# Déjà Vu All Over Again

## Legislative and Regulatory Action on Reproductive Health in 2004

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# Overview: Déjà Vu All Over Again

With the presidential election serving as a backdrop, the political polarization that has become the norm in Congress reigned supreme throughout the second session of the 108th Congress. While supporters of family planning and abortion rights fought many now-familiar battles during 2004 – some clearly intended to court the socially conservative political base – the electoral uncertainty in all likelihood prevented an all-out assault on reproductive rights.

### *Funding for Family Planning Holds Steady but Two Anti-Choice Bills Enacted*

Funding for domestic and international family planning programs – always a concern – held steady in 2004, with Title X receiving a small, but welcome, boost. However, two prominent pieces of the social conservative's anti-choice agenda were approved by Congress and signed into law. Legislation intended to undermine reproductive choice by promoting fetal "personhood" – the so-called Unborn Victims of Violence Act (cynically dubbed 'Laci and Conner's law by proponents) – became law in April. The other major coup for anti-choice members of Congress came in the post-election lame duck session when Congress approved a potentially far-reaching new federal refusal clause as part of the nine-bill FY 2005 omnibus spending package. This new language, originally the brainchild of the U.S. Conference of Catholic Bishops, imposes significant financial penalties on states and providers that enforce their own laws and policies designed to ensure access to abortion services or referrals – including at Title X-funded family planning clinics. The National Family Planning and Reproductive Health Association (NFPRHA) closed out the year by filing a challenge to the new law in federal court in the District of Columbia that is likely to be decided in 2005.

### *2004 Battles Over Judicial Nominees Provide Preview of Coming Attractions*

Speculation that President Bush would have an opportunity to nominate at least one Supreme Court justice in 2004 proved unfounded, although the October announcement that 80 year-old Chief Justice William Rehnquist has thyroid cancer, followed by his decision to scale back his participation in cases, has fueled rampant speculation that he will step down in 2005. Concern over the Administration's plans for the federal judiciary exploded in the final days of 2004 when President Bush set the course for confrontation by announcing his plan to renominate 20 judicial candidates who did not receive a vote in the 108th Congress. This combative announcement sets the stage for a new, but fierce round of nominations battles in 2005. Several of the recycled nominees have strikingly controversial anti-choice records that earned them a filibuster, including Priscilla Owen, William Pryor and Janice Rogers Brown.

Bush's statement came on the heels of the news that Senate Majority Leader Bill Frist (R-TN) had added two staunchly anti-choice conservatives, Senators Sam Brownback (R-KS) and Senator-elect Tom Coburn (R-OK), to the Judiciary Committee, which holds hearings on all judicial nominations and decides which ones to send to the Senate floor. At the same time, Majority Leader Frist made clear that he was seriously considering a rules change that would eliminate filibusters of judicial nominees, a change that would have major implications for the next Supreme Court nomination and for the 2005 legislative agenda.

### *FDA Decision on Emergency Contraception Blow to American Women*

Actions that typically affect family planning programs and access to reproductive health services often take place below the radar at the federal agency level. One of the rare agency actions that captured the public's attention in 2004 was the Food and Drug Administration's (FDA) decision to deny women access to over-the-counter (OTC) emergency contraception (EC). FDA Acting Director of Drug Evaluation and Research Steve Galson cited inadequate data on the use of the pills among girls less than 16 years of age as the basis for his decision. Speculation was rampant that the decision was politically motivated, since Galson overruled the advice of the agency's own medical experts, and ignored the recommendations of two FDA advisory panels, which include the nation's most respected obstetricians and gynecologists. The FDA's decision quickly became a proxy for broader complaints about the impact of social and religious conservatives on scientific research.

The end of the FDA's six-month clock for deciding whether to approve a revised application from manufacturer Barr Laboratories asking permission to allow the product to be sold OTC to individuals 16 and older while maintaining prescription status for those age 15 and under, is up on Janaury 20 – President Bush's inauguration day. Odds of approval are considered slim.

### *Good Things Happened Too!*

The year 2004 was not without its bright spots, although as is so often the case, many of these took the form of fears that never materialized. Numerous federal legislative restrictions directed at the domestic and international family planning programs were threatened but not enacted. In this category, the move to block grant Medicaid –the largest public payer for family planning services – was postponed for at least another year.

