insurance plans to cover abortion.[51] The Executive Order fails to direct the Health Resources and Services Administration not to include abortion in the definition of "preventive care," something that it could have done. Finally, an executive order does not "codify" anything. It exists at the will of the President. It can be undone, or modified, by the stroke of President Obama's pen. In other words, it is less "permanent" than is the underlying statute.

Still, with President Obama's promise to sign the Executive Order, enough Democratic votes were secured, and the Senate-created bill passed the House 219 to 212.[52] The block of Democrats allied with Rep. Stupak provided the margin for final passage.[53]

A PRO-LIFE RESPONSE

Pro-life organizations, such as Americans United for Life, are working to enact new state and federal laws and regulations to protect all life under PPACA.

State Solutions. One option pro-life Americans have is to pass laws in their states to "opt out" of having plans that cover abortions offered in

[50] Groups such as the Reproductive Health Access Project and the Abortion Access Project strongly advocate for the inclusion of abortion services in community health centers as part of providing "primary care" and preventive services. http://www.reproductiveaccess.org/getting_ started/faq.htm.

[51] For example, the back-door abortion mandate created by the Mikulski amendment requiring all insurance companies to cover "preventive care" for women. Supra note 22.

[52] Final vote results available at http://clerk.house.gov/evs/2010/roll165.xml. It should be noted that not all pro-life Democrats accepted the executive order. Rep. Daniel Lipinski (D-IL), who voted for the House-passed bill in November, voted against the bill. Other pro-life Democrats who voted against the Senate bill are Representatives Jason Altmire (PA), John Barrow (GA), Marion Berry (AR), Dan Boren (OK), Bobby Bright (AL), Ben Chandler (KY), Travis Childers (MS), Lincoln Davis (TN), Tim Holden (PA), Jim Marshall (GA), Jim Matheson (UT), Mike McIntyre (NC), Charlie Melancon (LA), Collin Peterson (MN), Mike Ross (AR), Heath Shuler (NC), Ike Skelton (MO), and Gene Taylor (MS).

[53] See note 41.

their state exchanges.[54] To assist state legislators in opting-out of providing health insurance plans with abortion coverage through their exchanges, Americans United for Life (AUL) has developed "The Federal Abortion Mandate Opt-Out Act."[55] More than thirty states have either introduced an opt-out bill, are planning to introduce a bill shortly, or are laying the groundwork to introduce a bill as soon as their legislative calendars permit. Those that have passed such legislation into law include Arizona, Mississippi, and Tennessee.[56] Opt-out legislation in Florida and Missouri are pending legislative action.[57] In Oklahoma, opt-out legislation was vetoed by Governor Brad Henry (D), without enough time left in the legislative session to override the veto.[58] In Louisiana, opt-out legislation has passed the House and is pending in the Senate. It is expected to pass and be signed into law by Governor Bobby Jindal (R).[59]

One positive outcome from the healthcare reform debate is that many more Americans are now aware that a large number of private insurance plans, even their own, cover elective abortions.[60] As a result, some states are going even farther than preventing insurance plans that cover

[54] Permitted by Section 1303 (a).

[55]AUL has drafted the "Federal Abortion Mandate Opt-Out Act," model legislation that states can use to opt-out of having health insurance plans that offer abortion coverage as part of their mandated state health insurance exchanges, as well as an accompanying legislative guide. The model and guide are available at http://www.aul.org/Legislative_Guides.

[56] Arizona Senate Bill 1305 available at http://www.azleg.gov/Format Document.asp?inDoc= /legtext/49leg/2r/laws/0114.htm. Mississippi Senate Bill 3214 available at http://billstatus.ls. state.ms.us/documents/2010/pdf/SB/3200-3299/SB3214SG.pdf. Tennessee House Bill 2681 available at http://state.tn.us/sos/acts/106/pub/pc0879.pdf.

[57] Since the date of the author's speech, the Missouri bill has become law. Missouri Senate Bill 793 available at http://www.senate.mo.gov/10info/pdf-bill/perf/SB793.pdf. The Florida legislation, House Bill 1143, was vetoed by Governor Charlie Crist (R).

[58]Statement by Gov. Henry regarding his veto is available at http://www. ok.gov/governor/display_article.php?article_id=1400&article_type=1.

[59] The Louisiana legislation became law in July. Louisiana H.B. 1247, "The Abortion Insurance Opt-Out Act", available at http://www.senate.mo.gov/ 10info/pdf-bill/perf SB793.pdf.

[60] In fact, according to the Guttmacher Institute, "87% of typical employer-based insurance policies in 2002 covered *medically necessary* or *appropriate* abortions."

abortions from participating in their state exchanges. Currently, five states have laws, dating back as far as 1978, that prohibit private insurance plans operating within their states from covering elective abortions. To assist legislators from other states in prohibiting health insurance coverage of elective abortions within their states, AUL has developed "The Abortion Coverage Prohibition Act."

State legislators are also seeking to prohibit abortion coverage for *state employees* (as is prohibited in various federal programs for *federal* employees[61]). Fourteen states currently prohibit the use of state funds for abortion coverage (with no or limited exceptions) for state employees. To assist state legislators in prohibiting the use of state taxpayer funds for health insurance coverage of elective abortions for state employees, AUL has developed "The Employee Coverage Prohibition Act."

