

## The Hyde Amendment: History, Current Status, and Application in Future Proposals

After *Roe v. Wade* was handed down in 1973, various federal health programs, including Medicaid, simply started paying for elective abortions. On September 30, 1976, an amendment by pro-life Congressman Henry Hyde (R-Il.) to prevent federal Medicaid funds from paying for abortions was enacted. The Hyde Amendment is widely recognized as having a significant impact on the number of abortions in the United States over an estimated 2.5 million lives.<sup>1</sup> We believe that the Hyde Amendment has proven itself to be the greatest domestic abortion-reduction measure ever enacted by Congress. It has been renewed each appropriations cycle — with few changes — every year for over 40 years. The Hyde Amendment, and similar provisions, have enjoyed bipartisan support over the years and have been supported by Congresses controlled by both parties as well as presidents from both parties.

The presidency of Joe Biden marked one of the sharpest departures from this long-standing principle, that tax dollars should not fund abortion. The Biden Administration has taken numerous aggressive steps to circumvent the clear Congressional intent in regards to prohibitions of tax-payer funded abortion.

### Veterans Affairs September 9, 2022 Interim Final Rule

Since 1992, Veterans Affairs (VA) has been statutorily prohibited from using taxpayer dollars for abortion. In fall of 2022, the administration disregarded this longstanding statutory prohibition on taxpayer funding for abortion at the VA and issued a new rule that includes funding abortion for health reasons<sup>2</sup>. The undefined reference to health will mean as in *Doe v. Bolton* (the companion case to *Roe v. Wade*) that abortions can be done for virtually any reason. The Court held in *Doe* that, “medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the wellbeing of the patient. All these factors may relate to health.”

### Department of Defense Memorandum October 20, 2022

Federal law (10 U.S.C. § 1093) has long prevented the Department of Defense (DOD) from using funds to perform elective abortions and prevented the DOD from using its facilities to provide abortions. In late October, 2022, Biden’s DOD published a memorandum directing the DOD to pay the travel and transportation costs for military members and dependents to travel to obtain elective abortions.<sup>3</sup>

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1 Michael J. New, Ph.D., Hyde @ 40 ANALYZING THE IMPACT OF THE HYDE AMENDMENT (<https://lozierinstitute.org/hyde-40-analyzing-the-impact-of-the-hyde-amendment-with-july-2020-addendum/>)

2 October 11, 2022 bicameral public comment letter in opposition to the Department of Veterans Affairs’ (VA) interim final rule (IFR) <https://www.lankford.senate.gov/imo/media/doc/Lankford%20Bicameral%20Comment%20on%20VA%20IFR%2010.11.22.pdf>

3 <https://media.defense.gov/2022/Oct/20/2003099747/-1/-1/1/MEMORANDUM-ENSURING-ACCESS-TO-REPRODUCTIVE-HEALTH-CARE.PDF>

The federal prohibition against DOD funding elective abortion clearly extends to funding for any item related to the abortion, such as travel and transportation, which has been the case for the entire life of the funding prohibition.

### Executive Order August 3, 2022

In early August, 2022, President Biden signed an executive order (EO) “Securing Access to Reproductive and Other Healthcare Services.” The EO “directs the Secretary of Health and Human Services to consider action to advance access to reproductive healthcare services, including through Medicaid for patients who travel out of state for reproductive healthcare services.”<sup>4</sup> This order is intended to pressure the Secretary of the Centers for Medicare and Medicaid to use his authority under Section 1115 demonstrations to waive certain provisions of Hyde Amendment. So far, no state has yet received such a waiver.

These actions are each an affront to the longstanding provisions of law prohibiting tax-payer funded abortion.

With that in mind, below is an analysis focusing on the history and importance of the Hyde Amendment and its application and suggestions for how to apply it to future proposals. Please find the following:

- [A brief history of the Hyde Amendment](#)
- [What the Hyde Amendment Covers \(and does not\)](#)
- [The mechanics of applying the Hyde Amendment](#)

### A Brief History of the Hyde Amendment

Federal funding of abortion became an issue soon after the U.S. Supreme Court, in its 1973 ruling in *Roe v. Wade*, invalidated the laws protecting unborn children from abortion in all 50 states. The federal Medicaid statutes had been enacted years before that ruling, and the statutes made no reference to abortion, which was not surprising, since criminal laws generally prohibited the practice. Yet by 1976, the federal Medicaid program was paying for about 300,000 elective abortions annually,<sup>5</sup> and the number was escalating rapidly.<sup>6</sup> If a woman or girl was Medicaid-eligible and wanted an abortion, then abortion was deemed to be “medically

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4 DCPD-202200684 - Executive Order 14079-Securing Access to Reproductive and Other Healthcare Services.

