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# ABORTION: NARROWING THE COURT'S JURISDICTION

## H.R. 4237

### Provisions and Status

H. R. 4273 was introduced by Congressman Philip M. Crane (R-Ill.) on March 2, 1977. This bill would remove the question of abortion from the jurisdiction of all Federal courts, including the Supreme Court. It would thereby enable state legislatures to prohibit or regulate elective abortions without being reversed by the Federal judiciary. The bill is now in the hands of the House Judiciary Committee.

### Precedents

Article III, Section 2 of the Constitution grants explicitly to Congress the power to limit the jurisdiction of the Federal Courts. The relevant language is as follows:

> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

Congress has actually used this power a number of times: In 1839, a Federal statute (Fifth United States Statutes at Large, p. 339) removed from Federal court jurisdiction the decisions of the Secretary of the Treasury on tax disputes so that those decisions would no longer be subject to appeal. This statute was upheld in the case of Cary v. Curtis.

NOTE: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

In 1867, a Federal statute (Fourteenth United States Statutes at Large, p. 475) provided that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

In 1932, the Norris-La Guardia Act (Title 29, U.S. Code, Section 107) deprived Federal courts of the power to issue injunctions in labor disputes except under certain specified conditions.

In 1934, the Johnson Act (Title 28, U.S. Code, Section 1341) qualified the power of Federal courts to suspend or enjoin public utility rate changes ordered by State agencies.

In 1942, the Emergency Price Control Act limited certain kinds of injunctions to an emergency court of appeals.

In 1974 Congress barred court challenges to the Alaska Pipeline based on environmental grounds.

In 1958 Senator Jenner of Indiana proposed legislation which would have deprived the Federal courts of jurisdiction to strike down certain kinds of state anti-subversive statutes. Among the opponents of this legislation were the American Civil Liberties Union, Americans for Democratic Action, the Emergency Civil Liberties Committee, and Senator Javits of New York -- all of whom nevertheless conceded that Congress did possess the constitutional power to do what Senator Jenner wanted.

## Objections

Opponents raise the following arguments against H.R. 4273:

1) Using legislative power to narrow judicial jurisdiction compromises the independence of the judiciary.

2) Elective abortion is a private decision which is properly made by the mother alone without outside interference.

## Arguments in Favor

Supporters of H.R. 4273 make the following points:

1) As Senator Jenner observed nineteen years ago, "Jurisdiction may be broad or narrow without affecting the independence of the judiciary." To delimit the area within which

the courts make their decisions is not to dictate those decisions in advance.

2) The belief that abortion is a private decision requires either of the following two premises:

   (a) The fetus is not a person.
   (b) A person's right to live is relative to the desires and conveniences of other people.

The first of these premises is an embryological and genetic question; the second a moral question. The Federal judiciary is not an appropriate forum for resolving either of them. In the American tradition, a matter this fundamental can be settled only by the informed and deliberate consensus of the people as expressed through their legislatures.

A recent (July 2, 1977) New Republic editorial suggests that the consensus is moving toward the pro-life position. While still supporting legalized abortion, the editorial rejects the legitimacy of the 1973 Roe v. Wade decision and makes several key concessions such as the following:

1) Pro-abortionists have failed to confront the right-to-lifers' central argument: "The government should not sanction the taking of human life except in the direst circumstances, such as when another life is threatened."

2) "For the government to take a truly agnostic position on the issue of when human life begins, it would have to protect fetuses from the moment of conception in case Roman Catholics are right: You don't walk away from a flooded mineshaft because there's only a 50-50 chance someone's trapped at the bottom."

3) "...there clearly is no logical or moral distinction between a fetus and a young baby; free availability of abortion cannot be reasonably distinguished from euthanasia."

The editors of the New Republic have thought very carefully about what feticide is, even though they believe that society's convenience can outweigh an individual's right to life. Many other Americans do not share this belief but have not given as much thought to the question of what feticide is. H.R. 4273 makes this issue impossible to escape.

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