



National Developments

Health Care Reform

The implementation of the “high-risk pools”¹ in individual states, covered by \$5 billion in federal subsidies under the Pre-existing Condition Insurance Plan, confirmed that a comprehensive congressional measure is necessary to ensure that there will be no federal funding of abortion under the Patient Protection and Affordable Care Act (PPACA), despite President Obama’s executive order.²

Plans permitting the use of federal funds for elective abortions were initially approved by the Department of Health and Human Services (HHS) for three states. Pro-life groups pointed out that the language in the Pennsylvania plan would not prohibit federal funds from being used for abortion. The New Mexico state plan, involving a \$37 million high-risk pool, explicitly *included* federal funding for elective abortions. The Maryland state plan, with \$85 million in its federally funded high-risk insurance pool, also expressly covered abortions.

On July 14, HHS spokeswoman Jenny Backus announced that the high-risk pools would not be permitted to include elective abortion coverage, citing prohibitions

¹Until 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.” States can either run this new program with resources made available by the Patient Protection and Affordable Care Act or rely on the Department of Health and Human Services to provide coverage.

²For a recent summary of deficiencies under the health care reform law and the executive order, see “AUL Action Legal Memo on Abortion,” September 10, 2010, <http://takeaction.aul.org/aul-action-legal-memo-on-abortion-funding/>.

in other federal programs, such as the Federal Employee Health Benefits Plan, as a basis for the HHS decision.³ This statement, however, was not backed by HHS regulations prohibiting abortion funding.⁴

The HHS view was contested by pro-abortion groups who asserted that abortion coverage was not prohibited in the plans. The Center for Reproductive Rights wrote, “Contrary to assertions by the White House, there’s no current legal basis for the policy. The executive order issued by the President on abortion only addressed rules for segregating funds for *abortion* coverage in the healthcare exchanges and limits on community health centers.”⁵

A July 23, 2010, memorandum from the Congressional Research Service confirmed what pro-life and pro-abortion organizations had noted.⁶ Summarizing the CRS findings, thirteen senators wrote in a July 28 letter to the Secretary of HHS, “According to CRS, neither the restrictions in PPACA, Presidential Executive Order 13535 nor the recently released HHS contract materials actually prohibit a state high-risk pool from covering elective abortions.”⁷

Finally, on July 29, two weeks after its initial statement, HHS issued regulations on the high-risk pools ensuring that the funds will not be used for elective

³The HHS statement is available at <http://www.hhs.gov/news/press/2010pres/07/20100714d.html>.

⁴Cardinal Daniel DiNardo, Chairman of the Committee on Pro-Life Activities of the U.S. Conference of Catholic Bishops (USCCB), praised HHS’s action but underscored the continued need for permanent prohibitions against taxpayer funding of abortion. Chris Korzen of Catholics United mischaracterized the comments of Cardinal DiNardo in an attempt to argue that PPACA and the executive order already prohibit abortion funding. The author responded to Korzen and defended Cardinal DiNardo’s statement. See William L. Saunders Jr., “Health Care Reform and Executive Order Did Not Prohibit Federal Funding for Abortion,” *Washington Post Guest Voices*, July 30, 2010, http://newsweek.washingtonpost.com/on_faith/guestvoices/2010/07/health_care_reform_and_executive_order_did_not_prohibit_federal_funding_for_abortion.html.

⁵“Center Denounces Obama Administration Policy Excluding Abortion Coverage from High-Risk Pools,” Center for Reproductive Rights news release, July 19, 2010, original emphasis, <http://reproductiverights.org/en/press-room/center-denounces-obama-administration-policy-excluding-abortion-coverage-from-high-risk-p>.

⁶CRS to Senate Committee on Health, Education, Labor, and Pensions, “High Risk Pools under PPACA and the Coverage of Elective Abortion Services,” 3, <http://help.senate.gov/imo/media/doc/CRS%20Report%20for%20HELP%2007232010.pdf>. Pro-life groups argued from the outset that nothing in PPACA or the executive order explicitly prohibited federal funding for abortion. See, for example, AUL memos “Abortion Tax and Other Problems in President’s Proposal,” February 22, 2010, <http://www.aul.org/2010/02/the-abortion-tax-and-other-problems-in-senator-reid%e2%80%99s-amendment/>, and “Why the Executive Order Does Not Prevent Taxpayer Funded Abortion,” March 21, 2010, <http://www.aul.org/2010/03/aul-legal-team-why-the-executive-order-does-not-prevent-taxpayer-funded-abortion/>.

