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## **Abortion: Legislative Response**

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## Abortion: Legislative Response

### SUMMARY

In 1973, the U.S. Supreme Court held that the Constitution protects a woman's decision whether to terminate her pregnancy, *Roe v. Wade*, 410 U.S. 113, and that a state may not unduly burden the exercise of that fundamental right by regulations that prohibit or substantially limit access to the means of effectuating that decision, *Doe v. Bolton*, 410 U.S. 179. But rather than settling the issue, the Court's rulings have kindled heated debate and precipitated a variety of governmental actions at the national, state, and local levels designed either to nullify the rulings or limit their effect. These governmental regulations have, in turn, spawned further litigation in which resulting judicial refinements in the law have been no more successful in dampening the controversy.

In recent years, the rights enumerated in *Roe* have been redefined by decisions such as *Webster v. Reproductive Health Services*, which gave greater leeway to the States to restrict abortion, and *Rust v. Sullivan*, which narrowed the scope of permissible abortion-related activities that are linked to federal funding. The decision in *Planned Parenthood v. Casey*, which established the "undue burden" standard for determining whether abortion restrictions are permissible, gave Congress additional impetus to move on statutory responses to the abortion issue, such as the Freedom of Choice Act.

In each Congress since 1973, constitutional amendments to prohibit abortion have

been introduced. These measures have been considered in committee, but none has been passed by either the House or the Senate.

Legislation to prohibit a specific abortion procedure, the so-called "partial-birth" abortion procedure, was passed in the 108<sup>th</sup> Congress. The Partial-Birth Abortion Ban Act appears to be one of the only examples of Congress restricting the performance of a medical procedure.

Since *Roe v. Wade*, Congress has attached abortion funding restrictions to numerous appropriations measures. The greatest focus has been on restricting Medicaid abortions under the annual appropriations for the Department of Health and Human Services. This series of restrictions is popularly known as the "Hyde Amendments." Restrictions on the use of appropriated funds affect numerous federal entities, including the Department of Justice, where federal funds may not be used to perform abortions in the federal prison system except in cases of rape or endangerment of the mother. Such restrictions also impact the District of Columbia, where both federal and local funds may not be used to perform abortions except in cases of rape, incest or endangerment of the mother, and affect international organizations like the United Nations Population Fund, which receives funds through the annual Foreign Operations appropriations measure.

## **MOST RECENT DEVELOPMENTS**

On September 8, 2004, a Nebraska federal district court concluded that the Partial-Birth Abortion Ban Act of 2003 is unconstitutional for several reasons: it fails to include a health exception that would allow the so-called “partial-birth” abortion procedure to be performed to preserve the health of the mother; it imposes an undue burden on women by banning, under certain circumstances, the D&E or dilation and evacuation procedure, the most common abortion procedure during the second trimester of pregnancy; and it is unconstitutionally vague. The court’s decision in *Carhart v. Ashcroft* is the third to consider the constitutionality of the act. The courts in two other cases, *Planned Parenthood v. Ashcroft* and *National Abortion Federation v. Ashcroft*, reached similar conclusions. Additional information on those cases is available in the *Legislation in the 108<sup>th</sup> Congress* section of this report.

## **BACKGROUND AND ANALYSIS**

### **Judicial History**

The primary focus of this issue brief is legislative action in the 108th Congress with respect to abortion. However, discussion of those legislative proposals necessarily involves a brief discussion of the leading U.S. Supreme Court decisions concerning a woman’s right to choose whether to terminate her pregnancy. For a more detailed discussion of the relevant case law, see CRS Report 95-724, *Abortion Law Development: A Brief Overview*.

#### ***Roe v. Wade* and *Doe v. Bolton***

In 1973, the Supreme Court issued its landmark abortion rulings in *Roe v. Wade*, 410 U.S. 113, and *Doe v. Bolton*, 410 U.S. 179. In those cases, the Court found that Texas and Georgia statutes regulating abortion interfered to an unconstitutional extent with a woman’s right to decide whether to terminate her pregnancy. The Texas statute forbade all abortions not necessary “for the purpose of saving the life of the mother.” The Georgia enactment permitted abortions when continued pregnancy seriously threatened the woman’s life or health, when the fetus was very likely to have severe birth defects, or when the pregnancy resulted from rape. The Georgia statute required, however, that abortions be performed only at accredited hospitals and only after approval by a hospital committee and two consulting physicians.

The Court’s decisions were delivered by Justice Blackmun for himself and six other Justices. Justices White and Rehnquist dissented. The Court ruled that states may not categorically proscribe abortions by making their performance a crime, and that states may not make abortions unnecessarily difficult to obtain by prescribing elaborate procedural guidelines. The constitutional basis for the decisions rested upon the conclusion that the Fourteenth Amendment right of personal privacy embraced a woman’s decision whether to carry a pregnancy to term. Regarding the scope of that privacy right, the Court stated that it included “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’” and “bears some extension to activities related to marriage, procreation,

contraception, family relationship, and child rearing and education.” *Roe v. Wade*, 410 U.S. 113, 152-153 (1973). Such a right, the Court concluded, “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” *Id.* at 153.

