

Fact Sheet

The "Freedom of Choice" Act

As of June 21, 1993 the so-called "Freedom of Choice" Act (FOCA) had 131 co-sponsors in the House and 42 co-sponsors in the Senate. It is being promoted by abortion-rights organizations and groups such as the League of Women Voters and the National Abortion Rights Action League. The bill was referred to the House Judiciary Committee's Civil and Constitutional Rights Subcommittee and the Senate Labor and Human Resources Committee, both of which have heavy pro-abortion majorities.

Abortion activist groups such as the National Abortion Rights Action League and the National Organization for Women have urged congressional incumbents to co-sponsor the Act, and want to make it a litmus test for new candidates. Says Rep. Edwards' legislative counsel, Catherine LeRoy, "It's a test for candidates. It's a test for members of Congress. It's a test for candidates running for state and local offices as well."

What is the wording of the House version of FOCA?

The main section of HR 25 reads:

PURPOSE.

It is the purpose of this Act to establish, as a statutory matter, limitations upon the power of the States to restrict the freedom of a woman to terminate a pregnancy, in order to achieve the same limitations as provided, as a constitutional matter, under the strict scrutiny standard of review enunciated in Roe v. Wade and applied in subsequent cases from 1973 to 1988.

RIGHT TO CHOOSE.

a) In General. Except as provided in subsection (b), a State may not restrict the right of a woman to choose to terminate a pregnancy

1) before fetal viability; or

2) at any time, if such termination is necessary to protect the life or health of the woman.

b) Medically Necessary Requirements. A State may impose requirements medically necessary to protect the life or health of women referred to in subsection (a).

The bill also contains these additional provisions:

c) Rules of Construction. Nothing in this Act shall be construed to

1) prevent a state from protecting unwilling individuals or private health care institutions from having to

participate in the performance of abortions to which they are conscientiously opposed; or

2) encourage or prevent a State requirement that a minor involve a parent, guardian, or other responsible adult before terminating a pregnancy, but any State that imposes such a requirement shall implement a confidential and expeditious bypass.

The "parental involvement" provision is a worthless amendment which would not necessarily allow states to require parental notice or consent. The "conscience clause" provision exempts individuals and private institutions from having to perform abortions but not public health care facilities.

What is the wording of the Senate version of FOCA?

The main section of S 25 is, in substance, identical to that of HR 25. The Senate version also contains these provisions:

b) Rules of Construction. Nothing in this Act shall be construed to

1) prevent a State from protecting unwilling individuals or private health care institutions from having to participate in the performance of abortions to which they are conscientiously opposed;

2) prevent a State from declining to pay for the performance of abortions; or

3) prevent a State from requiring a minor to involve a parent, guardian, or other responsible adult before terminating a pregnancy.

This version contains nearly the same phony parental involvement provision and incomplete conscience clause as the House bill.

What would this act do?

FOCA's promoters call it a simple codification of the Supreme Court's 1973 *Roe v. Wade* decision. However, the Act actually would go even further than *Roe* to legislate a national policy of abortion-on-demand. It would prohibit states (including Guam and the District of Columbia) from placing any significant restrictions on abortion at any stage of pregnancy. The sponsors' intent is to nullify the Court's decisions beginning with the July 3, 1989 ruling in *Webster v. Reproductive Health Services* and up through the July, 1992 ruling in *Planned Parenthood v. Casey* which gave states more power to restrict or at least regulate abortion.

Supreme Court decisions from *Webster* to *Casey* have upheld some restrictions on access to abortion which would not be allowed under FOCA. These are: restrictions on public subsidization of abortion, true parental notification or consent, testing for fetal viability with restrictions on post-viability abortions, informed consent, record-keeping and reporting by abortionists, and a 24-hour waiting period. Many other types of restrictions are also likely to fall.

Would the bill allow restrictions on late term abortions?

Since the bill does not define viability by gestational age, the determination is left up to the subjective judgment of the abortionist. But even after viability, states may not restrict abortion if it is considered necessary to preserve the woman's "health." In *Doe v. Bolton*, the companion case to *Roe v. Wade*, the Supreme Court said that abortion for "health" reasons could be performed "in light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient." This interpretation has permitted abortion through the third trimester for personal or emotional reasons. Supporters of FOCA are sure to oppose any attempts to narrow the definition of "health."

What are the bill's promoters saying about it?

The bill's sweeping language is designed to implement what supporters say is the core principle of *Roe*: to prohibit laws that restrict in any way access to abortion. Rep. Edwards, chairman of the Civil and Constitutional Rights Subcommittee, last year told a congressional staff briefing sponsored by NARAL,

[The bill] is explicit. It provides for no exceptions -- no exceptions whatsoever. It is a classic one-sentence statute that says a state may not restrict the right of a woman to terminate a pregnancy, and that is for any reason.

The ACLU said in its March/April 1990 legislative newsletter that the bill

prohibits such restrictions as spousal consent requirements, waiting periods, parental notification and consent, and requirements that all abortions be performed in a hospital.

What about possible amendments to the bill?

The various amendments under dispute do nothing to alter the radical nature of the bill; they were simply designed to make it more marketable. It is unclear whether

pro-abortion advocates will ultimately accept a funding restriction amendment or a true parental notice amendment in the final version in order to get the bill passed. What is certain is that they will not accept amendments allowing states to restrict third trimester or non-physician abortions or to allow informed consent or waiting period laws.

The bill explicitly prohibits state regulations on abortion by endorsing only Supreme Court decisions on abortion from *Roe* up to 1988. Between 1973 and 1988, the Court routinely struck down restrictions on abortion based on a "strict scrutiny" standard. Beginning with the *Webster* decision in 1989, the Court applied a less rigorous standard, termed the "undue burden" test in *Casey*.

Would FOCA permit non-physicians to perform abortions?

Pro-abortion professional groups, including the National Abortion Federation and the American College of Obstetricians and Gynecologists, have increasingly promoted the legalization of abortion by trained non-physicians. The number of physicians willing to become involved in abortion is steadily decreasing, causing pro-abortion advocates to rely on nurse practitioners and physician assistants to perform abortions. The lack of concern for women's health is reflected in this statement by South Bronx Planned Parenthood director Irving Rust: "In the future I expect that a lot of abortions will be done by technicians. You don't need a medical degree or an IQ of an Einstein to do certain things in medicine." (*Washington Post*, April 20, '93)

Currently, Vermont does allow non-physician abortions (physician assistants may perform abortions up to 15 weeks). Pro-abortion forces will use FOCA to invalidate the laws in most other states that restrict non-physician abortions. The 1992 Senate committee report on FOCA puts a very heavy burden of proof on states to justify even health-related regulations. The state must prove to a federal court that the regulation is "medically necessary" to protect life or health and is the least restrictive means of furthering that goal. The report also suggests that states allow only "medically competent personnel" -- not necessarily physicians -- to perform abortions.

The "Freedom of Choice" Act is clearly intended to preempt state efforts to regulate abortion. The bill would be more accurately titled the Mandatory Abortion-on-Demand Act (MAD Act).