⁷The senators’ letter to Kathleen Sebelius is available at <http://help.senate.gov/imo/media/doc/Letter%20to%20Sebelius%20HRP%20and%20Abortion%20FINAL%20doc2.pdf>.

abortions.⁸ However, this action does not close other anti-life loopholes in the PPACA and the executive order. Nancy-Ann DeParle, director of the White House Office of Health Reform, wrote on the White House blog that “the [high-risk pool] program’s restriction on abortion coverage is not a precedent for other programs or policies [covered by the health care reform law] given the unique, temporary nature of the program and the population it serves.”⁹ The only way to ensure that federal funds under the PPACA will not be used for abortions is to pass a federal law to that effect.¹⁰

Two bills have been introduced in the House of Representatives to do so. On April 22, Congressmen Joe Pitts (R-PA) and Dan Lipinski (D-IL)¹¹ introduced the Protect Life Act (H.R. 5111).¹² The act would amend the PPACA by prohibiting the use of any funds under it for abortions or abortion coverage. It would also prohibit the federal government from requiring private insurance companies to cover abortion, thereby closing one loophole. H.R. 5111 would also protect health care providers from discrimination for refusal to participate in abortions. The bill currently has 124 cosponsors.

H.R. 5939, the second bill, introduced on July 29 by Congressmen Chris Smith (R-NJ) and Dan Lipinski, is more comprehensive.¹³ The No Taxpayer Funding for Abortion Act would establish a permanent government-wide prohibition of federal funding for abortions and abortion coverage, eliminating the need for (a) appropriations riders (such as the Hyde Amendment, which must be renewed annually), (b) regulations (which can be overturned by new administrations), and (c) executive orders (which exist at the will of a president). H.R. 5939 also codifies the Hyde-Weldon conscience clause.¹⁴ The bill currently has 174 cosponsors.

⁸“Pre-Existing Condition Insurance Plan Program: Interim Final Rule,” 45 CFR part 152, *Federal Register* 75.146 (July 30, 2010): 45014–45033, <http://edocket.access.gpo.gov/2010/pdf/2010-18691.pdf>.

⁹Nancy-Ann DeParle, “Insurance for Americans with Pre-Existing Conditions,” White House blog, July 29, 2010, <http://www.whitehouse.gov/blog/2010/07/29/insurance-americans-with-pre-existing-conditions>.

¹⁰AUL has filed a comment to the HHS regulation noting that—in light of long-standing federal law prohibiting the use of federal tax dollars for abortions and the authority given by the PPACA to the Secretary of HHS to prohibit federal funding for abortions through the PCIP program—the regulation’s prohibition of abortion funding should remain in place.

¹¹Rep. Lipinski was the only pro-life Democrat who voted for the House-passed bill that contained the Stupak-Pitts amendment in November and also voted against the pro-abortion final bill because of its abortion-funding language.

¹²The text of H.R. 5111 is available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.5111>.

¹³The text of H.R. 5939 is available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.5939>.

¹⁴Subsections 508 (d)(1) and (2) of the Hyde-Weldon Amendment (added annually to Labor, Health and Human Services appropriations bill) state, “None of the funds made available in this Act may be made available to a Federal agency or program, or to a State

While challenges to the PPACA's mandate to purchase insurance continue in the courts,¹⁵ on August 3, by a margin of nearly three to one, Missouri voters passed Proposition C, a measure "to deny the government authority to penalize citizens for refusing to purchase private health insurance or infringe upon the right to offer or accept direct payment for lawful healthcare services."¹⁶ The aim is probably to provide the basis for a suit similar to those already filed by Virginia, Florida, and seventeen other states.

Two weeks earlier, Missouri became the fifth state to opt out of the PPACA's explicit abortion funding scheme by prohibiting health plans that offer elective abortion coverage¹⁷ from participating in its health insurance exchange. (Gov. Jay Nixon [D] allowed the restriction to become law without his signature.) The new legislation also contains an informed consent provision requiring that women be advised of the risks of abortion and receive information on the physical development of the unborn child and on available pregnancy support resources. Other provisions of the law require women to be given the opportunity to view an ultrasound, to learn about the pain an unborn child feels during a late-term abortion, and to have access to a telephone if they are at the abortion facility under duress from a third party.