With respect to protection of the right against state interference, the Court held that since the right of personal privacy is a fundamental right, only a “compelling State interest” could justify its limitation by a state. Thus, while it recognized the legitimacy of the state interest in protecting maternal health and the preservation of the fetus’ potential life (*id.* at 148-150), as well as the existence of a rational connection between these two interests and the state’s anti-abortion law, the Court held these interests insufficient to justify an absolute ban on abortions. Instead, the Court emphasized the durational nature of pregnancy and held the state’s interests to be sufficiently compelling to permit curtailment or prohibition of abortion only during specified stages of pregnancy. The High Court concluded that until the end of the first trimester, an abortion is no more dangerous to maternal health than childbirth itself, and found that “[With] respect to the State’s important and legitimate interest in the health of the mother, the “compelling” point, in light of present medical knowledge, is at approximately the end of the first trimester.” *Id.* at 163. Only after the first trimester does the state’s interest in protecting maternal health provide a sufficient basis to justify state regulation of abortion, and then only to protect this interest. *Id.* at 163- 164.

The “compelling” point with respect to the state’s interest in the potential life of the fetus “is at viability.” Following viability, the state’s interest permits it to regulate and even proscribe an abortion except when necessary, in appropriate medical judgment, for the preservation of the life or health of the woman. *Id.* at 160. In summary, the Court’s holding was grounded in this trimester framework analysis and the concept of fetal viability which was defined in post-natal terms. *Id.* at 164-165.

In *Doe v. Bolton*, 410 U.S. 179 (1973), the Court extended *Roe* by warning that just as states may not prevent abortion by making the performance a crime, states may not make abortions unreasonably difficult to obtain by prescribing elaborate procedural barriers. In *Doe*, the Court struck down state requirements that abortions be performed in licensed hospitals; that abortions be approved beforehand by a hospital committee; and that two physicians concur in the abortion decision. *Id.* at 196-199. The Court appeared to note, however, that this would not apply to a statute that protected the religious or moral beliefs of denominational hospitals and their employees. *Id.* at 197-198.

The Court in *Roe* also dealt with the question whether a fetus is a person under the Fourteenth Amendment and other provisions of the Constitution. The Court indicated that the Constitution never specifically defines “person”, but added that in nearly all the sections where the word person appears, “the use of the word is such that it has application only post-natally. None indicates, with any assurance, that it has any possible pre-natal application.” 410 U.S. at 157. The Court emphasized that, given the fact that in the major part of the 19th century prevailing legal abortion practices were far freer than today, the Court was persuaded “that the word ‘person’, as used in the Fourteenth Amendment, does not include the unborn.” *Id.* at 158.

The Court did not, however, resolve the question of when life actually begins. While noting the divergence of thinking on this issue, it instead articulated the legal concept of “viability”, defined as the point at which the fetus is potentially able to live outside the

womb, although the fetus may require artificial aid. *Id.* at 160. Many other questions were also not addressed in *Roe* and *Doe*, but instead formed the grist for a burgeoning book of post-*Roe* litigation.

## Supreme Court Decisions Subsequent to *Roe* and *Doe*

The post-*Roe* litigation included challenges to state restrictions requiring informed consent/waiting periods (*Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983)); spousal/parental consent (*Planned Parenthood v. Danforth*, *supra*, *Bellotti v. Baird*, 443 U.S. 622 (1979), *City of Akron*, *supra*, *Planned Parenthood Association of Kansas City, Missouri Inc. v. Ashcroft*, 462 U.S. 476 (1983)); parental notice (*Bellotti v. Baird*, *supra*, *H. L. v. Matheson*, 450 U.S. 398 (1981), *Hartigan v. Zbaraz*, 484 U.S. 171 (1987), *Hodgson v. Minnesota*, 497 U.S. 417 (1990), *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990); reporting requirements (*Planned Parenthood v. Danforth*, *supra*, *Planned Parenthood of Kansas City, Missouri, Inc. v. Ashcroft*, *supra*); advertisement of abortion services (*Bigelow v. Virginia*, 421 U.S. 809 (1975)); abortions by nonphysicians (*Connecticut v. Menillo*, 423 U.S. 9 (1975)); locus of abortions (*City of Akron*, *supra*, *Ashcroft*, *supra*, *Simopoulos v. Virginia*, 462 U.S. 506 (1983)); and viability, fetal testing, and disposal of fetal remains (*Planned Parenthood of Central Missouri v. Danforth*, *supra*, *Colautti v. Franklin*, 439 U.S. 379 (1979), *Ashcroft*, *supra*, *City of Akron*, *supra*).

The Court in *Rust v. Sullivan*, 500 U.S. 173 (1991), upheld on both statutory and constitutional grounds HHS' Title X regulations restricting recipients of federal family planning funding from using federal funds to counsel women about the option of abortion. This case can better be described as one involving a challenge to First Amendment free speech rights than to the constitutionally guaranteed substantive right to an abortion; however, following its earlier public funding cases (*Maher v. Roe* and *Harris v. McRae*) as precedent, the Court did conclude that a woman's right to an abortion was not burdened by these regulations. The Court reasoned that there was no such violation because the government has no duty to subsidize an activity simply because it is constitutionally protected and because a woman is "in no worse position than if Congress had never enacted Title X."

For the purpose of this issue brief, the two landmark cases relevant for discussion are *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), because they represent a shift in direction by the Supreme Court from the type of constitutional analysis it articulated in *Roe v. Wade* and have implications for future legislative action and how such statutory enactments will be judged by the courts in the years to come.

