Abortion: Legislative Response

Jon O. Shimabukuro
Legislative Attorney

January 15, 2009

Congressional Research Service
7-5700
www.crs.gov
RL33467

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

In 1973, the U.S. Supreme Court concluded in *Roe v. Wade* that the U.S. Constitution protects a woman's decision to terminate her pregnancy. In *Doe v. Bolton*, a companion decision, the Court found that a state may not unduly burden the exercise of that fundamental right with regulations that prohibit or substantially limit access to the means of effectuating the decision to have an abortion. Rather than settle the issue, the Court's rulings since *Roe* and *Doe* have continued to generate debate and have 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 Court's decision in *Planned Parenthood of Southeastern Pennsylvania 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 108th Congress. The Partial-Birth Abortion Ban Act appears to be one of the only examples of Congress restricting the performance of a medical procedure. Legislation that would prohibit the knowing transport of a minor across state lines for the purpose of obtaining an abortion has been introduced in numerous Congresses.

Since *Roe*, Congress has attached abortion funding restrictions to various 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 have an impact in the District of Columbia, where both federal and local funds may not be used to perform abortions except in cases of rape, incest or where the mother is endangered, and affect international organizations like the United Nations Population Fund, which receives funds through the annual Foreign Operations appropriations measure.

Contents

Contacts

Most Recent Developments

On December 19, 2008, the Department of Health and Human Services (HHS) issued a new rule to implement existing federal health care conscience protection laws. Under the so-called Church Amendments, the Weldon Amendment, and certain provisions of the Public Health Service Act, specified individuals or entities may not be discriminated against for failing to participate in activities related to abortion.[1] The new rule provides definitions for some of the terms used in the conscience protection laws, establishes a written certification of compliance requirement for recipients of federal health care funds, and identifies HHS's Office of Civil Rights as the entity responsible for complaint handling and investigation.

HHS maintains that the new rule is necessary to educate the public and health care providers on the protections afforded by federal law.[2] The agency also notes that the new rule will "[foster] a more inclusive, tolerant environment in the health care industry than may currently exist."[3] Opponents of the new rule, however, contend that the new rule could jeopardize the health of individuals by making it more difficult to obtain health care services and information. They argue, for example, that the new rule could limit the availability of oral contraceptives.

Legislation that would appear to have halted the new rule was introduced in the 110th Congress. The Protecting Patients and Health Care Act (S. 20/H.R. 7310) was introduced by Senator Hillary Rodham Clinton and Representative Diana DeGette, but was not considered by either chamber. The 111th Congress may attempt to address the new rule pursuant to the Congressional Review Act, which permits the use of expedited procedures to disapprove an agency's final rule.[4] Alternately, Congress could enact legislation that amends the conscience protection laws to establish new definitions and procedures. Such legislation would have the likely effect of overriding the new rule. The rule could also be amended or rescinded by further administrative action. Such action, however, would have to follow procedures established by the Administrative Procedure Act.[5]

Judicial History

The primary focus of this report is legislative action with respect to abortion. However, discussion of the various 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.[6]

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[1] For additional information on the federal health care conscience protection laws, see CRS Report RL34703, *The History and Effect of Abortion Conscience Clause Laws*, by Jon O. Shimabukuro.

[2] Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78,072, 78,074 (Dec. 19, 2008) (to be codified at 45 C.F.R. pt. 88).

[3] *Id*.

[4] For additional information on the Congressional Review Act, seeCRS Report RL34747, *Midnight Rulemaking: Considerations for Congress and a New Administration*, by Curtis W. Copeland.

[5] *See id*.

[6] For a more detailed discussion of the relevant case law, seeCRS Report 95-724, *Abortion Law Development: A Brief Overview*, by Jon O. Shimabukuro.

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 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). 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. With regard to 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*, 410 U.S. at 152-53. 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 found 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 163-64.

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 164-65.

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 196-99. 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 197-98.

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 led to a wealth 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)); 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*); and "partial-birth" abortions (*Stenberg v. Carhart*, 530 U.S. 914 (2000)).