Louisiana's opt-out legislation also became law in July.¹⁸

Approval of ella

In early August, ninety Congressmen sent a letter to the Food and Drug Administration expressing concern about the drug *ella*, which was under consideration for approval as an "emergency contraceptive" by the agency.¹⁹ The bipartisan letter raised

or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions. In this subsection, the term 'health care entity' includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan." *Consolidated Appropriations Act 2008*, Public Law 110-161, sec. 508(d), *U.S. Statutes at Large* 121 (2007): 2209.

¹⁵See William L. Saunders Jr., "Washington Insider," *National Catholic Bioethics Quarterly* 10.2 (Summer 2010): 237.

¹⁶The results of the August 3 vote can be found at http://www.sos.mo.gov/enrmaps/20100803/ballot_Issue_map.asp?eid=283&oTypeID=20&Saturday,%20September%2011,%202010. The text of Proposition C as it appeared on the ballot can be found at <http://www.sos.mo.gov/elections/2010ballot/>.

¹⁷Elective abortion is defined by the law as "an abortion for any reason other than a spontaneous abortion or to prevent the death of the female upon whom the abortion is performed." Missouri Senate Bill 793, sec. 376.805.1, adopted April 15, 2010, <http://www.senate.mo.gov/10info/pdf-bill/perf/SB793.pdf>.

¹⁸Louisiana H.B. 1247 (Act 941), effective July 2, 2010, <http://www.senate.mo.gov/10info/pdf-bill/perf/SB793.pdf>.

¹⁹Letter to Margaret Hamburg, FDA commissioner, August 2, 2010, <http://www.aul.org/wp-content/uploads/2010/09/08-02-10-Letter-to-Commissioner-Hamburg-Re-Ulipristal-Acetate.pdf>. The signers included fourteen Democrats.

concerns regarding (a) the similar chemical makeup of *ella* and the abortion drug RU-486, (b) the absence of evidence that the drug does not cause abortion, (c) the failure to address the dangers of off-label use (i.e., for conditions other than those approved by the FDA), and (d) the lack of information about health risks.

Nonetheless, the FDA approved *ella* on August 13 as an “emergency contraceptive,” despite the fact that the agency’s own prescribing instructions indicate that *ella* can cause abortions. (Like RU-486 [mifepristone], *ella* is a selective progesterone receptor modulator. By blocking progesterone, an SPRM can either prevent a developing human embryo from implanting in the uterus or starve an implanted embryo to death.)

The FDA’s prescribing instructions raise other red flags about *ella*, corresponding to those raised in the Congressional letter.

Classifying *ella* as a contraceptive means that money from federal and state taxpayers will be used to subsidize the drug through “family planning” programs such as Title X.²⁰ The FDA’s allowance for *ella* to be mis-marketed as a “contraceptive” also has implications for its funding under the new health care reform law. The PPACA requires all insurance plans—even those that do not participate in the new exchanges—to provide coverage for “preventive care” for women.²¹ The determination of what is “preventive care” is left to an administrative agency, the Health Resources and Services Administration. There is already a push to include contraception as “preventive care.”²² Since *ella* has been approved as a contraceptive and has not been labeled as an abortion drug, a decision to classify “contraception” as preventive care would funnel federal tax dollars toward it.²³

In addition, since many states do not provide comprehensive protection of conscience, health care providers who have ethical and moral concerns about the

²⁰ *Family Planning Services and Population Research Act of 1970*, Public Law 91-572, *U.S. Statutes at Large* 84 (1971): 1504.

²¹ The requirement is part of an amendment added by Senator Barbara Mikulski (D-MD), http://mikulski.senate.gov/_pdfs/BAI09N48.pdf.

²² 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>. Planned Parenthood’s vice president of public policy, Laurie Rubiner, adds about the amendment, “We see this as a tremendous opportunity to get no-cost birth control in the bill and ensure that this part of women’s health is covered under preventive health.” Sarah Kliff, “Free Birth Control under Health Care?” *Politico*, June 1, 2010, <http://www.politico.com/news/stories/0510/37980.html>.