One of the high points was the March for Women's Lives in April, which drew more than a million supporters to the streets of Washington, DC – including many from NFPRHA -- who organized to send the clear message that we must not turn back the clock on reproductive rights. Timed to coincide with the March, pro-family planning leaders in the House and Senate introduced the "Putting Prevention First Act" – an omnibus bill that set forth *our* agenda – including more funding for family planning through Medicaid and Title X, and improved access to emergency contraception and comprehensive sex education.
Other high points in the year included three successful legal challenges to the first-ever federal ban on abortion procedures that was signed into law in November 2003. Three federal courts across the country declared the so-called "Partial-Birth Abortion Act of 2003" unconstitutional because it prohibited physicians from performing some of the safest abortion procedures available starting as early as 12 weeks in pregnancy and failed to provide any exception for circumstances when the banned procedures would be safest for the woman's health.

### *Waxman Report on Federal Abstinence Programs Raises Questions*

In December, Congressman Henry Waxman (D-CA) took aim at the Bush Administration's just-say-no strategy for teenagers and sex with a scathing report criticizing federally-funded

abstinence education programs, in which the government and its backers in Congress have heavily invested. Representative Waxman's report called into question the wisdom of the $30 million increase just approved for those programs. Waxman's high-profile review of abstinence-only curricula concluded that many included "false, misleading, or distorted information." With that brief introduction, a detailed review of the legislative and regulatory actions in 2004 that impacted access to reproductive health follows.

# Tepid Federal Commitment to Domestic Family Planning
## *Title X Receives $10M Increase for 2005*

In 2004, the more than 4,500 family planning clinics funded through Title X of the Public Health Service Act remained vital to the provision of low-cost, confidential reproductive health care to millions of low-income Americans. However, despite the rising numbers of eligible individuals and the increasing cost of contraceptive drugs and devices and diagnostic tests needed to meet the legislative goal of "making comprehensive voluntary family planning services readily available," very little progress was made in addressing the long-term chronic underfunding of the Title X family planning program.

This is not to say that hope did not spring eternal for Title X. Each year, Congress provides an opportunity for public testimony regarding programs under the jurisdiction of the various Appropriations Committees. On April 21, NFPRHA President and CEO Judith DeSarno testified before the House Labor, Health and Human Services, and Education (Labor-HHS) Appropriations Subcommittee requesting $350 million in federal funding for Title X in FY 2005. Although Congress ultimately fell far short of this request, the Senate Appropriations Committee did approve a significant $30 million boost in funding for Title X (10.8 percent increase over FY 2004) in its version of the FY 2005 Labor-HHS spending bill on September 15. The Senate bill also included instructions stating that any increases in Title X funding for FY 2005 must be spent on medical services and supplies.

Unfortunately, the Senate Committee bill provided the high water mark for the program. The final FY 2005 catch-all spending bill signed into law on December 8 (P.L. 108-447) contained $288 million for Title X – a modest $10 million increase over last year. This increase will be reduced by more than $2 million as a result of the .8 percent across-the-board reduction for all non-defense, non-homeland security spending contained in the omnibus bill.

Although this increase will leave the program far short of the resources required to meet the need, it was far preferable to the House-approved Labor-HHS spending bill, which flat-funded the program at $278 million. In addition, the Senate report language that required funding increases to be spent on medical services made it into the final package.

Many other public health programs were also flat-funded, such as the Social Services Block Grant (SSBG) and the Maternal and Child Health (MCH) Block Grant, but selected programs that were Administration priorities received significant increases. As in recent years, however, the omnibus appropriations bill provided a hefty increase in funding for Community Health Centers -- $131 million over last year for a total of $1.7 billion in FY 2005. Another Administration priority, abstinence-unless-married education programs, received a $30 million increase for total funding of $170 million.

