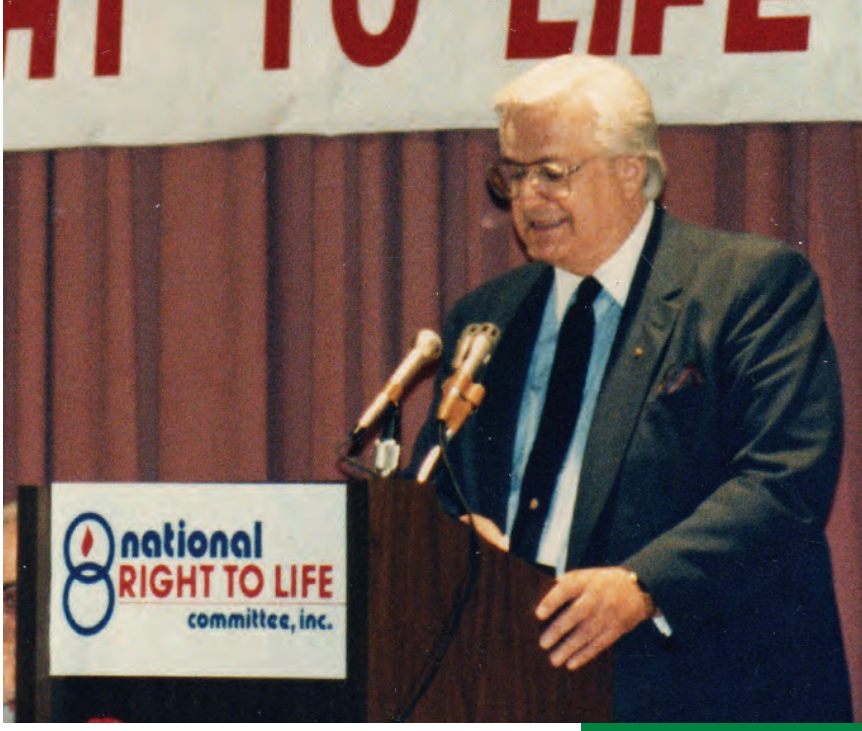
THE HYDE AMENDMENT
Background and History



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-Ill.) 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 saving an estimated two million American lives.[1] We believe that the Hyde Amendment has proven itself to be the greatest domestic abortion-reduction measure ever enacted by Congress.

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,[2] and the number was escalating rapidly.[3] If a woman or girl was Medicaid-eligible and wanted an abortion, then abortion was deemed to be "medically necessary" and federally reimbursable.[4] 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.[5]

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1. Michael J. New, Ph.D., Hyde @ 40 ANALYZING THE IMPACT OF THE HYDE AMENDMENT (https://s27589.pcdn.co/wp-content/uploads/2016/09/OP_hyde_9.28.3.pdf)

2. Statement of the Department of Health, Education and Welfare, "Effects of Sec. 209, Labor-HEW Appropriations Bill, H.R. 14232," June 25, 1976.

3. 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 . . ." 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.

That is why it was necessary for Congressman Henry Hyde to offer, beginning in 1976, his limitation amendment to the annual Health and Human Services 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[6]

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.)

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4. 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)]

5. 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.

6. "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).

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The current Hyde Amendment text reads in part[7]:

> 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.
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> 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.

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)).

7. *www.nrlc.org/uploads/ahc/ProtectLifeActDouglasJohnsonTestimony.pdf, and www.nrlc.org/uploads/DvSBA/GenericAffidavitOfDouglasJohnsonNRLC.pdf.*

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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.[8]

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.[9]

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 individual, an employer covering health cost, or to another covering entity. When government funds are expended to pay for abortions or to plans that pay for abortions, that constitutes federal funding for abortion.

8. 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.

9. Public Law 116-94, Division A, Title V, General Provisions