Federal Solutions. A bill recently introduced in Congress would correct the abortion funding problem in PPACA. On April 22, 2010, Congressmen Joe Pitts (R-PA) and Dan Lipinski (D-IL) introduced H.R. 5111, "The Protect Life Act."[62] Modeled after the Stupak-Pitts Amendment to the original House bill, The Protect Life Act would prohibit the use of any funds in the PPACA for abortions or abortion coverage. It would also protect healthcare providers from discrimination because they do not want to participate in abortions. Finally, it would prohibit the federal government from requiring private insurance companies to cover abortion, thereby closing a loophole created by the PPACA. H.R. 5111 currently has 121 cosponsors.[63]

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[61] Supra note 12.

[62] Text available at http://www.house.gov/pitts/documents/HR5111Protect Life Act.pdf. Rep. Lipinski was the only pro-life Democrat who voted for the House-passed bill (that contained the Stupak-Pitts amendment) in November and who also voted against the pro-abortion final bill, due to its abortion-funding language.

[63]On July 29, 2010, Congressmen Chris Smith (R-NJ) and Dan Lipinski (D-IL) introduced H.R. 5939, "The No Taxpayer Funding for Abortion Act." There are currently 162 cosponsors of this bill. The No Taxpayer Funding for Abortion Act would establish a permanent government-wide prohibition on federal funding for abortions and abortion coverage. The bill would also codify conscience protections for healthcare providers who do not want to participate in abortions. The No Taxpayer Funding for Abortion Act would eliminate the struggle that prolife Congressmen face every year to ensure that federal funds are not used for abortions, by enshrining this principle in federal statutory law. The text of H.R. 5939 is available at http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.5939.

CONCLUSION

In March 2010, President Obama signed the PPACA and an Executive Order. While the nation awaited issuance of regulations by HHS in accord with the Order, an honest evaluation of the PPACA shows that the promise of candidate Obama (that abortion would be at the heart of his healthcare plan), and not the promise of President Obama (that no federal funds would be used for abortion), came to fruition.

The argument frequently made during the healthcare reform debate by proponents of healthcare reform that a government takeover of healthcare is "one of the most powerful tools for reducing the numbers of abortions"[64] is suspect. Looking at global abortion data, it is clear that abortion restrictions have a more obvious relationship to reducing abortion rates in developed nations than whether or not the government runs the healthcare system.[65]

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[64] T.R. Reid, "Universal healthcare tends to cut the abortion rate," *The Washington Post,* March 14, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/03/12/ AR2010031202287.html.

[65] Importantly, as Michael New, a political science professor at the University of Alabama, has noted, the UN statistics misrepresent abortion rates in the United States. The most recent data available, from 2005, reported by the pro-abortion Guttmacher Institute and the Centers for Disease Control are 19.4 and 15, respectively. These figures put the United States on par with the abortion rates for Canada and Great Britain -- universal healthcare nations listed by Reid - and are actually lower than other government-run healthcare countries, such as Australia and Sweden.

Furthermore, while abortion rates are declining in the United States, they are rising in parts of Europe – including Great Britain. While these nations have not altered their laws on healthcare coverage, many have liberalized their abortion laws suggesting, again, that the latter is what drives abortion rates.

Studies confirm that abortion restrictions have a direct impact on the incidence of abortion. A 2004 study in The Journal of Law and Economics analyzed the relationship between changes in abortion policies and abortion rates in post-communist Eastern Europe (where under communist rule healthcare was "universal" and abortion rates were tremendously high). Modest restrictions on abortion were found to reduce abortion rates by around 25 percent. Poland, as one of the few countries to have significantly tightened restrictions on abortion, is an excellent case-study. In 1993 abortion was restricted to cases where the life or health of the mother was threatened, where the child was disabled, or in cases of rape – and they have strictly enforced these grounds. The number of abortions in Poland has drastically decreased since.

Furthermore, Prof. Michael New has cited experience from within the United States that further disproves the theory that universal healthcare lowers abortion rates.[66] For example, Hawaii's abortion rate consistently exceeds the national average, even though since 1974 the state has required all employers to provide relatively generous healthcare benefits to any employee who works 20 hours a week or more and has consistently had one of the lowest rates of uninsured adults in the country. Moreover, while the Guttmacher Institute reports the national abortion rate fell by 13.8% between 1995 and 2005, in Tennessee the abortion rate fell by only 3.3%, even though the state program TennCare, created in 1994, has expanded Medicaid to cover those who cannot afford insurance or who had been denied coverage by an insurance company.

From a pro-life perspective, healthcare reform was a disaster. It liberalized access to abortion, which will only increase its incidence. Further, it did so at taxpayer expense. It is up to pro-life Americans to respond.

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[66] Michael New, "Why universal healthcare will not reduce abortion rates," *National Review Online*, March 15, 2010, http://www.nationalreview.com/critical-condition/47414/why-universal-health-care-will-not-reduce-abortion-rates/michael-j-new.