²³ 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. 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*. The comment is available at <http://www.aul.org/wp-content/uploads/2010/09/Americans-United-for-Life-Comment-on-OCIIO.9992.pdf>.

drug may not be protected.²⁴ In some states, health care providers are required by law to provide and dispense emergency contraception.

Abortion in Military Hospitals

During the Senate Armed Services Committee mark-up on May 27, Senator Roland Burris (D-IL) offered an amendment to the Department of Defense (DOD) Authorization Bill to strike section 1093(b) of the *U.S. Code*, a provision that prohibited abortions from being performed by DOD personnel or in DOD medical facilities (except when the life of the mother is at risk, or when the pregnancy is the result of rape or incest).²⁵ The amendment passed by a vote of 15 to 12.²⁶ Since the underlying law does not differentiate between domestic and overseas facilities, the amendment's effect would be worldwide.

A separate provision of existing law prohibits any use of DOD funds for abortion except to save the life of the mother.²⁷ Proponents of the Burris amendment argue that since this funding restriction remains intact, elective abortions will be funded without the use of federal dollars.

However, DOD funds (federal taxpayer dollars) *are* used (and will continue to be used) in connection with the creation and maintenance of military facilities and the provision of equipment and personnel to perform abortions. In its Statement of Administration Policy issued September 21, the Obama administration explicitly

²⁴Three states (Alabama, New Hampshire, and Vermont) provide no protection for health care providers, and forty-five states protect only certain health care professionals from participating in specific procedures. A state-by-state guide to conscience protection laws is available at <http://www.aul.org/your-state/>. Whether existing federal law and the conscience regulations promulgated by the Bush administration would protect health care providers is perhaps an open question, as the administration specifically declined to define abortion. "Ensuring That Department of HHS Funds Do Not Support Coercive or Discriminating Policies or Practices in Violation of Federal Law; Final Rule," 45 CFR part 88, *Federal Register* 73.245 (December 19, 2008), <http://edocket.access.gpo.gov/2008/pdf/E8-30134.pdf>. Moreover, the Obama administration has been actively seeking to undo the Bush regulations. See William L. Saunders Jr., "Washington Insider," *National Catholic Bioethics Quarterly* 9.2 (Summer 2009): 234–235. See also William L. Saunders Jr. and Michael Frago, "Conscience Protection in Health and Human Services," *Engage* 10.2 (July 2009): 115–120, http://www.fed-soc.org/doclib/20090720_SaundersEngage102.pdf.

²⁵*U.S. Code*, title 10, sec. 1093. Mark-up is the meeting of a committee to review and amend the text of a bill before sending it to the full House or Senate for review. For more background on the issue of abortions and military facilities, see William L. Saunders Jr., "Abortion and Military Facilities: The Effect of the Burris Amendment in the Department of Defense Authorization Bill," Federalist Society New Federal Initiatives Project, September 17, 2010, http://www.fed-soc.org/publications/pubid.1966/pub_detail.asp.

²⁶Senator Ben Nelson (D-NE) was the only Democrat to vote against it.

²⁷"Funds available to the Department of Defense may not be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." *U.S. Code*, title 10, sec. 1093(a).

announced its support for this change in law to allow elective abortions in military hospitals.²⁸

Also on September 21, cloture on the motion to proceed to debate on the bill (which requires sixty votes) failed in the Senate on a vote of 56 to 43. Senator Blanche Lincoln (D-AR) and Senator Mark Pryor (D-AR) joined Senate Republicans in voting against the motion.²⁹ Majority Leader Harry Reid (D-NV) also joined the “nay” votes, but as a tactical move. By voting with the prevailing side, he is permitted by procedural rules to ask that the motion be reconsidered. However, it is unlikely that the Senate will revisit the bill before the midterm elections.

While the DOD authorization bill is sometimes characterized as a “must-pass” bill, it is possible for Congress to approve DOD funding for the next fiscal year without passing the proposed authorization bill. They may opt for a “continuing resolution,” thus maintaining current law and current spending amounts. Congress may also include DOD funding in an omnibus bill.