# FY 2005 Funding for Select Public Health Programs
## *($ in millions)*

| | FY 2005 Final (+/- over FY04) | FY 2004 Final | President's FY 2005 Budget Request |
|---|---|---|---|
| **Title X** | $288 (+$10) | $278 | $278 |
| **Adoption Awareness Training** | $13 ($0) | $13 | $13 |
| **SSBG** | 1,700* ($0) | $1,700 | $1,700 |
| **MCH Block Grant** | $730 ($0) | $730 | $730 |
| **Abstinence** | | | |
| **1. Community-Based Abstinence (earmark within ACF block grant)** | $105** (+$30) | $75 | $186 |
| **2. State Abstinence Grants (earmark within MCH block grant authorized by welfare legislation )** | $50 ($0) | $50 | $50 |
| **3. Adolescent Family Life Abstinence Earmark *** ** | $13 ($0) | $13 | $13 |
| **Ryan White (HIV/AIDS)** | $2,090 (+$45) | $2,045 | $2,080 |
| **Community Health Centers** | 1,748 (+$131) | $1,617 | $1,836 |
| **UNFPA**** ** | $34 ($0) | $34 | $25 |
| **USAID (international family planning programs)** | $441 (+9) | $432 | $425 |

*Up to 10 percent transfer from TANF to SSBG permissible
**Includes $4.5 million for abstinence evaluation and up to $10 million for a national abstinence-only education campaign
***Total funding for AFLA is $31 million
****President blocked the release of all UNFPA funds in FY 02, FY 03 and FY 04. Congress is allowing funding "up to" $34 million. A presidential determination of compliance with the Kemp-Kasten law is required.

# Federal Refusal Clause New Tact in War on Reproductive Rights

The most troubling development on the domestic reproductive rights front did not involve a fight over money, but rather the adoption of a new policy rider in the form of a sweeping federal refusal clause authored by Representative Dave Weldon (R-FL), a physician and staunch opponent of family planning and abortion rights. The new language dramatically highlights the increased clout of the Administration and of social conservatives in Congress in the wake of the November election. Although many policy riders deemed "controversial" were dropped during the final negotiations over the nine-bill omnibus spending package, emboldened House GOP leaders worked in tandem with the White House to ensure that the federal refusal clause provision was included in the final measure.

The federal refusal clause gathered steam in the House this year as a result of a letter-writing campaign engineered by the U.S. Conference of Catholic Bishops that bombarded Representative Ralph Regula (R-OH), the chair of the House Appropriations subcommittee responsible for crafting the bill that funds the Departments of Labor, Health and Human Services, and Education (Labor-HHS), with thousands of constituent postcards urging him to support new legislation to limit abortion referrals and services. As a relatively moderate Republican (albeit with an increasingly anti-family planning voting record), Chairman Regula allowed Representative Weldon, to take the lead on the amendment.

Incredibly, Representative Weldon and the Catholic Bishops insisted that the provision was necessary to stop "a campaign to force all health care providers to participate in abortion" – an outrageous assertion given that there are no federal requirements mandating that an individual provide abortion services. In fact, current federal law specifically allows individuals and institutions with moral or religious objections to opt out of providing abortion services. In reality, the only campaign in evidence was being conducted by conservatives themselves to *limit* protections related to abortion services and abortion-related speech.

**Text of the Weldon Amendment:**

Section 508: *None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.*

*(2) In this subsection, the term `health care entity' includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.*

### *Lowey's Attempt to Mitigate Weldon Language Fails*

Weldon's federal refusal clause amendment was initially approved by voice vote on July 14 during the House Appropriations Committee markup of its FY 2005 Labor-HHS spending bill. Family planning stalwart Representative Nita Lowey (D-NY) offered a second-degree amendment (an amendment to the Weldon amendment) intended to limit the impact of the Weldon provision. Her amendment was voted down on a voice vote.

### *Senate Never Considered the Measure Before It Was Added to Omnibus Bill*

Although the House affirmatively acted on this provision in committee, the Senate neither debated nor voted on the language in any committee or on the floor. Senate staff acknowledged that the timing of the negotiations over the provision could not have been worse, with family planning supporter Senator Arlen Specter (R-PA), the chair of the Labor–HHS Appropriations Subcommittee, unable to play his usual influential role in the process. Instead, Senator Specter was consumed – and politically neutralized – by his battle to secure the chairmanship of the Judiciary Committee. This left the Subcommittee's Ranking Member Tom Harkin (D-IA) as the chief opponent of the language. Not surprisingly, in the current environment, Democratic objections were insufficient to carry the day.

When it became clear that Senate appropriators failed in their efforts to eliminate, or even alter the language, ten women senators – led by Senator Barbara Boxer (D-CA) – sent a letter to Senate Appropriations Chair Ted Stevens (R-AK) expressing their opposition. In addition to Senator Boxer, signers to the November 19 letter included: Senators Maria Cantwell (D-WA), Hillary Clinton (D-NY), Susan Collins (R-ME), Dianne Feinstein (D-CA), Blanche Lincoln (D-AR), Barbara Mikulski (D-MD), Patty Murray (D-WA), Debbie Stabenow (D-MI), and Olympia Snowe (R-ME).

