

The Hyde Amendment

SYNOPSIS: *The Hyde Amendment is a rider to the annual Labor/Health and Human Services (HHS)/Education appropriations bill which prevents Medicaid and any other programs under these departments from funding abortions, except in limited cases. It is named after Rep. Henry J. Hyde (R-IL) who, as a freshman legislator, first offered the amendment.*

How long has the Hyde Amendment been in effect?

The Hyde Amendment has been enacted into law in various forms since 1976, during both Democratic and Republican administrations. In 1980, the Supreme Court affirmed the constitutionality of the Hyde Amendment. In *Harris v. McRae* the Court ruled that government may distinguish between abortion and “other medical procedures, because no other procedure involves the purposeful termination of a potential life.”

In addition to the life of the mother exception, the Senate had attached exceptions to the Hyde Amendment for rape and incest (FY 1977 to 1980) and for cases where there would be “severe and physical health damage” to the mother if the pregnancy were carried to term (FY 1977 to 1979). However, the 1980 elections brought enough new pro-life members to the Senate to produce a strong Hyde Amendment as part of Supplemental Appropriations and Rescission Act of 1981 (signed into law June 5, 1981 and effective thereafter):

None of the funds appropriated under 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.

This language remained constant from 1981 to 1993, though pro-abortion Members made several unsuccessful attempts to weaken the amendment. In 1989, Congress sustained President Bush’s veto of an appropriations bill that contained weakened language.

In 1993, pro-abortion advocates intended to use parliamentary rules of the House to eliminate the Hyde Amendment altogether and open the door for funding abortion on demand. To avoid this outcome, the Hyde Amendment was rewritten in a new format and the exceptions were expanded beyond “life of the

mother” to cases of rape or incest. This wording of the Hyde Amendment then became law:

None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

How does the Hyde Amendment apply to managed care plans?

Medicaid is a federal-state matching health care program for the poor. Traditionally, the Medicaid program is funded on a fee-for-service basis. Under this framework, the Hyde Amendment prohibits payment for abortion, except to save the life of the mother or in cases of rape or incest.

Many states secured waivers from the federal government so they can also provide medical care to Medicaid recipients through managed care plans. Federal funds are used to help pay for complete benefits packages instead of reimbursing specific procedures after the fact. In 1996, 40% of all Medicaid patients were served by managed care plans nationwide. This percentage is expected to increase in the future.

There was concern that the Hyde Amendment could be interpreted as not applying to Medicaid managed care plans. In 1997, an updated Hyde Amendment was included in the FY 98 Labor/HHS Appropriations Bill and was signed into law Nov. 3, 1997 (P.L. 105-78).

Does the Hyde Amendment cover programs paid for by separate federal trust funds?

In early 1998, it was reported that the Clinton Administration’s Health Care Financing Administration (HCFA) had been interpreting the

Hyde Amendment as not covering federal funds in the Medicare program, because those funds are paid into a trust fund controlled by separate authorizing legislation. Thus elective abortions had been subsidized for the people on disability covered by Medicare. In a June 22, 1998 letter to Sen. Don Nickles (R-OK), Donna Shalala, Secretary of Health and Human Services, reversed the reported HCFA interpretation and stated that “the Medicare trust funds will be administrated consistent with the Hyde criteria.” The FY 99 Labor/HHS Appropriations Bill, enacted into law as part of the FY 1999 Omnibus Appropriations Act (Public Law 105-277), also clarifies that the Hyde Amendment funding prohibition extends to government trust funds.

Does the Hyde Amendment ensure conscience protection in federal law?

Yes. In 2004, Reps. Henry Hyde and Dave Weldon (R-FL) offered what is known as the Hyde/Weldon Conscience Protection Amendment, which was enacted into law as part of the Fiscal Year 2005 Omnibus Appropriations Bill (Public Law 108-447). The amendment protects health care providers from gaps in the law that could be used to force all health care providers to participate in abortion.

So, then, what is the current wording of the Hyde Amendment?

As found in the Consolidated Appropriations Act, 2008 (H.R. 2764), signed into law December 26, 2007 (Public Law 110-161), the text of the Hyde Amendment law reads as follows:

SEC. 507. (a) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated under this Act, shall be expended for any abortion.

(b) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for health benefits coverage that includes coverage of abortion.

(c) The term ‘health benefits coverage’ means the package of services covered by a managed care provider

or organization pursuant to a contract or other arrangement.

SEC. 508. (a) The limitation established in the preceding section shall not apply to an abortion-

(1) if the pregnancy is the result of an act of rape or incest; or

(2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.

(b) Nothing in the preceding section shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State’s or locality’s contribution of Medicaid matching funds).

(c) Nothing in the preceding section shall be construed as restricting the ability of any managed care provider from offering abortion coverage or the ability of a state or locality to contract separately with such a provider for such coverage with State funds (other than a State’s or locality’s contribution of Medicaid matching funds).

(d) (1) None of the funds made available in this Act may be made available 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 discriminate on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

(2) In this subsection, the term ‘health care entity’ includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

Is the public supportive of the Hyde Amendment?

Yes, most Americans agree with the Hyde Amendment and other abortion funding restrictions. Numerous polls show that people are not in favor of the government using tax dollars to fund abortions. For example, a CBS/New York Times poll of 1,368 adults in 1993 illustrated to the nation that 72% of Americans do not want to see their tax dollars being used for abortions. A Zogby International poll in 2004 showed that 74% of Americans oppose the use of public funds to pay for abortions.

How much would it cost Medicaid to repeal the Hyde Amendment?

