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POLITICAL DEVELOPMENTS IN THE ABORTION AREA

JAMES L. ROBINSON

When I started out to develop this as a review of how Congress has reacted during the last 6 years to the Supreme Court decisions on abortion, I told George that I did not think it would take much time because Congress basically had avoided the constitutional amendment question. There were just a limited number of areas the Supreme Court had left for Congress to take action on and I thought I would confine myself to those areas and stay out of the area of administrative decisions and actions.

I discovered rather quickly, as I expect a lot of other people have, that my office, and all of us, have been so caught up in the question of the Supreme Court's decisions in relation to the Constitution and constitutional amendment that we had had a tendency to overlook the fact that Congress apparently has been left a rather large area in which to legislate, or at least attempt to legislate. When I got through some of the files, I decided that if I tried to do what I set out to do, which was to take each action of the Congress and try to develop a conclusion or indicate the trend of congressional reaction, I would not have time and you would not have time for me to do this. So what I have tried to do is to categorize the congressional reaction to the Supreme Court decisions. I mentioned I would not have time because in checking the files, I discovered, much to my surprise, that since *Roe*¹ and *Doe*,² the House of Representatives, as a full body, has had thirty-four separate roll call votes in which the issue involved was basically abortion and the aftermath of the Supreme Court's decisions. The Senate also has voted thirty-four times since *Roe* and *Doe* on the subject of abortion.

I guess you would say the inventiveness of both the pro-abortion people in this country and the anti-abortion people with finding issues that the Supreme Court deliberately had not dealt with or had not anticipated is almost amazing.

¹ *Roe v. Wade*, 410 U.S. 113 (1973).

² *Doe v. Bolton*, 410 U.S. 179 (1973).

I have a listing here, before I get into what Congress has been doing, to illustrate for the ninety-sixth Congress some of the new areas that will be coming before the Congress. It is quite a list. There already has been a bill introduced attempting to deal with the question of admissions to medical schools. Another area that has been discovered that has great potential at the federal level is an attempted plan to restrict the use of federal funds as subsidies and loans to finance the construction of abortion clinics. Here we have gone into a completely new area of the Small Business Administration and the Comprehensive Employment Training Act which provides funds generally for economic development. The Health Planning and Resources Development Act is coming up for renewal and there are at least five or six issues there as a result of the Supreme Court's decisions.

The whole question of Medicaid is to be greatly expanded because of the new idea that one Congressman has come up with of expanding Medicaid benefits to unborn children. Thus far, the argument over Medicaid has been whether the Federal Government should be funding abortions. Now a new twist has been developed and an attempt is going to be made to say that the unborn child has a right to Medicaid, as well as the mother claiming the right to have the government pay for an abortion.

There is pending now, on the floor of the Senate, a bill to establish a new Department of Education. I expect that when the Senate comes back the abortion issue will be injected into that debate and if not, then certainly when it reaches the House. The whole area of health insurance is nearing a point, I believe, where you are going to begin to see significant decisions being made by Congress as to the future character and financing of health services in the United States. Clearly here the abortion issue, in my opinion, is not going to be avoided by Congress. They are going to come directly into conflict in trying to reconcile the concept of a national health system and the question whether the government should be the sponsor of abortion and make abortion, more or less, a universal requirement in the delivery of health care in this country. Those are just a few things that have been developed.

The initial reaction of Congress to the Supreme Court's decisions in *Roe* and *Doe* was that some of the members were unhappy with the Supreme Court's action, but many of them were relieved. The initial reaction of Congress was that the Supreme Court has taken care of the abortion question. I do not think you can find many Congressmen today who would say that the Supreme Court has taken care of abortion and removed it from their jurisdiction. In 1977 alone, the House voted eighteen times, and the Senate fifteen times, on the question of what the federal government's role should be in the provision or denial of abortion benefits under welfare programs alone.