### **Webster**

The Supreme Court upheld the constitutionality of the State of Missouri's abortion statute in *Webster v. Reproductive Health Services*, 492 U.S. 49 (1989). In this 5-4 decision, while the majority did not overrule *Roe v. Wade*, it indicated that it was willing to apply a less stringent standard of review to state restrictions on abortion. *Webster* made it clear that state legislatures have considerable discretion to pass restrictive legislation in the future, with the likelihood that such laws would probably pass constitutional muster.

The main provisions in the 1986 Missouri law upheld by the Court included (1) barring public employees from performing or assisting in abortions not necessary to save the life of the mother; (2) barring the use of public buildings for performing abortions, despite the fact that there were no public monies involved (e.g., a building situated on public land); and (3) requiring physicians believing a woman desiring an abortion to be at least 20 weeks pregnant to perform tests to determine whether the fetus is viable. The *Webster* ruling was narrow in that it did not affect private doctors' offices or clinics, where most abortions are performed. Its significance derives more from the rationales articulated by the five justices regarding how abortion restrictions would be reviewed in the future. However, because the Missouri law did not limit abortion prior to viability, the plurality did not believe it was necessary to consider overruling *Roe*. *Webster* set the stage for the Court's 1992 decision in *Casey* where a real shift in direction was pronounced.

## **Casey**

Both *Webster* and *Rust* energized legislative activity, the former at both the federal and state levels and the latter at the federal level. Some of the state legislative proposals that have become law have been challenged in the courts (e.g., Pennsylvania, Guam, Louisiana, and Utah). The Pennsylvania case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, was decided by the Supreme Court on June 29, 1992. In a highly fractionated 5-4 decision, the Court reaffirmed the basic constitutional right to an abortion while simultaneously allowing some new restrictions. Justices O'Connor, Kennedy and Souter wrote the plurality opinion, and they were joined in part by Justices Stevens and Blackmun. Chief Justice Rehnquist and Justices White, Scalia and Thomas dissented. The Court refused to overrule *Roe v. Wade*, and the plurality explained at length why it was important to follow precedent. At the same time, the plurality indicated that state laws which contained an outright ban on abortion would be unconstitutional. Nevertheless, the Court abandoned the trimester framework articulated in *Roe* and the strict scrutiny standard of judicial review of abortion restrictions. Instead, it adopted a new analysis, "undue burden." Courts will now need to ask the question whether a state abortion restriction has the effect of imposing an "undue burden" on a woman's right to obtain an abortion. "Undue burden" was defined as a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 505 U.S. at 877.

The Court applied this new analysis to the Pennsylvania statute and concluded that four of the provisions did not impose an undue burden on the right to abortion and were constitutional. Those provisions upheld were the 24-hour waiting period; informed consent; parental consent for minors' abortions with a judicial bypass; and reporting requirements. The spousal notification provision, requiring a married woman to tell her husband she intends to have an abortion, did not survive the "undue burden" test, and it was struck down as being unconstitutional.

The Court's decision in *Casey* is significant because under the new standard of review more state restrictions will be able to pass constitutional muster. Also, the Court found that the state's interest in protecting the potentiality of human life extended throughout the course of the pregnancy, and thus the state could regulate, even to the point of favoring childbirth over abortion, from the outset. Under *Roe*, which utilized the trimester framework, during the first trimester of pregnancy, the woman's decision to terminate her pregnancy was reached in consultation between her and her doctor with virtually no state involvement.

Also, under *Roe*, abortion was a “fundamental right” that could not be restricted by the state except to serve a “compelling” state interest. *Roe*’s strict scrutiny form of review resulted in most state regulations being invalidated during the first two trimesters of pregnancy. The “undue burden” standard will allow more regulation during that period. This is evident from the fact that in *Casey* the Court overruled in part two of its earlier decisions which had followed *Roe*, *City of Akron v. Akron Center of Reproductive Health*, 462 U.S. 416 (1983) and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986.) In the 1983 and 1986 cases, the Court, applying strict scrutiny, had struck down 24-hour waiting periods and informed consent provisions; whereas in *Casey*, applying undue burden, the Court upheld similar provisions.

*Casey* had its greatest immediate effect on women in the State of Pennsylvania; however, its reasoning invites other states to pass similar restrictions or different ones which when challenged will be reviewed by the courts using the “undue burden” analysis. Finally, the Court in *Casey* left the door open for further challenges to the Pennsylvania statute once the law was actually applied. The Court specifically indicated that the abortion clinics which challenged the law would have the opportunity to document the effects of the waiting period and other provisions to show that while facially these provisions did not impose an “undue burden”, in practice they did.

## Public Funding of Abortions

After the Supreme Court’s decisions in *Roe* and *Doe*, one of the first federal legislative responses was enactment of restrictions on the use of federal money for abortions (e.g., restrictions on Medicaid funds — the so-called Hyde Amendment). Almost immediately these restrictions were challenged in the courts. Two categories of public funding cases have been heard and decided by the Supreme Court: those involving (1) funding restrictions for nontherapeutic (elective) abortions; and (2) funding limitations for therapeutic (medically necessary) abortions.

**The 1977 Trilogy — Restrictions on Public Funding of Nontherapeutic or Elective Abortions.** The Supreme Court, in three related decisions, ruled that the states have neither a statutory nor a constitutional obligation to fund elective abortions or provide access to public facilities for such abortions (*Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); and *Poelker v. Doe*, 432 U.S. 519 (1977) (per curiam)).