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. While *Rust* is probably better understood as a case involving First Amendment free speech rights rather than as a challenge to the constitutionally guaranteed substantive right to abortion, the Court, following its earlier public funding cases (*Maher v. Roe* and *Harris v. McRae*), did conclude that a woman's right to an abortion was not burdened by the Title X regulations. The Court reasoned that there was no constitutional 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."

In addition to *Rust*, the Court decided several other noteworthy cases involving abortion following *Roe*. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), illustrate a shift in direction by the Court from the type of constitutional analysis it articulated in *Roe*. These cases and other more recent cases, such as *Stenberg v. Carhart*, 530 U.S. 914 (2000), and *Ayotte v. Planned Parenthood of Northern New England*, 126 S.Ct. 961 (2006), have implications for future legislative action and how enactments will be judged by the courts in the years to come. *Webster*, *Casey*, and *Ayotte* are discussed in the subsequent sections of this report. A discussion of *Stenberg* is included in the "Partial-Birth Abortion" section of the report.

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*, 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 became law were 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 (1992), 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*, 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. The provisions that were upheld involved the 24-hour waiting period; informed consent; parental consent for minors' abortions with a judicial bypass; and reporting requirements. The spousal notification provision, which required a married woman to tell her husband if she intended to have an abortion, did not survive the "undue burden" test and was struck down as unconstitutional.

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

Moreover, 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 allowed greater regulation during that period. This is evident from the fact that the *Casey* 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 these cases, the Court, applying strict scrutiny, struck down 24-hour waiting periods and informed consent provisions; whereas in *Casey*, applying the undue burden standard, the Court upheld similar provisions.

Casey had its greatest immediate effect on women in the State of Pennsylvania; however, its reasoning prompted other states to pass similar restrictions that could withstand challenge under the "undue burden" standard.

Ayotte

In *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), the Court concluded that a wholesale invalidation of New Hampshire's Parental Notification Prior to Abortion Act was inappropriate. Finding that only a few applications of the act raised constitutional concerns, the Court remanded the case to the lower courts to render narrower declaratory and injunctive relief.

The New Hampshire law at issue in *Ayotte* prohibited physicians from performing an abortion on a pregnant minor or a woman for whom a guardian or conservator was appointed until 48 hours after written notice was delivered to at least one parent or guardian. The notification requirement could be waived under certain specified circumstances. For example, notification was not required if the attending abortion provider certified that an abortion was necessary to prevent the woman's death and there was insufficient time to provide the required notice.

Planned Parenthood of Northern New England and several other abortion providers challenged the New Hampshire statute on the grounds that it did not include an explicit waiver that would allow an abortion to be performed to protect the health of the woman. The First Circuit invalidated the statute in its entirety on that basis. The First Circuit also maintained that the act's life exception was impermissibly vague and forced physicians to gamble with their patients' lives by preventing them from performing an abortion without notification until they were certain that death was imminent.

Declining to revisit its prior abortion decisions, the Court insisted that *Ayotte* presented a question of remedy. Maintaining that the act would be unconstitutional only in medical emergencies, the Court determined that a more narrow remedy, rather than the wholesale invalidation of the act, was appropriate: "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force ... or to sever its problematic portions while leaving the remainder intact." *Id*. at 328-29.

The Court identified three interrelated principles that inform its approach to remedies. First, the Court tries not to nullify more of a legislature's work than is necessary because a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.

Second, the Court restrains itself from rewriting a state law to conform to constitutional requirements, even as it attempts to salvage the law. The Court explained that its constitutional mandate and institutional competence are limited, noting that "making distinctions in a murky constitutional context" may involve a far more serious invasion of the legislative domain than the Court ought to take. *Id*. at 330.

Third, the touchstone for any decision about remedy is legislative intent; that is, a court cannot use its remedial powers to circumvent the intent of the legislature. The Court observed that "[a]fter finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Id*.