After the *Roe* and *Doe* decisions, it did not take long for Congress to

realize that the Supreme Court had created problems in an area which, until then, had been mainly a question for state government. The first reaction was the so-called "Church Amendment" in 1973. In that particular action Senator Church offered an amendment to a Health Extension Act to deal with a problem involving abortion which he foresaw and which had arisen in Montana in the *Taylor*³ case on the question of a tubal ligation. The issue was whether a Catholic hospital would be required, contrary to the ethical standards of the hospital, to allow the performance of a tubal ligation because of the fact that the hospital had been financed in part by federal funds. The district court, as you perhaps recall, on that occasion determined that the hospital was engaged in state action and required the hospital to allow the ligation. Senator Church used this as an illustration of the problem he foresaw in the abortion decisions, and tried to establish what he characterized as a conscience clause in the abortion area. Basically, the Church Amendment said that the receipt of federal funds by any institution would not result in that institution being required to provide a medical service which was contrary to their religious convictions or ethical beliefs.

That vote was interesting. There was only one Senator at that time, and this was in March of 1973, who voted against the freedom of a Catholic institution, or any other private institution, to dissent from the Supreme Court's abortion ruling. That Senator happened to make a mistake. I was sitting in the gallery. He walked in to cast his vote. He apparently misunderstood the signal he got from the Democratic whip and voted no, and walked out the other side of the chamber and went back to his office. Someone ran after him and caught him in the hallway and told him what had happened, that he was supposed to vote yes, everyone else had. He ran back to try to change his vote, but the vote had been announced and he was not permitted to do so. As a result, the Church Amendment passed ninety-one to one. The Senator later made a statement in the Congressional Record explaining his vote and when he had the opportunity, after the House had acted, he asked to be recorded as voting to accept the House amendments.

I mention this because almost the same issue was before the Senate in 1978 in the Pregnancy Disability Act. Senator Eagleton offered an amendment which said that, insofar as compelling an employer to provide fringe benefits for his employees, pregnancy would not include abortion. He described his amendment as protecting the religious institutions and individuals who did not agree with the Supreme Court's position on abortion. It tried to protect them from the government compelling them to

³ *Taylor v. St. Vincent's Hospital*, 369 F. Supp. 948 (D. Mont. 1973), *aff'd*, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976).

pay for something to which they had strong religious and ethical objections. Senator Eagleton's amendment lost by three votes. The issue involved was not different from that in the Church Amendment in 1973. During the last 5 years, the Senate has had this issue before it a great number of times. The Senate has a record of shifting away from the idea of dissent on this question toward a record that minorities, those people in this society who disagree with the decision of the Supreme Court, should not be protected in their religious convictions. Last year, I thought that the Senate did not quite understand the issue that Senator Eagleton was laying before them. I thought that, after the House had acted and the issue was better explained, the Senate would take the position that the government should not be required by the Supreme Court decision to compel an employer to violate his own conscience by paying for abortions or requiring him to pay for abortions for his employees. I was wrong. When the House adopted, in effect, the Eagleton Amendment and the bill went to conference, I found that the House conferees, quite frankly, were amazed at the attitude taken by the Senate conferees. There was just a complete refusal to consider compromise on the issue for a long period of time. Finally, Congress did fashion what it seemed to think was a compromise. But it did so by trying to avoid the question of the government's right to impose on employers and church institutions, particularly religious institutions and individual employers, the morality of the Supreme Court. To me, this was a very disturbing development.

The Senate, not long after the experience on the Church Amendment, came to grips with the abortion issue in another area which is still before them. Senator Bartlett offered the first effort to disqualify from reimbursement to the states the Medicaid expenses of providing abortions to indigent women. This was in September of 1974. He offered an amendment to the HEW Appropriations Act. I do not recall whether he had an exception in there for the life of the mother, but I would expect he did. He had no exception for such things as rape and incest. His amendment carried by a vote of fifty to thirty-four. The amendment was dropped in conference. The House had passed the bill without the issue being raised. That is just 4 years ago last September.