Litigation about Embryonic Stem Cell Research

On August 23, in *Sherley v. Sebelius*, U.S. District Court Judge Royce Lamberth overturned President Obama’s executive order of March 11, 2009, and the guidelines thereunder, which provided federal funding for embryonic stem cell research.³⁰

In 2009, the National Institutes of Health (NIH) published guidelines permitting embryonic stem cell research under a legal analysis that distinguished federal dollars being spent to destroy embryos from federal dollars used to conduct research on the embryos after they were destroyed.³¹

In his August decision, Judge Lamberth held that federal funding violates established federal law—the Dickey-Wicker amendment, a limitation (“rider”) that has been attached yearly since 1996 to the HHS appropriations bills.³² Dickey-Wicker

²⁸The statement is available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/111/saps3454s_20100921.pdf.

²⁹Senator Lisa Murkowski (R-AK) did not vote. The roll call vote is available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00238.

³⁰*Sherley v. Sebelius*, no. 1:09-cv-1575 (DC Cir. August 23, 2010). President Obama, “Removing Barriers to Responsible Scientific Research Involving Human Stem Cells,” executive order no. 13505, *Federal Register* 74.46 (March 11, 2009): 10667–10668, <http://edocket.access.gpo.gov/2009/pdf/E9-5441.pdf>. In June 2010, the appellate court had reversed a previous ruling of Judge Lamberth’s that dismissed plaintiffs’ claims for lack of standing. *Sherley v. Sebelius*, 610 F.3d 69 (D.C. Cir. 2010). For background on the case, see William L. Saunders Jr., “Washington Insider,” *National Catholic Bioethics Quarterly* 10.2 (Summer 2010): 242.

³¹National Institutes of Health Guidelines on Human Stem Cell Research 2009 [final], NIH Stem Cell Information Web site, <http://stemcells.nih.gov/policy/2009guidelines.htm>.

³²For the text of the Dickey-Wicker amendment, see Public Law 104-99, sec. 128, *U.S. Statutes at Large* 110 (1996): 34, <http://history.nih.gov/research/downloads/PL104.99.pdf>.

prohibits federal funding for “research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death.”

The order issued by Judge Lamberth was temporarily suspended by the DC Circuit Court of Appeals on September 9, 2010.³³ Although Judge Lamberth’s order has been placed on hold while the court reviews the Department of Justice’s motion to suspend his ruling,³⁴ the panel stated that its decision “should not be construed in any way as a ruling on the merits.” A three-judge panel is set to hear oral arguments regarding the injunction on September 27, 2010.³⁵

Supreme Court Nomination—Elena Kagan

President Obama had his second opportunity to fill a vacancy on the U.S. Supreme Court when Justice John Paul Stevens announced his retirement in April. On May 10, President Obama selected U.S. Solicitor General and former Harvard Law School Dean Elena Kagan to replace Justice Stevens on the U.S. Supreme Court.

Americans United for Life (AUL) released daily memoranda detailing the pro-life concerns about her record.³⁶ First, in 2006, Kagan identified former Israeli Supreme Court Judge Aharon Barak, a world-renowned judicial activist, as her “judicial hero.”³⁷ Second, Kagan described Justice Thurgood Marshall’s constitutional interpretation as “a thing of glory.”³⁸ While that may be admirable in the abstract, in reality Justice Marshall’s agenda-driven opinions concerning abortion showed little concern for the most vulnerable people in our country—the unborn. Third, Kagan’s own writings and statements reveal a fondness for agenda-driven judging as well as a profound affection for the study and application of international and comparative law.³⁹

³³Rob Stein, “Appeals Court Lifts Ban on Stem Cell Funding,” *Washington Post*, September 9, 2010, http://voices.washingtonpost.com/checkup/2010/09/appeals_courts_lifts_ban_on_st.html.

³⁴The Justice Department filed an emergency motion arguing for lifting the stay “to avoid terminating research projects midstream, invalidating results in process, and impeding or negating years of scientific progress toward finding new treatments for devastating illnesses.” *Sherley v. Sebelius*, “Memorandum in Support of Defendants’ Emergency Motion to Stay Preliminary Injunction Pending Appeal and for Expedited Briefing and Consideration” (August 31, 2010), <http://www.washingtonpost.com/wp-srv/politics/documents/brief.pdf>.