In *Beal v. Doe*, the Court held that nothing in the language or legislative history of Title XIX of the Social Security Act (Medicaid) requires a participating state to fund every medical procedure falling within the delineated categories of medical care. The Court ruled that it was not inconsistent with the act’s goals to refuse to fund unnecessary medical services. However, the Court did indicate that Title XIX left a state free to include coverage for nontherapeutic abortions should it choose to do so. Similarly, in *Maher v. Roe*, the Court held that the Equal Protection Clause does not require a state participating in the Medicaid program to pay expenses incident to nontherapeutic abortions simply because the state has made a policy choice to pay expenses incident to childbirth. More particularly, Connecticut’s policy of favoring childbirth over abortion was held not to impinge upon the fundamental right of privacy recognized in *Roe v. Wade*, which protects a woman from undue interference in her decision to terminate a pregnancy. Finally, in *Poelker v. Doe*, the Court upheld a municipal regulation that denied indigent pregnant women nontherapeutic abortions at public



hospitals. It also held that staffing those hospitals with personnel opposed to the performance of abortions did not violate the Equal Protection Clause of the Constitution. *Poelker*, however, did not deal with the question of private hospitals and their authority to prohibit abortion services.

**Public Funding of Therapeutic or Medically Necessary Abortions.** The 1977 Supreme Court decisions left open the question whether federal law, such as the Hyde Amendment (restrictions on Medicaid funding of abortion), or similar state laws, could validly prohibit governmental funding of therapeutic abortions.

The Court in *Harris v. McRae*, 448 U.S. 297 (1980), ruled 5-4 that the Hyde Amendment's abortion funding restrictions were constitutional. The majority found that the Hyde Amendment neither violated the due process or equal protection guarantees of the Fifth Amendment nor the Establishment [of religion] Clause of the First Amendment. The Court also upheld the right of a state participating in the Medicaid program to fund only those medically necessary abortions for which it received federal reimbursement. In companion cases raising similar issues, the Court held that a state of Illinois statutory funding restriction comparable to the Federal Hyde Amendment also did not contravene the constitutional restrictions of the Equal Protection Clause of the Fourteenth Amendment (*Williams v. Zbaraz*; *Miller v. Zbaraz*; *U.S. v. Zbaraz*, 448 U.S. 358 (1980)). The Court's rulings in *McRae* and *Zbaraz* mean there is no statutory or constitutional obligation of the states or the federal government to fund medically necessary abortions.

## Partial-Birth Abortion

On June 28, 2000, the U.S. Supreme Court decided *Stenberg v. Carhart*, 530 U.S. 914 (2000), its first substantive abortion case since *Casey*. In *Stenberg*, the Court determined that a Nebraska statute that prohibited the performance of so-called "partial-birth" abortions was unconstitutional because it failed to include an exception to protect the health of the mother and because the language defining the prohibited procedure was too vague. In affirming the decision of the Eighth U.S. Circuit Court of Appeals, the Court agreed that the language could be interpreted to prohibit not just the dilation and extraction (D&X) procedure that pro-life advocates oppose, but the dilation and evacuation (D&E) procedure that is the most common abortion procedure during the second trimester of pregnancy. The Court believed that the statute was likely to prompt those who perform the D&E procedure to stop because of fear of prosecution and conviction. The result would be the imposition of an "undue burden" on a woman's ability to have an abortion.

During the 106<sup>th</sup> Congress, both the Senate and House passed bills that would have prohibited the performance of partial-birth abortions. The Senate passed the Partial-Birth Abortion Ban Act of 1999 (S. 1692) on October 21, 1999 by a vote of 63-34. H.R. 3660, the Partial-Birth Abortion Ban Act of 2000, was passed by the House on April 5, 2000 by a vote of 287-141. Although the House requested a conference, no further action was taken. Similar partial-birth abortion measures were vetoed during the 104<sup>th</sup> and 105<sup>th</sup> Congresses. In both instances, President Clinton focused on the failure to include an exception to the ban when the mother's health is an issue.

During the 107<sup>th</sup> Congress, the House passed H.R. 4965, the Partial-Birth Abortion Ban Act of 2002, by a vote of 274-151. H.R. 4965 would have prohibited physicians from

performing a partial-birth abortion except when it was necessary to save the life of a mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. The bill defined the term “partial-birth abortion” to mean an abortion in which “the person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.” Physicians who violated the act would have been subject to a fine, imprisonment for not more than two years, or both. H.R. 4965 was not considered by the Senate.

S. 3, the Partial-Birth Abortion Ban Act of 2003, was signed by the President on November 5, 2003. The House approved H.Rept. 108-288, the conference report for the measure, on October 2, 2003, by a vote of 281-142. The Senate agreed to the conference report on October 21, 2003, by a vote of 64-34. Although the Court has held that restrictions on abortion must allow for the performance of an abortion when it is necessary to protect the health of the mother, the act does not include such an exception. Senator Rick Santorum, the bill’s original sponsor, maintains that a health exception is not necessary because of the risks associated with partial-birth abortions.

## Legislative History

Rather than settle the issue, the Court’s decisions in *Roe v. Wade* and *Doe v. Bolton* have prompted debate and precipitated a variety of governmental actions at the national, state and local levels to limit their effect. As the previous Congresses have been, the 107<sup>th</sup> Congress continued to be a forum for proposed legislation and constitutional amendments aimed at limiting or prohibiting the practice of abortion. This section examines the history of the federal legislative response to the abortion issue.