In 1977, and again in 1978, the major issue was the Hyde Amendment which had been adopted in the House in January, 1976. When that was before the Senate, and those eighteen votes during that period, the Senate was voting consistently, and I would say overwhelmingly, against any restriction on federal funding of abortions. This is a considerable reversal from the 1974 vote when Senator Bartlett first raised this question.

On the issue of a constitutional amendment, the Senate is the only body to vote on the issue, and it did so rather indirectly. First, you will recall, there was a period during 1974 when the Senate Judiciary Subcommittee held rather extensive hearings on various proposals for consti-

tutional amendments. This finally came to a vote following the 1974 election. Early in 1975, the Constitutional Amendment Subcommittee defeated a modified states' rights amendment, which Senator Burdick sponsored, by a tie vote of four to four. So the amendment was defeated in committee. Senator Helms, however, managed in 1976 to get the issue before the entire Senate by offering a Human Life Amendment to another resolution that had been reported out of the Judiciary Committee. On the question whether to make this pending business, which was not a direct vote on the submission of a constitutional amendment, Senator Helms lost by a vote of forty-seven to forty. Later, a similar amendment was offered by Senator Scott, in 1977 or 1978, to the Voting Rights Act for the District of Columbia which is being circulated now for ratification. Senator Scott's amendment lost by a much larger vote than the earlier attempt by Senator Helms. I do not have the exact vote, but it showed a considerable loss of support in the Senate for the idea of a constitutional amendment.

In the House the experience has been quite different. The House began voting on the question of abortion following *Roe* and *Doe* on the same amendment that Senator Church had offered in the Senate. It was adopted by voice vote with very little opposition expressed.

A few months later Representative Hogan offered an amendment which became the second vote where abortion was an issue. The proposed amendment prohibited the Legal Services Corporation from using federal funds to bring lawsuits against institutions, particularly hospitals, to compel them to provide abortions. The vote was overwhelming. Over 300 Congressmen voted to place such a restriction on the Legal Services Corporation.

A little later in the same session, Congressman Froehlich, in what was basically an abortion issue, carried the House by 280 to 73 to place restrictions on fetal research. There were two or three votes on that issue over a period of a couple of years. The House vote was increasing from the anti-abortion standpoint.

The Hyde Amendment then brought the issue more directly to the House when the first effort was made in 1976 to place restrictions on the use of federal funds to pay for abortions. The House, as you recall, adopted the Hyde Amendment on its first vote of 207 to 167. Since then the anti-abortion vote in the House has been growing steadily. The last vote, where the issue was clearly drawn in 1978, was 256 to 114.

This is a rather strange development. I cannot think of any way to describe what has happened other than a comment that Senator Moynihan made last year to me at lunch one day when we were talking about another instance where the House had voted very strongly and repeatedly with a good majority on one side of an issue and the Senate had voted just as consistently completely opposite with no real indication of a desire

to compromise the two positions. He asked if I had looked at the House vote and what I discovered from it, and I said: "Well, it is what you would expect. You could predict it. You look at the district."

This particular issue involved tax credits for educational expenditures. With a very few exceptions, in every district where there are substantial numbers of private schools and parents with children in private schools, the Congressmen voted in favor of tax credits. In those districts with very few private schools and in the south, where the public school lobby was very active in opposition, the Congressmen voted against tax credits. They were voting their district.

Senator Moynihan said that just convinced him of what he had always suspected, that Senators do not talk to their people. They not only do not represent the voters, they do not even talk to them. He said, "You know, I don't really represent eight million people. I do not know what eight million people want. I have no way of talking to them. I cannot find out." He said Senators are institutions and they represent institutions. They talk to institutions. The only way that people can deal with the United States Senate is on an institutional basis.