5 The 1980 CQ Almanac reported, “With the Supreme Court reaffirming its decision [in *Harris v. McRae*, June 30, 1980] in September, HHS ordered an end to all Medicaid abortions except those allowed by the Hyde Amendment. The department, which once paid for some 300,000 abortions a year and had estimated the number would grow to 470,000 in 1980 . . .”

6 In 1993, the Congressional Budget Office, evaluating a proposed bill to remove limits on abortion coverage from Medicaid and all other then-existing federal health programs, estimated that the result would be that “the federal government would probably fund between 325,000 to 675,000 abortions each year.” Letter from Robert D. Reischauer, director, Congressional Budget Office, to the Honorable Vic Fazio, July 19, 1993.

necessary” and federally reimbursable.<sup>7</sup> It should be emphasized that “medically necessary” is, in this context, a term of art — it conveys nothing other than that the woman was pregnant and sought an abortion from a licensed practitioner.<sup>8</sup>

That is why it was necessary for pro-life Congressman Henry Hyde (R-Ill.) to offer, beginning in 1976, his limitation amendment to the annual Labor Health and Human Services (LHHS) appropriations bill, to prohibit the use of funds that flow through that annual appropriations bill from being used for abortions. In a 1980 ruling (*Harris v. McRae*), the U.S. Supreme Court ruled, 5-4, that the Hyde Amendment did not contradict *Roe v. Wade*.

The pattern established under Medicaid prior to the Hyde Amendment was generally replicated in other federally-funded and federally-administered health programs. In the years after the Hyde Amendment was attached to LHHS appropriations, the remaining appropriations bills as well as other government programs went entirely unaffected and continued to pay for abortions until separate laws were passed to deal with them. Where general health services have been authorized by statute for any particular population, elective abortions ended up being funded, unless and until Congress acted to explicitly prohibit it.

In later years, as Medicaid moved more into a managed-care model, the Hyde Amendment was expanded to explicitly prohibit any federal Medicaid funds from paying for any part of a health plan that covered abortions (with narrow exceptions). Thus, the Hyde Amendment has long prohibited not only direct federal funding of abortion procedures, but also federal funding of plans that include abortion coverage.

There is abundant empirical evidence that where government funding for abortion is not available under Medicaid or the state equivalent program, at least one-fourth of the Medicaid-eligible women carry their babies to term, who would otherwise procure federally-funded abortions. Some pro-abortion advocacy groups have claimed that the abortion-reduction effect is substantially greater — one-in-three, or even 50 percent.<sup>9</sup>

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7 As the Sixth Circuit Court of Appeals explained it: “Because abortion fits within many of the mandatory care categories, including ‘family planning,’ ‘outpatient services,’ ‘inpatient services,’ and ‘physicians’ services,’ Medicaid covered medically necessary abortions between 1973 and 1976.” [Planned Parenthood Affiliates of Michigan v. Engler, 73 F.3d 634, 636 (6th Cir. 1996)]

8 It has long been understood and acknowledged by knowledgeable analysts on both sides of abortion policy disputes that “medically necessary abortion,” in the context of federal programs, really means any abortion requested by a program-eligible woman. For example: In 1978, Senator Edward Brooke (R-Mass.), a leading opponent of the Hyde Amendment, explained, “Through the use of language such as ‘medically necessary,’ the Senate would leave it to the woman and her doctor to decide whether to terminate a pregnancy, and that is what the Supreme Court of these United States has said is the law.”

9 “Discriminatory Restrictions on Abortion Funding Threaten Women’s Health,” NARAL Pro-Choice America Foundation factsheet, January 1, 2010, citing Rachel K. Jones et al., Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001, *Persp. on. Sexual & Reprod. Health* 34 (2002).

What the Hyde Amendment Does (and Does Not) Cover: The Hyde Amendment is NOT a government-wide law, and it does NOT always apply automatically to proposed new programs.

The Hyde Amendment is a limitation that is attached annually to the appropriations bill that includes funding for the Department of Health and Human Services (DHHS), and it applies only to the funds contained in that bill. (Like the annual appropriations bill itself, the Hyde Amendment expires every September 30, at the end of every federal fiscal year. The Hyde Amendment will remain in effect only for as long as the Congress and the President re-enact it for each new federal fiscal year.). The current Hyde Amendment text reads in part<sup>10</sup>

Sec. 506. (a) 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 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. 507. (a) The limitations 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.

