

COMMENTS ON PRESIDENTIAL ANNOUNCEMENT OF MARCH 9, 2009
RE HESC RESEARCH

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Wisdom of the President's policy

- This research will use only embryos barred from the womb, embryos that have begun development but will never begin gestation. Their developmental potential is so bounded that they cannot develop beyond about day 10.
- This biological fact of bounded developmental potential, coupled with the duty of beneficence, renders it virtuous to donate such embryos for humanitarian use.
- This moral reasoning compels assent even within views usually interpreted as opposed to embryo use.

Reference: *The Morality of Embryo Use* (Cambridge University Press, 2008), chs. 2, 5.

Need for legislation enabling the policy

[Note: The Dickey Amendment, imposed for the purpose of precluding taxpayer complicity in embryo destruction, appears in the Omnibus Appropriations Act, 2009, as passed by the House on Feb. 25 [H.R. 1105, Division F, Title V, sec. 509, p. 671], and on which a motion to close debate was presented Friday in the Senate. See <http://thomas.loc.gov>. Enactment seems likely by Wednesday, when temporary funding by continuing resolution will end.]

- The operative provisions of the executive order declare, first, that NIH “may support . . . embryonic stem cell research . . . to the extent permitted by law,” and second, that “this order shall be implemented consistent with applicable law and subject to the availability of appropriations.”¹
- Authorization is one thing, appropriation of funds another. The order defers to the statute on point, the appropriations act containing the Dickey Amendment.
- This rider, construed according to legislative intent, prohibits use of appropriated funds for any research, including studies of embryonic stem cells, whose demand for materials induces

¹ Executive Order 13505, “Removing Barriers to Responsible Scientific Research Involving Human Stem Cells,” 74 Fed. Reg. 10667–10668 (March 11, 2009), §§ 2 and §4(a).

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embryo destruction.

- It has mistakenly been supposed to the contrary that a 1999 memorandum of HHS counsel established that the executive branch may, consistently with the Dickey Amendment, fund *use* of embryonic stem cells so long as it does not fund the embryo-destructive process of *deriving* the cells. That memorandum, oft cited but seldom read, did not distinguish or discuss use and derivation. Taking up the rider’s ban on funding for “research in which . . . embryos are destroyed,” the memorandum confined itself to arguing for the truism that pluripotent cells fall outside the definition of “embryo.” The memorandum never considered the reach of “research in which”
- A proponent of the Dickey Amendment who legislates to prevent taxpayer complicity will oppose embryo destruction not only when two steps removed from the taxpayers, as when performed by government-funded investigators, but also when three steps removed, as when induced by demand generated by government-funded investigators.
- Press and policymakers have relied upon impressions of documents, including the 1999 HHS memorandum and the new executive order, without reading them.

Reference: *The Morality of Embryo Use*, p. 215n.; ‘[Mechanics for Implementing New Federal Policy on Embryonic Stem Cell Research](#),’ December 30, 2008, pp. 4-17.

- To enable the presidential policy, it falls to Congress to carve an exception—as does the Castle-DeGette bill—to the Dickey Amendment. Congress may authorize funding in a bill that begins with the phrase “notwithstanding any other provision of law,” as does the Castle-DeGette bill, and that goes on to provide that the Secretary “may expend appropriated funds for” embryonic stem cell research.
 - Thereby Congress will partially override the rider without repealing it.
- The executive order launches NIH on a process—formulating guidelines, receiving grant applications, and selecting grant recipients—whose length will afford Congress ample time to enact legislation.
- NIH may prepare to make grants, but funds cannot flow until Congress overrides the Dickey Amendment.

Role of legislation

- What legislation will achieve will not be embodiment or codification of the executive order in statute, since the order effectively says only that “NIH is authorized to do what NIH is allowed to do.” Nor can legislation render the presidential policy permanent, since any statute may be repealed. The role of legislation is to permit funding. Hence in relation to implementation of the presidential policy, legislation is not a complement, it is a prerequisite.
- Legislation would be crucial even if there were no Dickey Amendment. As a society, our best prospects for a stable consensus will arise from action by the people’s representatives after open discussion.

References: *The Morality of Embryo Use*, pp. 140-141, 234; ‘[Mechanics for Implementing New Federal Policy on Embryonic Stem Cell Research](#),’ p. 18; [interview by President-Elect Obama with CNN](#), January 16, 2009.

Contents of legislation

- The legislation should differ from the Castle-DeGette bill in several respects. The act should define as eligible for research only embryos that have been barred from the womb by the unilateral decisions of patients, and have been donated by them for the specific purpose of medical research or therapy. These constraints require specification so that the described research will be morally permissible research, as best we may understand the latter by reference to an overlapping consensus. Since the Castle-DeGette bill allows the use of funds for embryonic stem cell derivations (a little-known fact), a congressional resolve against funding derivations will require an express provision to that effect. Because the Dickey Amendment constrains not authorization but appropriations, the legislation should provide that the Secretary “may expend appropriated funds for” the described research. Since President Obama has disavowed the prior policy favoring hurlclone research,² legislative endorsement of that policy would best be omitted.³ Since his executive order provides for guidelines and periodic review thereof, legislation need not provide for such.

² A policy declared in [Executive Order 13435](#), 72 Fed. Reg. 34589-34593 (June 22, 2007), criticized in my ‘[Wishful Thinking Will Not Obviate Embryo Use](#),’ *Stem Cell Reviews* 1: 309–315 (2005), and revoked by §5(b) of the order of March 9, 2009.

³ The endorsement remains in the recently introduced [S. 487](#), §3.

- The drafting deficiencies may be overcome by a recommended text that puts authorized research on a sound and intuitively clear moral foundation.

Reference: '[Mechanics for Implementing New Federal Policy on Embryonic Stem Cell Research](#),' pp. 17-24, and Appendix, 1.