In an impassioned floor speech, Senator Boxer labeled the provision a "sham conscience clause," noting that "any business entity can decide to tell its doctors who work for it that they cannot give women information about their constitutional right to choose, even in case of rape, incest and life of the mother." New Jersey Democratic Senators Frank Lautenberg and Jon Corzine also spoke against the language.

That the new language would be a priority for anti-choice forces was made clear in a November 22 interview on National Public Radio's All Things Considered with Douglas Johnson of the National Right to Life Committee. Johnson claimed that the language was needed in response to an "orchestrated campaign" by abortion rights advocates "to use state and local government agencies to coerce and compel health care providers to participate in abortions…" He also claimed that corporations should have "ethical positions" and was clear that the language was intended to override Title X's abortion referral requirement.

### *What Is the Potential Impact of the Federal Refusal Clause?*

Although Representative Weldon's stated goal of limiting "discrimination" against health care entities because they do not provide, pay for, provide coverage of, or refer for abortions may

sound innocuous, and possibly even laudable, the clear intent of the refusal language is to dramatically undermine existing laws that protect a woman's right to choose, including her right to an abortion referral. According to the provision, health care entity is broadly defined to include physicians or other health care professionals, hospitals, provider-sponsored organizations, HMOs, insurance plans, or "any kind of health care facility, organization, or plan." In other words, any "health care entity" would be allowed to refuse to perform, pay for, provide coverage of, or refer for abortions regardless of federal, state, or local laws to the contrary. The penalty for violating the law is severe – the loss of all federal funds provided through the Labor-HHS bill.

Since the language of the amendment is sufficiently vague, its precise reach likely will determined by litigation. Legal analyses suggest that the new law could have major ramifications for those states, localities, and health care providers across the country that protect women's health by enforcing relevant federal, state or local laws.

If the language is determined to be as expansive as its author hopes, the impact could be substantial for any entity or health practitioner receiving money through the U.S. Department of Health and Human Services (HHS), whether through grant or contract. This is not limited to Title X programs, but could include private physician practices, community health programs, maternal and child health programs, hospitals, and Medicaid managed care organizations. States that use their own funds to pay for Medicaid abortion-related services beyond the limited circumstances permitted under the federal Hyde amendment could feel a significant impact.

In addition, state and local governments could be prohibited from enforcing a wide range of their own laws and constitutional mandates that ensure access to abortion services and referrals. While the amendment affects all states, the stakes are particularly high in a place like California, which not only has some of the country's most progressive reproductive health care laws, but also a right to privacy embedded in the state Constitution.

***What is the Specific Impact on Title X?***

The Weldon federal refusal clause appears to be odds with a fundamental principle of Title X that ensures pregnant women who request information about all their medical options, including abortion, are given that information, including a referral upon patient request. The new Weldon provision does not impact the non-directive options *counseling* requirement under Title X but, it could be a direct hit on the referral requirement. As such, it risks trampling on medical ethics, as well as Title X program regulations and guidelines that make clear that the abortion referral requirement is a condition of receiving federal Title X funding.

By law, Title X funds cannot be used to provide abortions and no individual is required to provide abortion referrals if he/she has an objection. Rather, it is the clinic that is responsible for ensuring that the requested information is conveyed to the patient. The Public Health Service Act regulations for Title X require that "if requested to provide such information and counseling, [the program must] provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant woman indicates she does not wish to receive such information and counseling."

Under the new federal refusal clause, Title X grantees and clinics, which include Planned Parenthoods, non-profit clinics, hospitals, family planning councils, and more than 40 state, city or county health departments, are not affirmatively prohibited from providing abortion referrals ("gagged"). However, the lack of clarity in the new language adds a legal requirement that could well be at odds with the existing legal requirement that makes the provision of abortion referrals a condition of receiving federal funds. The provision prohibits "discrimination" with respect to abortion referrals – whether it be distributing Title X funds to other entities or assigning duties to staff. If adhering to the existing abortion referral requirement is deemed "discrimination," the recipient could lose all federal funds provided in the Labor-HHS bill. This could create an untenable situation for recipients of Title X funds. Violation of either legal requirement (the current abortion referral requirement or the Weldon Federal Refusal Clause) could expose them to legal liability.