The Hyde Amendment is sometimes referred to as a “rider,” but in more correct technical terminology it is a “limitation amendment” to the annual appropriations bill that funds the Department of Health and Human Services and a number of smaller agencies. A “limitation amendment” prohibits funds contained in a particular appropriations bill from being spent for a specified purpose. The Hyde Amendment limitation prohibits the spending of funds within the HHS appropriations bill for abortions (with specified exceptions). It does not control federal funds appropriated in any of the other 11 annual appropriations bills, nor any funds appropriated by Congress outside the regular appropriations process. [However, because of an entirely separate statute enacted in 1988, the HHS policy is automatically applied as well to the Indian Health Service.]

That is why it has been necessary to attach funding bans to other bills to cover the programs funded through other funding streams (e.g. international aid, the federal employee health benefits program, the District of Columbia, Federal prisons, Peace Corps, etc.). Together these various funding bans form a patchwork of policies that cover most federal programs and the District of Columbia, but many of these funding bans must be re-approved every year and could be eliminated at any time.

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<sup>10</sup> Public Law 117-328., Division A, Title V, General Provisions

## **Some examples of programs currently covered by the Hyde Amendment policy:**

-Medicaid (\$75 million) and Medicare (\$67 million), and other programs funded through the Department of Health and Human Services.

-The Federal Employees Health Benefits Program (covering 9 million federal employees) prevents the use of federal funds for “the administrative expenses in connection with any health plan... which provides any benefits or coverage for abortions.” Federal employees may choose from a menu of dozens of private health plans nationwide, but each plan offered to these employees must exclude elective abortions because federal funds help pay the premiums.

-State Children’s Health Insurance Program (SCHIP) prohibits the use of federal funds “to assist in the purchase, in whole or in part, of health benefit coverage that includes coverage of abortion” (42 USC§1397ee(c)(7)).

-The 2010 Obamacare health law ruptured longstanding policy. Among other objectionable provisions, the Obamacare law authorized massive federal subsidies to assist many millions of Americans to purchase private health plans that will cover abortion on demand. The Patient Protection and Affordable Care Act (PPACA) allows premium assistance credits under PPACA to be directed to health insurance coverage that includes abortion, where a state has not specifically banned it.<sup>11</sup>

The PPACA also created multiple new streams of federal funding that are “self-appropriated” — that is to say, they flow outside the regular funding pipeline of future DHHS appropriations bills and therefore would be entirely untouched by the Hyde Amendment.<sup>12</sup>

Government agencies receive funds from many sources, but once they are received by the government they become federal funds. If such funds are transmitted to abortionists to pay for abortions or to plans that pay for abortions, that constitutes federal funding for abortion.

When a federal program pays for abortion or subsidizes health plans that cover abortion, that constitutes federal funding of abortion — no matter what label is used. The federal government collects monies through various mechanisms, but once collected, they become public funds — federal funds.

Further, there is not a meaningful distinction to how the funds are dispersed once they become federal funds — be it towards a direct payment for health coverage or in the form of tax credits (which may or may not be paid in advance, or simply count against tax liability — which does not always exist). Additionally, there is no meaningful distinction to whom the funds are paid, be it to an individual, an employer covering health cost, or to another covering entity. When

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11 The PPACA §1303(a)(1) 42 U.S.C. 18023 allows individual states to pass legislation to keep abortion out of the health plans that participate in the exchanges. But, even where a state does this (as about half have done), it does not address the other fundamental problems with the PPACA — and the taxpayers in such a state will still be paying to subsidize abortion-covering insurance plans in other states, and the other abortion-expanding components of the law.

12 [www.nrlc.org/uploads/ahc/ProtectLifeActDouglasJohnsonTestimony.pdf](http://www.nrlc.org/uploads/ahc/ProtectLifeActDouglasJohnsonTestimony.pdf), and [www.nrlc.org/uploads/DvSBA/GenericAffidavitOfDouglasJohnsonNRLC.pdf](http://www.nrlc.org/uploads/DvSBA/GenericAffidavitOfDouglasJohnsonNRLC.pdf).

government funds are expended to pay for abortions or to plans that pay for abortions, that constitutes federal funding for abortion.

### The Mechanics of Applying the Hyde Amendment

It is our position that when Congress creates or reauthorizes a health or health insurance program, it should write explicit permanent abortion policy language into the law itself, as it would be a reckless assumption to believe that the Hyde Amendment would be renewed for each successive fiscal year in perpetuity.