According to an estimate by the Alan Guttmacher Institute, the cost to the federal government of funding poor women's abortions in FY 1994 if the Hyde Amendment were repealed would have been between \$62.5 million and \$75 million for 312,000 abortions. This estimate is very low. Others estimate that 500,000 or more abortions would have been funded by Medicaid in FY 1994 if the Hyde Amendment were repealed.

Are states required, or simply allowed, to pay for abortions under the Hyde Amendment?

In 1993, Congress added to the Hyde Amendment funding for abortion also in cases of rape or incest. The laws and policies of many states traditionally allowed funding for abortion only when the mother's life was in danger. President Clinton said he would interpret the Medicaid statute to permit but not require state funding of abortion in the additional cases of rape or incest. But after Congress passed the revised Hyde Amendment, he reversed his interpretation and insisted that states must fund all abortions that are eligible for federal funds. He also interpreted the "rape and incest" standard very broadly, so an abortionist could claim reimbursement even if no rape or incest had ever been reported to law enforcement or public health authorities.

As a result of the Clinton administration's determination, several states were formally threatened with loss of all Medicaid funds unless they complied with the new federal standard, even if their own stricter policy against abortion funding was in their

state constitutions. Some of these states' laws had even been passed by public referendum. At the time the Clinton administration set this mandate, 32 states had laws prohibiting public funding for abortion except in cases where the life of the mother would be endangered. Battles over coercing the states raged in federal and state courts. Many states were forced to fund abortions against their will; some courts invalidated state laws in their entirety, requiring states to fund abortions without meaningful restriction. As of 1998, every state engaged in a law suit had lost in court. The outcome is that the states must now comply with the Clinton Administration mandate.

Congress proposed amendments that would have clarified the issue by permitting, but not requiring, states to fund rape and incest abortions. These amendments never became law.

How much has federal funding been reduced under the Hyde Amendment?

Prior to 1976, the federal Medicaid program paid for about 300,000 abortions a year. However, after the Hyde Amendment went into effect for FY 1977, the funding levels dropped dramatically. In FY 1977, 182,000 abortions were funded. In FY 1986, the number was 232; in FY 2000, 109; in FY 2004, 159.

Does reduction of funding result in more illegal abortions by poor women?

Several studies, conducted in states where both state and federal Medicaid abortion funding has been cut off, have indicated that there is no increase in the numbers of illegal abortions. One of these studies was conducted by the Texas Department of Health in cooperation with the Centers for Disease Control. The results were published in the CDC's June 8, 1980 *Morbidity and Mortality Weekly Report*. The study concluded:

The present study in Texas found more than one-third of the legal abortions expected among Medicaid-eligible women were not obtained in the postfunding restriction period. The data cited from the present study are consistent with those from a previous

investigation in Texas, which found approximately 40% of the expected number of subsidized abortions were not being obtained in the interval after the funding restriction . . . In Texas, pregnant, low-income women who do not have federal or state funds for abortions do not appear to be resorting to illegal abortions to terminate unwanted pregnancies . . . These findings are consistent with those from a national monitoring system, which also could not document that the restriction of public funds for abortion caused a large percentage of Medicaid-eligible women to choose self-induced or non-physician-induced abortions.

Does the Hyde Amendment discriminate against poor women?

Pro-abortion advocates claim that because wealthy women can easily pay for an abortion, it is the government's duty to pay for abortions for women who cannot afford them. But it does not improve the circumstances of the poor to help them kill their children simply because the wealthy may do so. Abortion is itself the most severe form of discrimination, since it is aimed at the most helpless and takes away the most fundamental right, the right to life. Public funds are better directed to efforts that really help poor women and their children.

Furthermore, a Wirthlin Poll of May 1992 found that people making less than \$15,000 per year oppose tax-funded abortions 2 to 1 (63% to 32%). The wealthier, earning more than \$60,000 per year, support funding by a margin of 57% to 41%. Thus, the very group that would allegedly benefit from certain tax-funded abortions rejects the idea of using public money for the procedure. When abortion is publicly funded, the poor are offered the abortions favored by the rich.

Should money be saved by funding abortions for poor women?

Proponents of public funding have employed the grotesque argument that Medicaid abortion funding is cheaper than childbirth. The Alan Guttmacher

Institute, the research arm of Planned Parenthood, argues that:

If public funds are not available to pay for abortions, a far greater amount of money will be spent to provide maternity care, medical care for the infant . . . and nutritional assistance to women on Medicaid. (*Abortion and Women's Health*).

This cost-benefit analysis of the worth of human life is degrading and absurd. It establishes a frightening precedent for looking at a human life not as something precious but simply as an economic commodity. As columnist William Raspberry wrote, "It also costs less to kill children than to educate them, but that's hardly a persuasive argument for infanticide."

What are the funding policy goals of pro-abortion advocates?

Pro-abortion advocates have long sought to make abortion not only legal but funded to the greatest extent possible. Since the Supreme Court has defined "health" so broadly in the context of abortion to include social and emotional "well-being" (*Doe v. Bolton*), abortion advocates try to insert "health" or "medically necessary" into abortion funding policies in order to eliminate all meaningful restrictions on public funding. As the National Abortion Rights Action League puts it, "medically necessary" is "a term which generally includes the broadest range of situations for which a state will fund abortion." (*Who Decides? A Reproductive Rights Issues Manual*, NARAL, 1990).

Even more ominous than the expansion of Medicaid funding for abortion on demand was the proposal during 1994 to mandate abortion coverage in every American's health insurance policy through a national health care plan. While most of the reform bills offered in Congress mandated abortion coverage, none of the measures passed.

April 2008