***Does the Weldon Federal Refusal Clause Address "Conscience" Issues?***

While supporters of the federal refusal clause claim that the provision is simply a technical change to current law that is necessary to stop "a campaign to force all health care providers to participate in abortion," the enacted policy change is neither technical in nature nor a clarification of current law. This argument, which asserts that health care providers are being "forced" to provide abortion services against their will, is simply a red herring. Carefully crafted conscience clauses already exist to protect the religious views of individual medical providers. The reach of the federal refusal clause is potentially so broad that it cannot be considered a conscience clause at all. In supposedly seeking to protect religious views, the provision effectively subjects health care entities and the patients they serve to public health protocols that could result in a lack of access to information and services that patients may need to protect their health. Moral or religious objections do not come into play at all in triggering the Weldon provision, and discrimination is not defined by the law.

***Up-or-Down Vote on Federal Refusal Clause Expected in Next Congress***

The good news is that the language is contained in a one-year appropriations bill, and will expire at the end of FY 2005 – giving family planning advocates an opportunity to educate the public and members of Congress on the impact of the egregious provision.

In fact, a vote to remove the language could take place in the Senate relatively early in the 109th Congress as a result of the eleventh hour campaign by the women senators to remove the language. Although their campaign failed, they were able to secure one concession from Senate Majority Leader Bill Frist (R-TN) – an agreement to hold a Senate vote by April 30 on a Boxer-sponsored bill that would repeal Weldon's federal refusal clause. According to the agreement, no amendments or procedural motions will be allowed to that bill. No such agreement regarding a vote was forthcoming in the House.

### *NFPRHA Files Suit Against Weldon Provision, Anti-Choice Forces Weigh in on Government's Side*

NFPRHA filed suit on December 13 in the U.S. District Court for the District of Columbia seeking to enjoin enforcement of the federal refusal clause. NFPRHA's request for immediate relief in the form of a Temporary Restraining Order to prevent HHS from enforcing any aspect of the federal refusal clause against NFPRHA members was denied on December 20. However, U.S. District Judge Henry Kennedy heard oral arguments in *NFPRHA v. Ashcroft et al* on January 5. Judge Kennedy gave both sides ten days to submit additional documents, and a decision in the case could come any time after that.

That anti-choice advocates are closely watching this case is no surprise. But they are clearly not content to stay on the sidelines. A right-wing legal think tank, the American Center for Law and Justice, filed an *amicus* brief in support of the government's case prior to the January 5 hearing on behalf of Representatives Weldon, Mark Souder (R-IN), Henry Hyde (R-IL) and C.L. "Butch" Otter (R-ID). Prior to the hearing, another request was filed by the Christian Medical Association and the National Association of Pro-Life Obstetricians and Gynecologists, seeking to be "interveners" in the case on the side of the government.

### *California Announces Plan to Challenge Federal Refusal Clause*

California Attorney General Bill Lockyer (D) announced on December 7 that he plans to file suit to block the federal refusal clause. Lockyer called the language "an unacceptable attack on women's rights and state sovereignty, and a back-door attempt to overturn *Roe v. Wade*."

California is expected to ask the court to declare the new provision invalid and to prohibit its enforcement, arguing that the state could be slapped with the amendment's severe financial penalties, for example, if it tried to enforce a state law that prohibits hospitals from refusing to perform abortions for women in emergency or life-threatening situations. The complaint may allege that by requiring the state to refuse to protect women's constitutional rights in order to avoid stiff fiscal punishment, the provision impermissibly infringes on state sovereignty in violation of the 10th Amendment to the U.S. Constitution. The lawsuit may also allege the amendment exceeds Congress' spending powers.

According to the California Attorney General's office, in prior cases involving spending conditions, courts have deferred to Congress and been reluctant to strike down restrictions on states' receipt of federal funds. But the penalty under the federal refusal clause is more coercive than those previously considered by the courts because, unlike the others, it punishes violations by denying all affected federal funds to the entire state or local government. The amendment also fails to pass legal muster because the federal government's interest in the health care programs affected by language have nothing to do with its interest in labor, education and other programs that could lose funding based on violations. In addition, Lockyer noted the U.S. Supreme Court has held for three decades that restrictions on abortion rights do not withstand scrutiny unless they contain an exception for cases in which pregnancy endangers the mother's life or health. The federal refusal clause does not have such an exception.