In the decade prior to the decision in *Roe v. Wade*, ten pieces of legislation relating to abortion were introduced in either the House or the Senate. Since 1973, more than 1,000 separate legislative proposals have been introduced. The wide disparity in these statistics illustrates the impetus that the Court’s 1973 decisions gave to congressional action. By far the greater number of these proposals have sought to restrict the availability of abortions. A few measures have been introduced seeking to better secure the right. The Freedom of Choice Act (FOCA), which was introduced and debated in both the 102<sup>nd</sup> and 103<sup>rd</sup> Congresses, was never enacted. FOCA was an attempt to codify *Roe v. Wade* legislatively. The Freedom of Access to Clinic Entrances Act of 1994, P.L. 103-259 (18 U.S.C.248), made it a federal crime to use force, or the threat of force, to intimidate abortion clinic workers or women seeking abortions.

Proponents of more restrictive abortion legislation have employed a variety of legislative initiatives to achieve this end, with varying degrees of success. Initially, legislators focused their efforts on the passage of a constitutional amendment which would overrule the Supreme Court’s decision in *Roe*. This course, however, proved to be problematic.

## Constitutional Amendments

Since 1973, a series of constitutional amendments have been introduced in each Congress in an attempt to overrule the Court's decision in *Roe v. Wade*. To date, no constitutional amendment has been passed in either the House or the Senate; indeed for several years, proponents had difficulty getting the measures reported out of committee. Interest in the constitutional approach peaked in the 94<sup>th</sup> Congress when nearly 80 amendments were introduced. By the 98<sup>th</sup> Congress, the number had significantly declined. It was during this time that the Senate brought to the floor the only constitutional amendment on abortion that has ever been debated and voted on in either House.

During the 98<sup>th</sup> Congress, S.J.Res. 3 was introduced. Subcommittee hearings were held, and the full Judiciary Committee voted (9-9) to send the amendment to the Senate floor without recommendation. As reported, S.J.Res. 3 included a subcommittee amendment eliminating the enforcement language and declared simply, "A right to abortion is not secured by this Constitution." By adopting this proposal, the subcommittee established its intent to remove federal institutions from the policymaking process with respect to abortion and reinstate state authorities as the ultimate decisionmakers.

S.J.Res. 3 was considered in the Senate on June 27 and 28, 1983. The amendment required a two-thirds vote to pass the Senate since super-majorities of both Houses of Congress must approve a constitutional amendment before it can be submitted to the states. On June 28, 1983, S.J.Res. 3 was defeated (50-49), not having obtained the two-thirds vote necessary for a constitutional amendment.

[For a review of the full debate on S.J.Res. 3, see 129 Congressional Record S9076, *et seq.*, daily ed., June 27, 1983; 129 Congressional Record S9265, *et seq.*, daily ed., June 28, 1983.]

## Statutory Provisions

**Bills that Seek to Prohibit the Right to Abortion by Statute.** As an alternative to a constitutional amendment to prohibit or limit the practice of abortion, opponents of abortion have introduced a variety of bills designed to accomplish the same objective without resorting to the complex process of amending the Constitution. Authority for such action is said to emanate from Section 5 of the Fourteenth Amendment, which empowers the Congress to enforce the due process and equal protection guarantees of the amendment "by appropriate legislation."

One such bill, S. 158, introduced during the 97<sup>th</sup> Congress, would have declared as a congressional finding of fact that human life begins at conception, and would, it was contended by its sponsors, allow states to enact laws protecting human life, including fetuses. Hearings on the bill were marked by controversy over the constitutionality of the declaration that human life begins at conception, which contradicted the Supreme Court's specific holding in *Roe v. Wade*, and over the withdrawal of lower federal court jurisdiction over suits challenging state laws enacted pursuant to federal legislation. A modified version of S. 158 was approved in subcommittee, but that bill, S. 1741, had no further action in the 97<sup>th</sup> Congress.

**Hyde-Type Amendments to Appropriation Bills.** As an alternative to these unsuccessful attempts to prohibit abortion outright, opponents of abortion sought to ban the use of federal monies to pay for the performance of abortions. They focused their efforts primarily on the Medicaid program since the vast majority of federally funded abortions were reimbursed under Medicaid.

The Medicaid program was established in 1965 to fund medical care for indigent persons through a federal-state cost-sharing arrangement; however, abortions were not initially covered under the program. During the Nixon Administration, the Department of Health, Education and Welfare (HEW) decided to reimburse states for the funds used to provide abortions to poor women. This policy decision was influenced by the Supreme Court's decision in *Roe v. Wade* which, in addition to decriminalizing abortion, was seen as legitimizing the status of abortion as a medical procedure for the purposes of the Medicaid program.

Since *Roe v. Wade*, Congress has attached abortion funding restrictions to numerous appropriations bills. Although the Foreign Assistance Act of 1973, P.L. 93-189, was the first such enactment, the greatest focus has been on restricting Medicaid abortions under the annual appropriations for the Department of Health, Education, and Welfare (HEW) (now the Department of Health and Human Services (HHS)).

The first of a series of restrictions, popularly referred to as the "Hyde Amendments," was attached to the FY1977 Departments of Labor and Health, Education, and Welfare Appropriation Act, P.L. 94-439. As originally offered by Representative Hyde, the proposal would have prohibited the funding of all abortions. A compromise amendment offered by Representative Conte was eventually agreed to, providing that "None of the funds contained in this act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."