The best solution would be a permanent government-wide policy as created by H.R. 7, the No Taxpayer Funding for Abortion Act, as the current various funding bans (covering most federal programs) form a patchwork of policies that must be re-approved every year and could be eliminated at any time.<sup>13</sup> President Joe Biden supports a full repeal of the Hyde Amendment,<sup>14</sup> and the Woman's Health Protection Act which would enshrine into law abortion-on-demand and would overturn existing pro-life laws and prevent new protective laws from being enacted at the state and federal levels and nullify nearly all federal limits on taxpayer funding of abortion<sup>15</sup>

### The Hyde Amendment and the Appropriations Process

The Hyde amendment has in the past and would need to continue to be applied by

1. applying the direct language limiting both abortion payments and coverage to the provision in question or
2. cross-referencing the Hyde provision in LHHS.

Since LHHS has long-included the Hyde Amendment, any monies flowing through that program are generally protected, so long as the language continues to be approved. There are also other appropriations bills that contain protections as in the Financial Services Bill in regards to the FEHB. It is important to note that while the current appropriations for that year may be protected, any supplemental legislation that deals with additional funds, renewals, or expansions must be subjected to any limitation terms and conditions, including the Hyde Amendment.

Language regarding supplemental appropriations dealing with LHHS would look like:

"Unless otherwise provided for by this Act, the additional amounts appropriated by this Act to appropriations accounts shall be available under the authorities and conditions applicable to such appropriations accounts for fiscal year XX.

Direct Language of Hyde would need to be tailored to any given circumstance based on what sort of payment/program the funds are applying to, but generally appears like:

LIMITATION.—Amounts appropriated under paragraph (1) shall not be available to pay for an abortion and (2) shall not include payment to an issuer of a qualified health plan

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13 <https://www.congress.gov/bill/118th-congress/house-bill/7?q=%7B%22search%22%3A%5B%22no+taxpayer+funding+abortion%22%5D%7D&s=1&r=1>

14 <https://www.nationalrighttolifeneews.org/2020/06/89048/amp/>

15 <https://www.congress.gov/bill/117th-congress/senate-bill/4132?q=%7B%22search%22%3A%5B%22s4132%22%5D%7D&s=4&r=1>

that includes coverage of abortion (other than any abortion necessary to save the life of the mother or any abortion with respect to a pregnancy that is the result of an act of rape or incest).

Language dealing with a cross-reference would look like:

"LIMITATION.—Amounts appropriated under [insert, section/subsection/paragraph] are subject to the requirements and limitations under sections 506 and 507 of division H of Public Law [most recent appropriations] in the same manner and to the same extent as if such amounts for such quarter and each such year were appropriated under such division."

### The Hyde Amendment and Mandatory (Non-Appropriated) Funding

Anytime a general health services have been authorized by statute for any particular population, Hyde restrictions must be attached to the legislation and its funding streams.

The primary ways of incorporating the Hyde amendment

Direct language that explicitly forbids payment for abortion or benefits that cover abortion or indirect language that permanently cross-references the most recently enacted Hyde Amendment.

"No funds authorized or appropriated by this Act..."

"LIMITATION.—Amounts appropriated under [insert, section/subsection/paragraph] are subject to the requirements and limitations under sections 506 and 507 of division H of Public Law [most recent appropriations] in the same manner and to the same extent as if such amounts for such quarter and each such year were appropriated under such division."

That is what was done, for example, when Congress created the State Children's Health Insurance Program (SCHIP) in 1997. It was generally recognized that this proposed program would end up funding abortions for children under age 18 without limitation if there was no explicit restriction, so such a restriction was written into the base statute. During more recent Congresses there were debates over various issues on bills to reauthorize SCHIP, but there was no fight over abortion policy, because that issue had been addressed explicitly when the program was created.

Another approach can include that when a new program offering health care services is created, language could be crafted to ensure that the appropriated money flows through a program that is permanently Hyde protected.

### **Ensuring that Hyde is implicated:**

When drafting, it is critical to ensure that operative appropriations language to refer to the program in question as "health benefits coverage" to make crystal clear that the second prong of Hyde is implicated. Because Hyde was drafted for Medicaid, applying it to a different program requires precise phrasing.

Some Examples of the Application (and Non-Application) of the Hyde Amendment in Coronavirus-Related Legislation from the 117th Congress can be found here:

<https://www.nrlc.org/uploads/fedleg/HydeApplicationinCOVID.pdf>