This comment by Senator Moynihan certainly applies in the abortion area. I think it is rather apparent at this point that, if given the opportunity, the House of Representatives would produce a majority for some type of a constitutional amendment on abortion. After the 1976 election, as we have assessed the new Congress, we are somewhere between, I would say, thirty and forty votes short in the House to get a two-thirds majority on a constitutional amendment if the issue reached the House floor in a fashion where the Congressmen could clearly vote their commitments to their constituents. About a year after *Roe* and *Doe*, we made an effort to assess the Senate. At that time, I came to the conclusion that approximately a third of the Senate would be committed to the Supreme Court decision and approximately a third would be willing to vote for something to overrule the Supreme Court. In between, there were approximately thirty-three Senators who had not made up their minds or were unsure what their people wanted. They were liable to go in either direction. The results of the last four or five years, I think, would require an assessment that the Senate, as presently constituted, is no longer in an undecided position. Today it would be a surprise to me if a third of the Senate would vote for some type of constitutional amendment. The issue probably will not reach them in a clear fashion to be able to count the votes in the 96th Congress. In our appraisal, there are sixteen new Senators in the 96th Congress, and out of that sixteen the anti-abortion people feel that they have made a net gain of one as a result of the 1978 elections on the constitutional amendment question, and a possible gain of about five votes on the question of federal funding. In the House, the result of the election was merely to increase the number of votes. It is still short of

a two-thirds vote for a constitutional amendment, although there was a rather substantial increase in the number of votes for prohibition of federal funding.

What this situation will produce for the nation in the long run, I would hesitate to begin to guess. There has developed around the country, in the last 2 or 3 years, a greater commitment on the part of the anti-abortion segment of our population. Originally, many of the people in the Right-to-Life movement approached the Supreme Court decision really feeling that all they had to do was to explain to Congress what was wrong with the Supreme Court's decision and Congress would respond and allow the people, through the states, to vote on a constitutional amendment. I think in the last 2 or 3 years, the Right-to-Life movement has realized that that is not the way the Congress of the United States functions, and that there is no shortcut or substitute for the political process. Today, you are seeing the anti-abortion forces going into the political arena, where they are going to have to go if they hope to change the attitude of Congress and have an effect on our legislative process. Today, they are in the precincts in many parts of the country, doing what the labor group organizations began to do thirty years ago. They are out ringing doorbells. They are running voter identification projects. They are identifying, precinct-by-precinct, all of the voters they feel will vote for an anti-abortion candidate and organizing volunteers to see that those people vote at the next election. The results last year, I think, were rather impressive and just within the last week or so, in a special election in California, an anti-abortion candidate, a Republican, was elected in a district traditionally Democratic. I believe this was brought about partly by the activity of the anti-abortion people in that locality.

In New York State there is now a political party that will be on the ballot, along with the Conservatives, the Republicans and the Democrats, called the Right-to-Life Party. In this respect, they are following the American tradition. You could go back to the struggle over the prohibition amendment in the early part of this century when the prohibitionists formed their own political party because the two traditional parties were not responsive, in their opinion, to their interests. The Prohibition Party has, of course, long since gone out of existence. The pro-abortion forces (that's a rather catchall phrase), those who are supporting the Supreme Court's position, basically, have not been able, up to this point, to reach down and develop a grassroots activist volunteer group to go out and do this work at the precinct level. I think the action of Congress clearly shows this. What I would call the pro-abortion movement in this country, aside from the Supreme Court, has developed its support by influencing the institutions of our society, both private and public. It is those institutions, press, labor unions, and civil rights organizations, who have influenced the Senate.

So the struggle develops and continues. Today I would say almost every member of Congress could tell you that the issue is not going to go away. At least the House members will tell you that, because they know that, in their own districts, the issue is getting stronger and their seat in Congress is becoming more and more dependent upon their position on this issue. What we have is, in my experience, a somewhat unique situation, where the people, as represented by the House of Representatives, appear to be saying one thing, and the major institutions of our society, as represented by the United States Senate, are saying something else. To me that is a basic conflict in our legislative process that somehow or other will have to be resolved before this country accepts or finds an accommodation on the issue of abortion.