On remand, the lower courts were expected to determine the intent of the New Hampshire legislature when it enacted the parental notification statute. Although the State argued that the measure's severability clause illustrated the legislature's understanding that the act should continue in force even if certain provisions were invalidated, the respondents insisted that New Hampshire legislators actually preferred no statute rather than one that would be enjoined in the manner described by the Court. On February 1, 2007, a federal district court in New Hampshire entered a procedural order that stayed consideration of the case while a bill to repeal the Parental Notification Prior to Abortion Act was pending in the state legislature.[7] The act was subsequently repealed by the legislature, effective June 29, 2007.

Some criticized the Court's willingness to invalidate the New Hampshire statute only as it applied during medical emergencies. While it is not uncommon for federal courts to save a statute from invalidation by severing unconstitutional provisions, these courts have generally limited this practice to federal statutes. Critics maintained that the Court's opinion represented an impermissible expansion of federal judicial power over the states. They also argued that the opinion could encourage states to enact legislation with provisions that are possibly or clearly

[7] *See Planned Parenthood of Northern New England v. Ayotte*, 571 F.Supp.2d 265 (D. N.H. 2008).

unconstitutional, knowing that a reviewing court will sever the impermissible provisions and allow the remaining statute to continue in force.

Public Funding of Abortions

After the Supreme Court's decisions in *Roe* and *Doe*, one of the first federal legislative responses was the 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*, 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 an 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 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.[8] In affirming the decision of the Eighth Circuit, the Court agreed that the language of the Nebraska statute could be interpreted to prohibit not just the dilation and extraction (D&X) procedure that pro-life advocates oppose, but the standard 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 106th 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 104th and 105th Congresses. In both instances, President William J. Clinton focused on the failure to include an exception to the ban when the mother's health is an issue.

During the 107th 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.

During the 108th Congress, 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

[8] *See also* CRS Report RL30415, *Partial-Birth Abortion: Recent Developments in the Law*, by Jon O. Shimabukuro.

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 prohibits 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 are subject to a fine, imprisonment for not more than two years, or both.

Despite the Court's holding in *Stenberg* and past decisions that have found that restrictions on abortion must allow for the performance of an abortion when it is necessary to protect the health of the mother, the Partial-Birth Abortion Ban Act of 2003 does not include such an exception. In his introductory statement for the act, Senator Rick Santorum discussed the measure's lack of a health exception.[9] 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."[10]

Within two days of the act's signing, federal courts in Nebraska, California, and New York blocked its enforcement. On April 18, 2007, the Court upheld the Partial-Birth Abortion Ban Act of 2003, finding that, as a facial matter, it is not unconstitutionally vague and does not impose an undue burden on a woman's right to terminate her pregnancy.[11] In *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007), the Court distinguished the federal statute from the Nebraska law at issue in *Stenberg*. According to the Court, the federal statute is not unconstitutionally vague because it provides doctors with a reasonable opportunity to know what conduct is prohibited. *Id*. at 1628. Unlike the Nebraska law, which prohibited the delivery of a "substantial portion" of the fetus, the federal statute includes "anatomical landmarks" that identify when an abortion procedure will be subject to the act's prohibitions. The Court noted: "[I]f an abortion procedure does not involve the delivery of a living fetus to one of these 'anatomical landmarks'—where, depending on the presentation, either the fetal head or the fetal trunk past the navel is outside the body of the mother—the prohibitions of the Act do not apply." *Id*. at 1627.

The Court also maintained that the inclusion of a scienter or knowledge requirement in the federal statute alleviates any vagueness concerns. Because the act applies only when a doctor "deliberately and intentionally" delivers the fetus to an anatomical landmark, the Court concluded that a doctor performing the D&E procedure would not face criminal liability if a fetus is

[9] 149 *Cong. Rec.* S2523 (daily ed. February 14, 2003) (statement of Sen. Santorum).

[10] *Id*.

[11] Unlike "as-applied" challenges, which consider the validity of a statute as applied to a particular plaintiff, facial challenges seek to invalidate a statute in all of its applications.

delivered beyond the prohibited points by mistake. *Id*. at 1628. The Court observed: "The scienter requirements narrow the scope of the Act's prohibition and limit prosecutorial discretion." *Id*. at 1629.

