Response to "Episcopal Oversight" by Timothy Jost (*Commonweal* magazine, June 4 issue)

Posted by Richard Doerflinger of the USCCB Secretariat of Pro-Life Activities on *Commonweal*'s web site, June 14, 2010

Last November, Timothy Jost criticized the Stupak amendment on abortion funding, widely supported in the Catholic community, as going "too far," and he warned against the undue influence of the Catholic Church on public policy: "Let us not become another Iran" (www.politico.com/arena/perm/Timothy_Stoltzfus_Jost_1F801CB1-72F6-470F-89A2-AC72B14A18BA.html). It is welcome news that he now finds "nothing objectionable" in the new bill the Catholic bishops support (H.R. 5111), which will amend the health care reform law with the Stupak policy. (For the USCCB's May 20 letter supporting H.R. 5111 and other background, see www.usccb.org/healthcare.)

Instead of rejoicing in this new common ground, however, he repeats old misrepresentations (and offers new ones) of the law and of the bishops' position, to argue against a real need for the bill. Taking his charges in order:

1. First, he still holds wrongly that current laws like the Hyde amendment ban only direct federal funding of particular abortion procedures, and thus that our effort to prevent federal subsidies for overall health plans that cover abortion is some kind of innovation. It's true that one can one mean several different things by the phrase "prevent federal funding of abortion." One can mean: (a) prevent the traceable and direct use of a federal dollar for a particular abortion procedure; (b) prevent subsidies for benefits packages (e.g., health plans) that include abortion among the benefits one has to sign up for; or (c) prevent subsidies for entire institutions such as hospitals that also "independently" do abortions. The Hyde amendment and all other current federal laws go as far as (b). Jost is wrong to think they only do (a), and wrong to imagine that those working to preserve Hyde must really be trying to reach out and do (c). If he thinks the new law should violate the Hyde policy, while separating abortion funds and other funds WITHIN each plan, because he thinks that's just as strong as obeying (b), he should argue that. (It is a hard argument to make: Pro-abortion leaders in Congress accepted such a policy, while fiercely opposing our Hyde policy, precisely because they know the latter is much stronger.)

2. Jost further says health plans receiving federal subsidies will fund abortions "independently" under the new law. But there is nothing independent about it. New plans covering abortion will owe their very existence and their fiscal survival to the offer of federal subsidies. The insurance companies that choose to cover abortion will present it as an integral part of the package, and will advertise only the COMBINED cost of ALL the benefits including abortion. (Why? Because the new health law REQUIRES them to bury abortion in the fine print of the benefits summary, and to advertise only this total unified cost – see sec. 1303(b)(3).) All who purchase such a plan – even if they do so for entirely unrelated reasons relating to their family's health

needs, and even if they did not want abortion coverage and didn't know it was included – will be forced without exception to pay a distinct fee solely for other people's abortions. (Why? Because the law will REQUIRE the insurer to charge "each enrollee" for this "service" actively sought by a relative few – see sec. 1303(b)(2)(B)(i)). Every enrollee in these plans who is forced by the federal government to pay for other people's abortions will have only the cold comfort that this mandatory fee is called a premium rather than a tax.

3. The USCCB has previously answered Jost's claims about the bill's appropriation of new funds for, among other things, services at Community Health Centers. Use of these funds for abortion is not prevented by the Hyde amendment (or old regulations implementing Hyde), because this new funding bypasses the Hyde amendment. (Hyde covers only funds appropriated "in THIS Act" – that is, in the annual appropriations act that Hyde amends, which is not the source of these new funds.) In the absence of a relevant statutory barrier to using these new funds for abortion, courts will look first to the language of the Community Health Centers statute – and that statute REQUIRES the centers to provide (among other things) "family planning" and "gynecology" services, the same categories that the courts have consistently read in the Medicaid statute to require funding of abortion. That judicial application of the statute has been blocked in the past (at community health centers as well as in Medicaid and many other programs) only by Congress's constantly renewed passage of provisions like the Hyde amendment. No one has claimed before that this statutory mandate can be overridden by mere executive order – not even when Congress's failure to address this problem in the early 1970s was allowing 300,000 federally funded abortions a year. But in any case, if H.R. 5111 does only what you see the executive order as trying to do, why not support it?

4. Jost says the health law is already adequate on conscience protection, because it allows existing federal conscience laws like the Weldon amendment to remain intact. Here he makes the same mistake he made on the Hyde amendment. Like Hyde, Weldon only covers entities receiving funds from the Act that Weldon amends, the Labor/HHS appropriations act ("None of the funds made available IN THIS ACT," it begins). What we need is not language that leaves traditional conscience policies in place where they already were, but language that APPLIES these policies to the NEW funding streams created by the new health care act. Why not do so?

5. Jost further claims that the USCCB now sees a new conflict between federal conscience law and the federal Emergency Medical Treatment and Active Labor Act (EMTALA). This is untrue. As our letter makes clear, we see a potential conflict between federal conscience law and some STATE laws trying to force all health care providers to provide "emergency" abortions. The new health law says that when there is a conflict the state abortion mandate, not the federal protection for conscience, will prevail – which could end the ability of any health provider to practice in accord with Catholic teaching on abortion. Already the state of California has sued against the existing Weldon amendment, claiming that it prevents the state from enforcing its own mandate for "emergency" abortions deemed to serve either life or health. On March 18 a federal court said this claim is not yet ripe for adjudication. The conflict needs to be resolved

now, as conscience laws will be hollow shells if any state can ignore them simply by defining abortion in various circumstances as an “emergency.”

Mr. Jost concludes by praising the new health reform law’s positive provisions, including those serving pregnant women and supporting adoption. Here we agree. But those provisions are not served by his “all or nothing” stance of insisting that this long and complicated legislation is perfect in every detail and must be inviolable. That can only feed the conservative call for total repeal. Let’s address these legitimate concerns now, while retaining all that is good in health care reform.