In subsequent years, Hyde Amendments were sometimes reworded to include exceptions for rape and incest or long-lasting physical health damage to the mother. However, from the 97<sup>th</sup> Congress until recently the language has been identical to the original enactment, allowing only an exception to preserve the life of the mother. In 1993, during the first year of the Clinton Administration, coverage under the Hyde Amendment was expanded to again include cases of rape and incest. Efforts to restore the original language (providing for only the life of the woman exception) failed in the 104<sup>th</sup> Congress.

The Hyde Amendment process has not been limited to the Labor/HHS appropriation. Beginning with P.L. 95-457, the Department of Defense Appropriation Acts have contained Hyde-type abortion limitations. This recurring prohibition was eventually codified and made permanent by P.L. 98-525, the Department of Defense Authorization Act of 1984.

Beginning with P.L. 96-93, the District of Columbia (D.C.) Appropriations Acts have contained restrictive abortion provisions. In recent years there have been efforts to expand the prohibitions to District funds as well as the federal funds appropriated. The passage of P.L. 100-462, the FY1989 D.C. Appropriations Act, marked the first successful attempt to extend abortion restrictions to the use of District funds. In 1993 and 1994, lawmakers approved a prohibition that applied only to federal monies. The 104<sup>th</sup> Congress approved a

ban on all government funding of abortion (federal and D.C.), except in cases of rape, incest or danger to a woman's life.

In 1983, the Hyde Amendment process was extended to the Department of the Treasury and Postal Service Appropriations Act, prohibiting the use of Federal Employee Health Benefits to pay for abortions except when the life of the woman was in danger. Prior to this, it had been reported that in 1980, for instance, federal government health insurance plans paid an estimated \$9 million for abortions, both therapeutic and non-therapeutic. The following year the Office of Personnel Management (OPM) attempted through administrative action to eliminate non-life-saving abortion coverage. This action was challenged by federal employee unions, and the U.S. district court held that OPM acted outside the scope of its authority, and that absent a specific congressional statutory directive, there was no basis for OPM's decision. *American Federation of Government Employees v. AFL-CIO*, 525 F.Supp. 250 (1981). It was this background that led to the 1983 congressional action to include the prohibition on coverage for abortion in federal employee health insurance plans except when the life of the woman was in danger. This prohibition was removed in 1993. However, the 104<sup>th</sup> Congress passed language prohibiting the use of federal money for abortion under the Federal Employee Health Benefit Program except in cases where the life of the mother would be endangered or in cases of rape or incest.

Finally, under Department of Justice appropriations, funding of abortions in prisons is prohibited except where the life of the mother is endangered, or in cases of rape. First enacted as part of the FY1987 Continuing Resolution, P.L. 99-591, this provision has been reenacted as part of the annual spending bill in each subsequent fiscal year, but the language has been modified in recent years.

## **Other Legislation**

In addition to the temporary funding limitations contained in appropriation bills, abortion restrictions of a more permanent nature have been enacted in a variety of contexts since 1970. For example, the Family Planning Services and Population Research Act of 1970, P.L. 91-572 (42 U.S.C. 300a-6), bars the use of funds for programs in which abortion is a method of family planning.

The Legal Services Corporation Act of 1974, P.L. 93-355 (42 U.S.C. 2996f(b)(8)), prohibits lawyers in federally funded legal aid programs from providing legal assistance for procuring non-therapeutic abortions and prohibits legal aid in proceedings to compel an individual or an institution to perform an abortion, assist in an abortion, or provide facilities for an abortion.

The Pregnancy Discrimination Act, P.L. 95-555 (42 U.S.C. 2000e(k)), provides that employers are not required to pay health insurance benefits for abortion except to save the life of the mother, but does not preclude employers from providing abortion benefits if they choose to do so.

The Civil Rights Restoration Act of 1988, P.L. 100-259 (20 U.S.C. 1688), states that nothing in the measure either prohibits or requires any person or entity from providing or paying for services related to abortion.

The Civil Rights Commission Amendments Act of 1994, P.L. 103-419 (42 U.S.C. 1975a(f)), prohibits the Commission from studying or collecting information about U.S. laws and policies concerning abortion.

## Legislation in the 108<sup>th</sup> Congress

On February 20, 2003, the President signed H.J.Res. 2, the Consolidated Appropriations Resolution, 2003 (P.L. 108-7). This omnibus measure encompasses the FY2003 appropriations of eleven spending measures. In general, the omnibus measure maintains longstanding restrictions on the availability of federal funds for abortions.

Under the omnibus measure, appropriated funds may not be used to pay for abortions in the federal prison system, except where the life of the mother would be endangered if the fetus were carried to term, or in the case of rape. The measure also prohibits the use of appropriated funds and local funds to perform any abortion in the District of Columbia, except where the life of the mother would be endangered if the fetus were carried to term, or where the pregnancy is the result of rape or incest.

With respect to foreign operations, the omnibus measure provides that none of the appropriated funds and none of the unobligated balances from prior appropriations may be made available to any organization or program which, as determined by the President, supports or participates in the management of a program of coercive abortion or involuntary sterilization. Appropriated funds may not be used overseas to pay for abortion as a method of family planning or to motivate or coerce any person to perform abortions. In addition, appropriated funds may not be used to lobby for or against abortion. Finally, appropriated funds shall be available only to voluntary family planning projects that meet specified requirements.

