

WebMemo



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Protection of Health Care Providers' Right of Conscience: What Federal Law Says

Randolph W. Pate

The Obama Administration is moving rapidly to overturn federal “conscience clause” regulations protecting health care providers who object to performing procedures that violate their religious beliefs or moral convictions. These regulations implement longstanding federal laws expressing the decided opinion of Congress and the American people that no individual—doctor, patient, or other health professional—should be forced to violate his or her conscience in the provision of medical care.

Rather than rushing to overturn conscience protections, the Obama Administration should leave the existing regulation in place and work to enforce existing laws. Congress should also work to protect health care provider conscience laws and expand protections to include patients as well as health care providers.

What the Law Says: Three Federal Health Care Conscience Protection Laws:

1. *The Weldon Amendment*. First adopted in 2004, the Weldon Amendment (named after former Representative Dave Weldon [R-FL]) has been included in each subsequent Health and Human Services (HHS) appropriations act.¹ The law’s requirements apply to federal agencies and programs as well as state and local governments receiving federal funds from HHS.

The Weldon Amendment prohibits discrimination against health care providers who do not provide, pay for, provide coverage for (in the case of a health plan), or refer for, abortions. It protects

a broad number of entities including physicians and other health care professionals, hospitals, provider-sponsored organizations, HMOs, and health insurance plans that do not cover abortion. It also contains important catch-all language including in its protections “any other kind of health care facility, organization, or plan.”

2. *Public Health Service Act Section 245*. Signed into law by President Clinton in 1996, Section 245 of the Public Health Service Act (PHSA) places restrictions on the federal government as well as state and local governments receiving federal financial assistance.²

PHSA Section 245 prohibits discrimination against both individuals and institutions (including doctors, hospitals, and postgraduate training programs) that refuse to undergo training in, require or provide training in, provide referrals for, or perform, abortions.³ It also prohibits discrimination against individuals and institutions that refuse to “make arrangements for” any of these activities.⁴ Thus, PHSA Section 245 would on its face prohibit discrimination against a doctor who refused even to “make arrangements for” such activities as abortion referrals.

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214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

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3. *The Church Amendments*. Named after former Senator Frank Church (D-ID), the Church Amendments were enacted at various times in the 1970s in part to respond to the 1973 Supreme Court decision in *Roe v. Wade* and to address concerns that doctors and faith-based hospitals would be forced to perform abortions or sterilizations as a condition of receiving federal funds.⁵

The Church Amendments:

- Prohibit courts and other public officials from requiring individuals or institutions receiving grants under certain federal programs to perform or assist in abortions or sterilizations or to provide facilities or personnel for the same.⁶
- Forbid discrimination against physicians or other health care personnel because of their religious or moral objections to performing abortions or sterilizations.⁷ Areas of prohibited discrimination include employment, promotion, termination, and extension of staff privileges.⁸
- Extend protection to individuals, including researchers and laboratory staff participating in HHS-funded behavioral or biomedical research (including research funded by the National Institutes of Health).⁹ Under this provision, no individual can be discriminated against on the basis that (1) the individual

performed or assisted in any lawful research activity or (2) the individual refused to perform or assist in any research activity because it would be contrary to his or her religious beliefs or moral convictions. This means, for example, that researchers who object to participating in federally funded embryo-destroying research cannot be fired or otherwise discriminated against on the basis of their beliefs.

- Bar any program funded by HHS from requiring any individual to perform or assist in “any part” of a “health service program or research activity” if such participation would be contrary to the individual’s religious beliefs or moral convictions. On its face, this provision covers a broad array of activities, including contraception programs and research activities administered by HHS.

The Provider Conscience Regulation. Efforts to develop the regulation began partially in response to a November 2007 ethics opinion by the American College of Obstetricians and Gynecologists that raised fears that physicians would risk losing board certification if they did not violate their conscience by referring for abortions.¹⁰

On December 18, 2008, the Bush Administration finalized a regulation implementing the Weldon Amendment, PHSA Section 245, and the

1. See the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Public Law 110-329, Div. A, section 101, 122 Stat. 3574, 3575.
2. See 42 U.S. Code § 238n.
3. See 42 U.S. Code § 238n(a).
4. *Ibid.*
5. See *Taylor v. St. Vincent’s Hospital*, 523 F.2d 75 (1975), where the 9th Circuit Court of Appeals required a Catholic hospital to provide facilities for performing sterilizations, in spite of the hospital’s faith-based policy against providing sterilizations.
6. See 42 U.S. Code § 300a-7(b).
7. See 42 U.S. Code § 300a-7(c)(1).
8. The Church Amendments also prohibit discrimination against individuals because of their past involvement in lawful abortions or sterilizations.
9. See 42 U.S. Code § 300a-7(c)(2).
10. See “HHS Secretary Calls on Certification Group to Protect Conscience Rights,” U.S. Department of Health and Human Services, March 15, 2008, at <http://www.hhs.gov/news/press/2008pres/03/20080314a.html> (April 3, 2009); Mark Hemingway, “A Limit to ‘Choice’: Obama Will Invite Discrimination against Doctors Who Choose Not to Perform Abortions,” *National Review Online*, March 5, 2009, at <http://article.nationalreview.com/?q=N2E3ODlhYWRjNDQ4NGRkZTE0MWU4MDhkOWVjNzdkZjQ> (April 3, 2009).

Church Amendments. The regulation defines key statutory terms, provides guidance for HHS grantees and other funding recipients subject to the law's requirements, and designates the HHS Office for Civil Rights to receive and investigate complaints of discrimination.

After less than two months in office, the Obama Administration proposed to overturn the provider conscience regulation.¹¹ It is currently conducting a 30-day public comment period on the proposal, which ends April 9, 2009.

Conscience in Health Care: Good for Patients and Providers. The Obama Administration should:

- Allow the provider conscience regulation to go into full effect; and
- Work to ensure compliance with existing law.

Additionally, Congress should:

- Support existing laws protecting the conscience of health care workers; and
- Expand conscience rights for both health care professionals and patients.¹²

The conscience protection laws stem from a long tradition of defending religious and conscience rights in the United States, from the First Amendment to laws protecting conscientious objectors during time of war.

While numerous federal laws and programs spend billions of dollars each year to promote access to health care services, including reproductive services, conscience protection laws are based on the premise that the nation should never require the violation of individual moral or religious beliefs to achieve health care access. These laws ensure that Americans from diverse faith and philosophical backgrounds are free to pursue their professional calling without fear of persecution or coercion.

—*Randolph W. Pate is Visiting Fellow in the Richard and Helen DeVos Center for Religion and Civil Society at The Heritage Foundation. To learn more about the provider conscience regulation and the Obama Administration's effort to overturn the regulation, as well as to send a comment to HHS supporting conscience rights for health care providers, visit www.doctorsright.com. Comments may be submitted until April 9, 2009.*

11. *Ibid.*

12. For more discussion on the importance of protecting patients' rights of conscience in health care, see Robert E. Moffit and Jennifer A. Marshall, "Patients' Freedom of Conscience: The Case for Values-Driven Health Plans," Heritage Foundation Backgrounder No. 1933, May 15, 2006, at <http://www.heritage.org/Research/HealthCare/bg1933.cfm>.