# Administrative Activity Could Signal Trouble for Title X

***OPA Continues to De-Emphasize Confidential Contraceptive Services***

It is no longer news in the family planning community that the Bush Administration's ideological agenda is shifting Title X's focus away from the provision of confidential family planning services to low-income women of reproductive age – in ways that are both obvious and subtle. Nevertheless, many of the attendees at the mandatory Title X grantee meeting, "Planning Healthy Families 2004," held in Atlanta in August by the Office of Population Affairs (OPA) were distressed to witness the Administration's shifting priorities up close and personal.

The sessions failed to touch on many of the key service delivery issues of greatest concern to family planning administrators, instead focusing almost exclusively on the Administration's priorities -- compliance with statutory rape reporting requirements, adoption, the integration of HIV/AIDS services (specifically **A**bstain, **B**e Faithful, and use **C**ondoms or "ABC"), encouraging parental involvement in the family planning decisions of minors and encouraging abstinence with young adolescents. NFPRHA remains concerned that the end result of this selective focus is the inevitable redirection of scarce dollars *away* from core family planning activities such as prevention, contraceptive care, STD screening and treatment, etc. and *towards* fulfillment of OPA's newly emphasized priorities.

Title X program chief, Alma Golden, MD, Deputy Assistant Secretary for Population Affairs and a key member of the Texas abstinence-only booster club that has a great deal of influence within the U.S. Department of Health and Human Services (HHS), laid bare her political agenda in her welcoming remarks. Her speech emphasized "marriage," "babies," and "abstinence" and urged providers to shift their focus from "intendedness" to "preparedness" for pregnancy.

While many of these concepts can certainly be embraced as laudable, the family planning community recognizes that OPA's focus on a political/ideological agenda leaves little room for efforts needed to deliver more and better medical services to patients at financially strapped Title X clinics. Many Title X patients are unmarried and sexually active and not at all receptive to Dr. Golden's admonition that all people be abstinent until they are married.

Dr. Golden also denigrated the value of clinics and the confidential services they provide by claiming there are *perceptions* (without naming the source of these perceptions*)* that Title X providers treat teens without regard to their parents, prepare patients for sex but not for families, promote/enable abortion, and teach sex education in the schools but fail to involve communities and families. Dr. Golden also spoke about her fears that college-educated women were having fewer and fewer children and she called on Title X providers to explain to college-educated clients the implications of their limited childbearing.

The meeting was tightly controlled and choreographed, with little interaction between attendees and HHS staff. In fact, grantees were able to question OPA staff only during the final 30 minutes of the meeting, and questions had to be submitted in writing and in advance.

***HHS Submits Report to Congress on Number of Privately Funded Abortions in Title X Family Planning Clinics***

At the behest of then-Representative David Vitter (R-LA) – who was elected to the U.S. Senate in 2004 – Congress approved report language in 2003 that required HHS to collect information on the number of family planning sites receiving funding through Title X that also provide abortions with non-Title X funds. The report language was a consolation prize after more senior appropriators denied Vitter's request for a vote on statutory language that would have precluded entities that provide abortions with non-federal dollars from being eligible for Title X funds. The compromise report language reflected heavy lifting by pro-family planning lawmakers on the Senate side to ensure that the confidentiality of patient and providers was protected.

The language made clear that all such reporting by grantees was voluntary and that there would be no consequences if grantees chose not to respond. In the summer of 2004, HHS sent a short survey instrument to the 86 grantees that receive Title X funds and submitted a report of survey findings to Congress at the end of the year (dated November 2004).

According to the very brief report: "The Department received 46 responses…Of these, 34 indicated that no clinics (sic) sites also provide abortion with non-Federal funds. Nine responses indicated that a total of 17 clinic sites also provide abortions with non-Federal funds…"

Family planning supporters remained concerned that the report would fuel efforts by conservatives in Congress to limit Title X funding to certain types of providers. Title X funds are prohibited from being used to provide abortions. However, in the past, Vitter supported efforts to prohibit private organizations from receiving Title X funds to provide contraception and other preventive health care services if they provide abortions with their own, non-Title X funds.