Under the omnibus measure, funds appropriated in P.L. 107-115, the FY2002 Foreign Operations appropriations measure, that were available for the UNFPA, and an equal amount in the FY2003 omnibus measure, shall be made available to the UNFPA if the President determines that the UNFPA no longer supports or participates in the management of a program of coercive abortion or involuntary sterilization. The omnibus measure stipulates that none of the funds made available to the UNFPA may be used in the People's Republic of China. Amounts spent by the UNFPA in the People's Republic of China in calendar years 2002 and 2003, as determined by the Secretary of State, shall be deducted from funds made available to the UNFPA under P.L. 107-115 and the FY2003 omnibus measure.

Provisions of the omnibus measure concerning the Departments of Labor, HHS, and Education provide that none of the appropriated funds and none of the funds in any trust fund to which funds are appropriated under the omnibus measure, may be expended for abortion, except where the pregnancy is the result of rape or incest, or where the mother's life would be endangered if an abortion is not performed. The Treasury and Postal Service provisions of the omnibus measure also prohibit the use of appropriated funds to pay for an abortion, or the administrative expenses in connection with any health plan under the federal employees health benefit program which provides any benefits or coverage for abortions. However, this restriction does not apply where the life of the mother would be endangered if the fetus were carried to term, or the pregnancy is the result of rape or incest.

On November 5, 2003, the President signed S. 3, the Partial-Birth Abortion Ban Act of 2003 (P.L. 108-105). The Senate initially passed S. 3 on March 13, 2003 by a vote of 64-33. H.R. 760, a companion measure to S. 3, was passed by the House on June 4, 2003 by a vote of 282-139. Shortly after passage of H.R. 760, pursuant to H.Res. 257, the language of S. 3 was struck, and the provisions of H.R. 760 were inserted into the measure. On September 17, 2003, the Senate voted 93-0 to reject the House amendment to S. 3. The Senate's vote moved the two measures to conference. On September 30, 2003, a House-Senate conference committee agreed to report a version of the bill that was identical to the House-passed measure. The House approved H.Rept. 108-288, the conference report for the Partial-Birth Abortion Ban Act of 2003, by a vote of 281-142 on October 2, 2003. The Senate agreed to the conference report by a vote of 64-34 on October 21, 2003.

In general, the act would prohibit physicians from performing a partial-birth abortion except when it is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. Physicians who violate the act would be subject to a fine, imprisonment for not more than two years, or both.

Although the U.S. Supreme Court has held that restrictions on abortion must allow for the performance of an abortion when it is necessary to protect the health of the mother, the act does not include such an exception. In his introductory statement on the act, Senator Rick Santorum discussed the measure's lack of a health exception.<sup>1</sup> He maintained that an exception is not necessary because of the risks associated with partial-birth abortions. Senator Santorum insisted that congressional hearings and expert testimony demonstrate "that a partial birth abortion is never necessary to preserve the health of the mother, poses significant health risks to the woman, and is outside the standard of medical care."<sup>2</sup>

Within two days of the signing of the act, federal courts in Nebraska, California, and New York blocked its enforcement.<sup>3</sup> Permanent injunctions have since been issued by three courts. In *Planned Parenthood v. Ashcroft*, a federal district court in San Francisco found that the act is unconstitutional because it poses an undue burden on a woman's ability to choose a second trimester abortion, is unconstitutionally vague, and impermissibly lacks an exception for preserving the health of the mother.<sup>4</sup> In *National Abortion Federation v. Ashcroft*, a federal district court in New York concluded that the act is unconstitutional based simply on its failure to include an exception to preserve the health of the mother.<sup>5</sup> In discussing the level of deference owed to Congress's findings, the court observed that it must ascertain "whether Congress reasonably determined, based on substantial evidence, that there is no significant body of medical opinion believing the procedure to have safety advantages

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<sup>1</sup> 149 Cong. Rec. S2523 (daily ed. Feb. 14, 2003) (statement of Sen. Santorum).

<sup>2</sup> 149 Cong. Rec., at S2523.

<sup>3</sup> *Abortion Ban Blocked Again*, Wash. Post, Nov. 7, 2003, at A2.

<sup>4</sup> No. C 03-4872 PJH, slip op. (N.D. Cal. June 1, 2004).

<sup>5</sup> No. 03 Civ. 8695 (RCC), slip. op. (S.D. N.Y. Aug. 26, 2004).

for some women.”<sup>6</sup> Given the lack of consensus in the medical community over whether the D & X procedure is never medically necessary, and similar uncertainty over the procedure being safer than other procedures for some women, the court concluded that Congress’s findings were not reasonable and based on substantial evidence.

Finally, in *Carhart v. Ashcroft*, a federal district court in Nebraska concluded that the Partial-Birth Abortion Ban Act of 2003 is unconstitutional for several reasons: it fails to include a health exception that would allow the so-called “partial-birth” abortion procedure to be performed to preserve the health of the mother; it imposes an undue burden on women by banning the D&E or dilation and evacuation procedure, the most common abortion procedure during the second trimester of pregnancy, under certain circumstances; and it is unconstitutionally vague.<sup>7</sup>

Appeals are expected for all of the cases. An appeal to the Supreme Court is also expected.

H.R. 1997, the Unborn Victims of Violence Act of 2004 or Laci and Conner’s Law, was signed by the President on April 1, 2004 (P.L. 108-212).<sup>8</sup> The act establishes a separate offense for harming or killing an “unborn child” in utero during the commission of a violent crime. Punishment for the separate offense is the same as if the offense had been committed against the pregnant woman. In addition, an offense does not require proof that the person engaging in the misconduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant, or that the defendant intended to cause the death of, or bodily injury to, the child in utero. The phrase “child in utero” is defined by the act to mean “a member of the species homo sapiens, at any stage of development, who is carried in the womb.”