In reaching its conclusion that the Partial-Birth Abortion Ban Act of 2003 does not impose an undue burden on a woman's right to terminate her pregnancy, the Court considered whether the federal statute is overbroad, prohibiting both the D&X and D&E procedures. The Court also considered the statute's lack of a health exception.

Relying on the plain language of the act, the Court determined that the federal statute could not be interpreted to encompass the D&E procedure. The Court maintained that the D&E procedure involves the removal of the fetus in pieces. In contrast, the federal statute uses the phrase "delivers a living fetus." The Court stated: "D&E does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix." *Id*. at 1630. The Court also identified the act's specific requirement of an "overt act" that kills the fetus as evidence of its inapplicability to the D&E procedure. The Court indicated: "This distinction matters because, unlike [D&X], standard D&E does not involve a delivery followed by a fatal act." *Id*. at 1631. Because the act was found not to prohibit the D&E procedure, the Court concluded that it is not overbroad and does not impose an undue burden a woman's ability to terminate her pregnancy.

According to the Court, the absence of a health exception also did not result in an undue burden. Citing its decision in *Ayotte*, the Court noted that a health exception would be required if the act subjected women to significant health risks. *Id*. at 1635. However, acknowledging medical disagreement about the act's requirements ever imposing significant health risks on women, the Court maintained that "the question becomes whether the Act can stand when this medical uncertainty persists." *Id*. at 1636. Reviewing its past decisions, the Court indicated that it has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. *Id*. The Court concluded that this medical uncertainty provides a sufficient basis to conclude in a facial challenge of the statute that it does not impose an undue burden. *Id*. at 1637.

Although the Court upheld the Partial-Birth Abortion Ban Act of 2003 without a health exception, it acknowledged that there may be "discrete and well-defined instances" where the prohibited procedure "must be used." *Id*. at 1638. However, the Court indicated that exceptions to the act should be considered in as-applied challenges brought by individual plaintiffs: "In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack." *Id*. at 1638-39.

Justice Ginsburg authored the dissent in *Gonzales*. She was joined by Justices Stevens, Souter, and Breyer. Describing the Court's decision as "alarming," Justice Ginsburg questioned upholding the federal statute when the relevant procedure has been found to be appropriate in certain cases. *Id*. at 1641. Citing expert testimony that had been introduced, Justice Ginsburg maintained that the prohibited procedure has safety advantages for women with certain medical conditions, including bleeding disorders and heart disease. *Id*. at 1644-45.

Justice Ginsburg also criticized the Court's decision to uphold the statute without a health exception. Justice Ginsburg declared: "Not only does it defy the Court's longstanding precedent affirming the necessity of a health exception, with no carve-out for circumstances of medical uncertainty ... it gives short shrift to the records before us, carefully canvassed by the District

Courts." *Id*. at 1646. Moreover, according to Justice Ginsburg, the refusal to invalidate the Partial-Birth Abortion Ban Act of 2003 on facial grounds was "perplexing" in light of the Court's decision in *Stenberg*. *Id*. at 1650. Justice Ginsburg noted: "[I]n materially identical circumstances we held that a statute lacking a health exception was unconstitutional on its face." *Id*.

Finally, Justice Ginsburg contended that the Court's decision "cannot be understood as anything more than an effort to chip away at a right declared again and again by [the] Court—and with increasing comprehension of its centrality to women's lives." *Id*. at 1653. Citing the language used by the Court, including the phrase "abortion doctor" to describe obstetrician-gynecologists and surgeons who perform abortions, Justice Ginsburg maintained that "[t]he Court's hostility to the right *Roe* and *Casey* secured is not concealed." *Id*. at 1650. She argued that when a statute burdens constitutional rights and the measure is simply a vehicle for expressing hostility to those rights, the burden should be viewed as "undue." *Id*. at 1653.