³⁵John A. Hawkinson, “Three-Judge Panel Asks for Oral Arguments on Stem Cell Ban,” *The Tech*, September 17, 2010, <http://tech.mit.edu/V130/N37/stemcells.html>.

³⁶See AUL’s Kagan File, May 10–June 28, 2010, <http://www.aul.org/initiative/scotus-nominee/>.

³⁷See Dawn Eden, “The ‘Judicial Hero’ Memo,” AUL’s Kagan File, May 11, 2010, <http://www.aul.org/2010/05/auls-kagan-file-the-judicial-hero-memo/>; and “Israel’s Aharon Barak Receives 2006 Gruber Justice Prize,” Gruber Foundation news release, 2006, http://www.gruberprizes.org/PressReleases/PressRelease_2006_Justice.php.

³⁸See Dawn Eden, “The ‘Marshall’ Memo,” AUL’s Kagan File, May 14, 2010, <http://www.aul.org/2010/05/auls-kagan-file-the-marshall-memo/>; and Elena Kagan, “For Justice Marshall,” *Texas Law Review* 71.6 (1993): 1129, 1130.

³⁹See Americans United for Life, “The ‘Foreign Justice’ Memo,” AUL’s Kagan File, May 21, 2010, <http://www.aul.org/2010/05/auls-kagan-file-the-foreign-justice-memo/>; “The

In April 1988, then-clerk Kagan wrote to Justice Marshall that a Circuit Court decision mandating taxpayer funding for the elective abortions of inmates was “well intentioned.”⁴⁰ Kagan extensively criticized the Supreme Court decision in *Rust v. Sullivan*, where the Court upheld the constitutionality of HHS regulations that prohibit Title X family planning funds from being “used in programs where abortion is a method of family planning.”⁴¹ Kagan argued that the Title X regulations amount to unconstitutional viewpoint discrimination.⁴²

Significantly, from 1995 to 1999, Kagan advised President Clinton on life issues, crafted his policy positions on these issues, and promoted anti-life positions that, at times, extended beyond what President Clinton was inclined to do. In particular, Kagan appears to have lobbied two major medical groups—the American College of Obstetricians and Gynecologists and the American Medical Association—to change their positions on partial-birth abortion.⁴³

Despite the strong case against Kagan’s confirmation, the Senate voted 63 to 37 on August 5 to confirm her. Senator Ben Nelson (D-NE), who supported the PPACA despite pro-life objections, became the first Democrat to oppose a Democratic president’s nominee since Justice Marshall’s nomination in 1967. Kagan received six more “no” votes than Sonia Sotomayor received during her nomination last year. These are the most “no” votes received by any Democrat nominee who was eventually confirmed.

Agency Appointment—Donald Berwick

In early July, President Obama bypassed the usual Senate confirmation procedure to install Donald Berwick, a supporter of health care rationing, as director of the Centers for Medicare and Medicaid Services.⁴⁴

‘Oxford Thesis’ Memo,” June 17, 2010, <http://www.aul.org/2010/06/auls-kagan-file-the-oxford-thesis-memo/>; and “The ‘Agenda-Driven Judge’ Memo,” June 11, 2010, <http://www.aul.org/2010/06/auls-kagan-file-the-agenda-drive-judge-memo/>.

⁴⁰See Americans United for Life, “The ‘Marshall Memo Number 5,’” June 4, 2010, <http://www.aul.org/2010/06/auls-kagan-file-the-marshall-memo-number-5/>.

⁴¹*Rust v. Sullivan*, 500 U.S. 173 (1991). See Dawn Eden, “The ‘Abortion Funding’ Memo,” May 13, 2010, <http://www.aul.org/2010/05/auls-kagan-file-the-abortion-funding-memo/>.

⁴²See Elena Kagan, “The Changing Faces of First Amendment Neutrality: *R.A.V. v. St. Paul*, *Rust v. Sullivan*, and the Problem of Content-Based Underinclusion,” *Supreme Court Review* 29 (1992): 29–72.

⁴³See AUL Action, “Investigating the Confirmation Testimony of Elena Kagan before the Senate Judiciary Committee and the Negative Impact of Her Amendment of the January 1997 Policy Statement of Obstetricians and Gynecologists on the Federal Administration of Justice and the U.S. Supreme Court (2010),” July 15, 2010, <http://www.aul.org/featured-images/Kagan-Ethics-Report.pdf>.