H.R. 1755, the Child Custody Protection Act, was introduced by Representative Ileana Ros-Lehtinen on April 10, 2003. S. 851, the Senate version of the act, was introduced by Senator John E. Ensign on the same day. The act would prohibit the knowing transport of a minor across state lines for the purpose of obtaining an abortion. The bill seeks to prevent the abridgement of parental consent requirements in a minor’s residing state. Violators of the act would be subject to a fine under Title 18 of the United States Code or imprisonment for not more than one year, or both. The act’s prohibition would not apply to abortions that are necessary to save the life of the minor because her life is endangered by physical disorder, physical injury, or physical illness.

S. 1397, the Abortion Non-Discrimination Act of 2003, was introduced by Senator Judd Gregg on July 14, 2003. Under the bill, various health care entities, including hospitals and health maintenance organizations, that refuse to provide coverage for abortion or refuse to pay for induced abortions would not be subject to adverse action by the federal government or state or local governments that receive federal financial assistance. A similar version of the act was passed by the House during the 107<sup>th</sup> Congress, but was not considered by the

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<sup>6</sup> *Id.* at 84.

<sup>7</sup> No. 4:03CV3385, slip op. (D. Neb. Sept. 8, 2004).

<sup>8</sup> See also CRS Report RS21550, *The Unborn Victims of Violence Act*.



Senate. For additional information on the Abortion Non-Discrimination Act, see CRS Report RS21428, *The History and Effect of Abortion Conscience Clause Laws*.

## **FY2004 Appropriations**

H.R. 2673, the FY2004 Consolidated Appropriations bill, was signed by the President on January 23, 2004 (P.L. 108-199). The measure encompasses five appropriations bills with notable abortion or family planning provisions: H.R. 2660, the FY2004 appropriations measure for the Departments of Labor, HHS, and Education; H.R. 2799, the FY2004 appropriations measure for the Departments of Commerce, Justice, and State; H.R. 2800, the FY2004 Foreign Operations appropriations measure; H.R. 2765, the FY2004 appropriations measure for the District of Columbia; and H.R. 2989, the Treasury and Postal Service appropriations measure for FY2004. The conference report for the omnibus bill, H.Rept. 108-401, was agreed to in the House by a vote of 242-176. The Senate agreed to the conference report by a vote of 65-28.

The restrictions on abortion funding that are included in H.Rept. 108-401 generally reflect past restrictions. Provisions related to the Departments of Labor, HHS, and Education would prohibit the use of funds, including funds derived from any trust fund that receives appropriations, for abortions except in cases of rape or incest, or where a woman who suffers from a physical disorder, injury, or illness would have her life jeopardized if an abortion was not performed. Under the provisions related to the Departments of Commerce, Justice, and State, appropriated funds would be available to pay for an abortion only where the life of the mother would be endangered if the fetus was carried to term or in the case of rape.

The Foreign Operations provisions of the conference report provide that none of the appropriated funds would be available to an organization or program which, as determined by the President, supports or participates in the management of a program of coercive abortion or involuntary sterilization. In addition, appropriated funds would not be available for the performance of abortions as a method of family planning, or to motivate or coerce any person to practice abortions. Appropriated fund would not be available to lobby for or against abortion. To reduce reliance on abortion in developing nations, funds would be available only to voluntary family planning projects which offer a broad range of family planning methods and services. Such voluntary family planning projects would also have to meet specified requirements.

Contributions to the UNFPA would remain conditioned on the entity's not funding abortions. In addition, funds provided to the UNFPA could not be used for a country program in the People's Republic of China.

Under provisions related to the District of Columbia, appropriated funds and local funds could not be used for the performance of any abortion except where the life of the mother would be endangered if the fetus was carried to term or where the pregnancy was the result of an act of rape or incest.

The Treasury and Postal Service provisions of the conference report would prohibit the use of appropriated funds to pay for abortions and for any administrative expenses related to a health plan under the federal employees health benefits program that provides any benefits or coverage for abortions. These restrictions would not apply where the life of the

mother would be endangered if a fetus was carried to term or where the pregnancy was the result of rape or incest.

## **FY2005 Appropriations**

H.R. 4850, the FY2005 appropriations measure for the District of Columbia, is one of only four appropriations bills passed by Congress for FY2005 funding (P.L. 108-335). The measure includes a restriction on the use of appropriated and local funds to pay for abortions except where the life of the mother would be endangered if the fetus was carried to term or where the pregnancy was the result of an act of rape or incest. The other three appropriations bills that have been passed by Congress do not include abortion provisions.

H.R. 5006, the FY2005 appropriations measure for the Departments of Labor, HHS, and Education was passed by the House on September 9, 2004 by a vote of 388-13. The Senate has not yet considered the bill. While the measure is noteworthy for its perennial inclusion of various abortion funding restrictions, the inclusion of an additional provision has made the bill even more worthy of discussion. Section 508(d) of the bill prohibits the availability of appropriated funds to a federal agency or program or to a state 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.” This prohibition resembles similarly restrictive language in S. 1397, the Abortion Non-Discrimination Act of 2003. A discussion of that measure is included in the *Legislation in the 108<sup>th</sup> Congress* section of this report.