Legislative History

Rather than settle the issue, the Court's decisions in *Roe* and *Doe* have prompted debate and precipitated a variety of governmental actions at the national, state, and local levels to limit their effect. The 110th 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*, 10 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, most of these proposals have sought to restrict the availability of abortions. A few measures have been introduced to better secure the right to terminate a pregnancy. The Freedom of Choice Act (FOCA), for example, was introduced and debated in both the 102nd and 103rd Congresses, but was never enacted. FOCA attempts to codify *Roe* legislatively, and was reintroduced in the 110th Congress. 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*. 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 94th Congress when nearly 80 amendments were introduced. By the 98th 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 98th 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.[12]

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 97th 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*, 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 97th 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* which, in addition to

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

decriminalizing abortion, was seen as legitimizing the status of abortion as a medical procedure for the purposes of the Medicaid program.

Since *Roe*, 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).

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 97th 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 104th 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 104th 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. This ban has continued in recent appropriations measures for the District.

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 104th 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 110th Congress

Legislation that would have prohibited the knowing transport of a minor across state lines for the purpose of obtaining an abortion was again introduced in the 110th Congress. The Child Interstate Abortion Notification Act was introduced on February 15, 2007 by Representative Ileana Ros-Lehtinen. The measure would have required a physician who performed or induced an abortion on a minor who was a resident of a state other than the state in which the abortion was performed to provide at least 24 hours written notice to a parent of the minor before performing the abortion. A parent who suffered harm from a violation of the notice requirement could have obtained appropriate relief in a civil action. The notice requirement would not have applied in certain specified situations, including those where the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness.

Legislation that would have required an abortion provider or his agent to provide specified information to a pregnant woman prior to the performance of an abortion was also introduced. The Unborn Child Pain Awareness Act was introduced by Senator Sam Brownback in the Senate on January 22, 2007, (S. 356) and by Representative Christopher H. Smith in the House on August 3, 2007 (H.R. 3442). Under the measure, an abortion provider or his agent would have been required, prior to the performance of an abortion, to communicate specified information to the pregnant woman, provide an "Unborn Child Pain Awareness Brochure" to the woman, and obtain the woman's signature on an "Unborn Child Pain Awareness Decision Form."

The act's requirements would have applied only when an abortion was being performed on a so-called "pain-capable unborn child." The term "pain-capable unborn child" was defined by the act to mean "an unborn child who has reached a probable state of development of 20 weeks after fertilization." The requirements would not have applied during a medical emergency when delaying the procedure would endanger the pregnant woman. Penalties for knowing violations of the act would have included civil penalties. Under the Senate version of the measure, the suspension or revocation of a medical license would also have been possible.

On April 19, 2007, in apparent response to the Court's decision in *Gonzales*, the Freedom of Choice Act was introduced in the House by Representative Jerrold Nadler and in the Senate by Senator Barbara Boxer (H.R. 1964/S. 1173). The measure would have codified the Court's decision in *Roe* by stating that a government may not deny or interfere with a woman's right to choose to bear a child, to terminate a pregnancy prior to viability, or to terminate a pregnancy after viability where termination is necessary to protect the life or health of the woman. The act would have also authorized an aggrieved individual to obtain appropriate relief, including relief against a government, in a civil action.

FY2007 Appropriations

H.J.Res. 20, the Revised Continuing Appropriations Resolution, 2007, was enacted on February 15, 2007 (P.L. 110-5) and provided funding for various federal agencies for the remainder of FY2007.[13] Conditions attached to the availability of FY2006 funds, including those pertaining to abortion, were made applicable to funds appropriated for FY2007 under H.J.Res. 20.

The FY2006 appropriations measures retained longstanding restrictions on the use of federal funds for abortion and abortion-related services. H.R. 3057, the FY2006 Foreign Operations appropriations measure (P.L. 109-102), provided that none of the appropriated funds could be made available to an organization or program that supported or participated in the management of a program of coercive abortion or involuntary sterilization. In addition, appropriated funds were not available for the performance of abortions as a method of family planning, or to motivate or coerce any person to practice abortions. Appropriated funds were not available to lobby for or against abortion. To reduce reliance on abortion in developing nations, funds were available only for voluntary family planning projects which offered a broad range of family planning methods and services. Such voluntary family planning projects were required to meet specified requirements.