⁴⁴Robert Pear, “Obama to Bypass Senate to Name Health Official,” *New York Times*, July 6, 2010, http://www.nytimes.com/2010/07/07/health/policy/07recess.html?_r=1.

In 2008, Dr. Berwick admitted that he is “in love” with the socialized British system of rationed health care.⁴⁵ In an interview in 2009, he stated, “The decision is not whether or not we will ration care—the decision is whether we will ration with our eyes open.”⁴⁶

Medicare and Medicaid together insure nearly one-third of all Americans. The new health care law calls for major changes in their programs, including the expansion of Medicaid to cover six million more people. Dr. Berwick’s appointment raises concern that he will direct these changes in a way that does not adequately respect all human life.

International Developments

Kenya’s President Mwai Kibaki signed a new constitution on August 27, following a national referendum passed by voters earlier in the month.⁴⁷ Although purporting to protect the right to life from conception, the constitution contains a broad “health” exception that permits abortion on demand.⁴⁸ The insertion of this pro-abortion language was the work of a “committee of experts” that included three non-Kenyans.⁴⁹ It reverses the country’s previous anti-abortion laws, such as those reflected in Kenya’s penal code.

⁴⁵ Alan Mascarenhas, “Don Berwick Appointed to Drive Health Care Changes, Sidestepping Congress,” *Newsweek*, July 7, 2010, <http://www.newsweek.com/blogs/the-gaggle/2010/07/07/don-berwick-appointed-to-drive-health-care-changes-sidestepping-congress.html>.

⁴⁶ Katherine T. Adams, “Rethinking Comparative Effectiveness Research: An Interview with Dr. Donald Berwick,” *Biotechnology Healthcare*, June 2009, 36, <http://www.biotechologyhealthcare.com/journal/fulltext/6/2/BH0602035.pdf>.

⁴⁷ “Kenya President Ratifies New Constitution,” *BBC Mobile*, August 27, 2010, <http://www.bbc.co.uk/news/world-africa-11106558>.

⁴⁸ The text of the new constitution is available at <http://www.nation.co.ke/blob/view/-/913208/data/157983/-/18do0kz/-/published+draft.pdf>. Article 26(4) permits abortion when, in the opinion of a “trained health professional” (which is undefined), “the life or health of the mother is in danger.” According to the World Health Organization, the “directing and coordinating authority for health” within the United Nations, “health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity” (<http://www.who.int/about/en> and <http://www.who.int/suggestions/faq/en>).

⁴⁹ Zoe Alsop, “Kenya’s Abortion Ban Fires Constitutional Debate,” *Women’s eNews*, March 19, 2010, <http://www.womensradio.com/articles/-Kenyas-Abortion-Ban-Fires-Constitutional-Debate/4698.html>. The Kenyan Parliamentary Select Committee sent a draft to the Committee of Experts with the pro-abortion language removed. The PSC draft permitted abortion only in the case where, “in the opinion of a registered medical practitioner, the life of the mother is in danger.” Text of the draft is available at http://kenyalaw.org/Downloads/NAIVASHA_DRAFT_AS_FROM_PSC_TO_COE.pdf. The committee then reinserted the abortion language, and the final constitution was accepted by the entire Parliament with no votes on any of the sections. (The rules were such that any change in the document meant they would have to start over.)

Abortion on demand is not what Kenyans want. A recent poll showed that 69 percent of Kenyans are against abortion.⁵⁰ The special rules for the referendum did not allow Kenyans to vote on specific provisions. Thus Kenyans were forced to either reject or approve the proposed constitution in its entirety.

In May three members of Congress—Chris Smith (R-NJ), Ileana Ros-Lehtinen (R-FL), and Darrell Issa (R-CA)—requested an investigation into whether the Obama administration violated the Siljander Amendment.⁵¹ That law, applicable to foreign assistance programs since 2006, states that “none of the funds made available under this Act may be used to lobby for or against abortion.”⁵² In July, the U.S. Agency for International Development (USAID) issued estimates that \$23 million in federal funds were spent by the Obama administration in support of passage of the pro-abortion Kenyan constitution.⁵³ Representative Smith asked for further investigations, citing the USAID report and information about recent actions taken by the U.S. Embassy in Kenya to suspend or conclude the work of U.S. aid grantees there, “presumably because of issues we and the Inspector General have raised.”⁵⁴

