

Case 13

In the 1970's the U.S. Supreme Court ruled that the government was not required to fund abortions. Congress, in a bitterly hard fought compromise, enacted legislation that authorized payment for Medicaid abortions in the cases of rape, incest, and danger to the health of the woman. Congressional legislation characteristically is phrased in broad language that leaves many issues unsettled about how to put the legislation into effect. A specific governmental agency or department thus is given the responsibility of drafting, issuing, and implementing regulations for this purpose. In the case of the congressional compromise legislation relative to Medicaid funding for abortions, the Department of Health, Education and Welfare (HEW - now Health and Human Services (HHS)) had the responsibility to draft, issue, and implement regulations.

The Department's Secretary at that time, Joseph Califano, was a practicing Catholic who believed both that abortion is morally wrong, except to save the life of the mother, and that, as a matter of public policy, elective abortions should not be funded by the government. Califano had made his personal views on abortion clear for the public record during his confirmation hearings, under intense and, in some instances, adverse questions posed by members of the Senate. As a person with extensive experience in public life at the national level, however, Califano also acknowledged at his confirmation hearings that, if confirmed as HEW Secretary, he would have an obligation to carry out the law, as a public official in a democratic system of government. He thus assured the Senators that if Congress passed laws calling for funds to be provided for abortions, he would enforce them.

Shortly after the President (Jimmy Carter) signed into law the congressional compromise on Medicaid funding of abortions, Senator Edward Brooke of Massachusetts described the law as "not really acceptable to either side."^{*} In this regard, Representative Henry Hyde of Illinois, a staunch anti-abortionist, protested that it "provides for the extermination of thousands of unborn lives," and on the other side of the issue, American Civil Liberties President Norman Dorson called the law "a brutal treatment of women with medical needs for abortion." Almost immediately pro and anti abortion forces pressed HEW for regulations to further their respective opposed positions.

Under firmly established judicial precedent, a court will not overturn regulations issued by a federal agency or department to implement a congressional enactment unless the regulations conflict directly with the congressional enactment's clear intent.

^{*} Several years later, Congress voted to forbid all Medicaid funded abortions.

As Secretary of the Department of Health, Education, and Welfare, Califano was the public official ultimately responsible for the drafting, issuing, and implementing of the regulations in regard to the congressional compromise legislation on Medicaid funding for abortions.

© Association for Practical and Professional Ethics 2005