[13] For additional information on H.J.Res. 20, 110th Cong. (2007), see CRS Report RL33282, *The Budget for Fiscal Year 2007*, by Philip D. Winters.

Contributions to the United Nations Population Fund (UNFPA) were conditioned on the entity not funding abortions. In addition, amounts appropriated to the UNFPA under the measure were required to be kept in an account that was separate from the UNFPA's other accounts. The UNFPA could not commingle funds provided under the measure with the entity's other sums.

H.R. 2862, the FY2006 appropriations measure for the Departments of Commerce, Justice, and State (P.L. 109-108), prohibited the use of funds to pay for abortions in the federal prison system except in cases where the life of the mother would have been endangered if the fetus was carried to term or in the case of rape.

Under H.R. 3058, the FY2006 appropriations measure for the Departments of Transportation, Treasury, and Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies (P.L. 109-115), appropriated funds could not be used to pay for abortions or for any administrative expenses related to a health plan in the federal employees health benefits program that provided benefits or coverage for abortions. H.R. 3058 also prohibited the use of appropriated and local funds to pay for abortions in the District of Columbia except where the life of the mother would have been endangered if the fetus was carried to term or where the pregnancy was the result of an act of rape or incest.

H.R. 3010, the FY2006 appropriations measure for the Departments of Labor, Health and Human Services, and Education, and Related Agencies (P.L. 109-149), prohibited the use of funds, including funds derived from any trust fund that received appropriations, for abortions except in cases of rape or incest, or where a woman who suffered from a physical disorder, injury, or illness would have her life jeopardized if an abortion was not performed. H.R. 3010 included the nondiscrimination language that first appeared in the FY2005 appropriations provisions for the Department of Health and Human Services. This language prohibited the availability of appropriated funds to a federal agency or program or to a state or local government if such agency, program, or government subjected a health care entity to discrimination on the basis that the entity did not provide, pay for, provide coverage of, or refer for abortions

FY2008 Appropriations

On December 26, 2007, the President signed H.R. 2764, the Consolidated Appropriations Act, 2008 (P.L. 110-161). The measure provided FY2008 funds for all of the federal agencies except the Department of Defense. The Department of Defense Appropriations Act, 2008, was enacted separately on November 13, 2007 (P.L. 110-116).

Longstanding restrictions on the use of federal funds for abortion and abortion-related services were again included in the FY2008 omnibus appropriations measure. For example, H.R. 2764 continued restrictions on the use of funds to pay for abortions in the federal prison system except in cases where the life of the mother would be endangered if the fetus was carried to term or in the case of rape. Subject to similar exceptions, H.R. 2764 continued other restrictions on the use of appropriated funds to pay for the abortions of federal employees or for any administrative expenses related to a health plan in the federal employees health benefits program that provided benefits or coverage for abortions. H.R. 2764 also maintained nondiscrimination language that prohibited the availability of appropriated funds to a federal agency or program or to a state or local government if such agency, program, or government subjected any institutional or individual health care entity to discrimination on the basis that the entity did not provide, pay for, provide coverage of, or refer for abortions.

Although H.R. 2764 was passed by the Senate with a provision that seemed to weaken the so-called "Mexico-City policy," such provision was removed from the final version of the measure. The policy, first announced by President Reagan at the 1984 United Nations International Conference on Population in Mexico City, requires foreign nongovernmental organizations to agree as a condition of receiving federal funds to avoid performing or promoting abortion as a method of family planning. The inclusion of the provision in the Senate-passed version of the bill aroused controversy because it would have permitted foreign nongovernmental organizations to receive federal funds and still perform or promote abortion with their own funds.

Author Contact Information

Jon O. Shimabukuro
Legislative Attorney
jshimabukuro@crs.loc.gov, 7-7990