In response, the State Department’s Office of Inspector General issued a report stating that the law was not violated because there was no evidence that U.S. officials made “any private or public statements . . . expressing either a positive or negative position on the abortion provision in the draft Kenyan constitution, nor did they attempt to influence any Kenyan’s opinion, either positively or negatively, on the abortion provision.”⁵⁵ The USAID’s Office of Inspector General issued a second report exonerating the administration. Rep. Smith called the new USAID report “the most superficial report I’ve seen in my 30 years in Congress,” criticizing, among other things, the report’s distinction between admitted U.S. spending in Kenya to “achieve a yes vote” and “direct lobbying.”⁵⁶

⁵⁰Rep. Chris Smith, “Buying Kenya’s Pro-abortion Constitution,” *Washington Times*, September 1, 2020, <http://www.washingtontimes.com/news/2010/sep/1/buying-kenyas-pro-abortion-constitution/>.

⁵¹The Congressmen’s letters requesting the investigation are available at <http://chris.smith.house.gov/News/DocumentSingle.aspx?DocumentID=184721>

⁵²See the *Consolidated Appropriations Act 2010*, Public Law 111-117, division F, title III, *U.S. Statutes at Large* 123 (2009): 3324, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ117.111.pdf.

⁵³See “U.S. Taxpayer Funding for Kenyan Referendum Soars to \$23 Million,” Congressman Chris Smith news release, July 16, 2010, and supporting materials at <http://chrissmith.house.gov/News/DocumentSingle.aspx?DocumentID=198790>.

⁵⁴Rep. Smith’s statement, “‘Unprecedented Interference’ by Obama Pushes Pro-abortion Constitution,” July 30, 2010, is available at http://chrissmith.house.gov/UploadedFiles/2010_07_30_Kenya_Press_Conference_Statement.pdf.

⁵⁵Department of State Office of Inspector General, Review of Department of State Activities concerning the Draft Kenya Constitution, report ISP-I-10-77, August 2010, <http://oig.state.gov/documents/organization/146146.pdf>.

⁵⁶“Report Clears Obama Administration Over Role in Kenya Election, as Congressman Objects,” FoxNews.com, October 2, 2010, <http://www.foxnews.com/politics/2010/10/02/congressman-slams-ig-report-obama-abortion-push-kenya/>.

State Developments

Louisiana governor Bobby Jindal signed two pro-life bills into law—an ultrasound measure that requires abortion providers to offer an ultrasound to the mother⁵⁷ and a law that prohibits doctors from being covered under medical malpractice insurance when performing elective abortions.⁵⁸

On August 18, South Carolina governor Mark Sanford signed a law requiring a twenty-four-hour waiting period before an abortion. The waiting period begins after the woman receives required written materials from an abortionist concerning the genetic contribution of each parent, the age of the fetus, and the availability of free sonograms.⁵⁹ The new law further requires the State Department of Health and Environmental Control to make available on its Web site these written materials and Web site links to pregnancy centers that offer free ultrasounds. South Carolina is the twenty-fifth state to mandate a twenty-four-hour waiting period before a woman may undergo an abortion. The state previously required a one-hour reflection period.

On August 24, Alaska became the thirty-seventh state to enact a parental notification requirement when voters approved Ballot Measure 2, the Alaska Parental Involvement Act, by 55.4 to 44.6 percent.⁶⁰ The measure requires an abortionist to notify at least one parent or guardian before performing an abortion on a minor.

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⁵⁷Louisiana S.B. 528 (now Act 888), signed July 6, 2010, <http://www.legis.state.la.us/billdata/streamdocument.asp?did=708291>.

⁵⁸Louisiana H.B. 1453 (Act 950), signed July 6, 2010, <http://www.legis.state.la.us/billdata/streamdocument.asp?did=719969>.

⁵⁹South Carolina Act 268, signed June 24, 2010, http://www.scstatehouse.gov/sess118_2009-2010/bills/3245.htm.

⁶⁰The text of the act is available at http://www.elections.alaska.gov/petitions/09PIMA/09PIMA_severed.pdf. The votes are recorded at <http://soaelections.gci.net/data/results.htm>.