Advocates have long opposed such efforts because such a policy would prohibit many entities (hospitals, Planned Parenthood affiliates) that now receive Title X funds from being able to continue to provide contraceptive services to low-income women. Further, advocates have argued that it is unfair to single out family planning services for discriminatory treatment – while such efforts would prohibit certain private entities from receiving Title X funds if they perform abortions with their own funds, it would not prevent these same health care providers from receiving other types of federal dollars. This issue has never come up in the Senate, but with Senator Vitter's election to fill the seat occupied by retiring Senator John Breaux, that could change.

# Administration's Push for Abstinence-Only Education Continues Despite Critical Studies on Program Effectiveness

Throughout the year, the Bush Administration continued to push for increases in funding for abstinence-unless-married programs. Congressional appropriators were happy to oblige despite mounting evidence raising questions about the effectiveness of these programs.

### *FY 2005 Abstinence-Unless-Married Programs Receive $30M Increase*

The final omnibus spending bill increased funding for federal abstinence-unless-married programs in FY 2005 by $30 million for total funding of approximately $170 million. Although there are three streams of abstinence-unless-married education funds administered by the U.S. Department of Health and Human Services (HHS), the entire increase is slated for community-based abstinence-only education (CBAE) grants.

This restrictive stream of funding makes grants directly to community and faith-based organizations. CBAE programs must target adolescents aged 12-18; they must adhere to *all* components of the eight-point federal abstinence education program definition (including ideological messages claiming that sexual activity outside of marriage will lead to psychological and physical harm) and they can provide young people with information about only the *failure rates* of contraceptives. Also new in 2004, administration for the program which was formerly done through the Maternal and Child Health Program's Special Projects of Regional and National Significance was moved to HHS' Administration for Children and Families.

The $30 million boost – three times more than the Title X increase – still leaves total abstinence-unless-married funding far short of the President's challenge to Congress in his State of the Union address that abstinence-unless-married education funding be doubled to approximately $270 million. President Bush said in his speech, "To encourage right choices, we must be willing to confront the dangers young people face -- even when they're difficult to talk about. Each year, about three million teenagers contract sexually transmitted diseases that can harm them, or kill them, or prevent them from ever becoming parents. We will double federal funding for abstinence programs, so schools can teach this fact of life: Abstinence for young people is the only certain way to avoid sexually transmitted diseases."
The choice of $270 million was anything but random. In choosing that level, the President was supporting one of the goals of social conservatives: that there be "parity" between what the federal government spends on providing contraceptive services (which conservatives routinely label "comprehensive sex ed" programs), and what it spends on abstinence-only education programs. "Parity" has become a mantra of the right despite the vastly differing purposes of these two programs.

### *Waxman Report Confirms that Many Abstinence-Unless-Married Education Programs Mislead Teens*

As the Bush Administration and Congressional conservatives continue to invest heavily in a just-say-no strategy for teenagers and sex, much of the information that America's youth are being taught is medically inaccurate or misleading, according to an analysis by Congressman Henry

Waxman's (D-CA) staff released on December 1. The report confirms what advocates of comprehensive sex education have long argued -- that many federally funded abstinence-unless-married education programs contain "false, misleading, or distorted information."

Representative Waxman is the Ranking Democrat on the House Government Operations Committee and has long been a supporter of comprehensive sex education. The Waxman report took aim at federally-funded abstinence-unless-married education programs after reviewing 13 of the most commonly used curricula. Researchers found that two of the curricula were accurate but the 11 others, used by 69 organizations in 25 states, contained unproven claims, subjective conclusions or outright falsehoods regarding reproductive health, gender traits and when life begins.

The Waxman report cited numerous examples of misinformation including statements that: abortion can lead to sterility and suicide, touching a person's genitals can result in pregnancy, a 43-day-old fetus is a "thinking person," HIV can be spread via sweat and tears, and condoms fail to prevent HIV transmission as often as 31 percent of the time in heterosexual intercourse. Representative Waxman noted that in some cases the factual errors were limited to occasional misinterpretations of publicly available data; in others, the materials pervasively presented subjective opinions as scientific fact.

### *Waxman Report Echoes Study by Advocates for Youth on Ineffectiveness of Abstinence-Only Programs*

Earlier in the year, Advocates for Youth released a report raising questions about the effectiveness of the abstinence-unless-married approach to sex education funded by the federal government. Their analysis, *Five Years of Abstinence-Only-Until-Marriage Education: Assessing the Impact*, looked at state evaluations from Arizona, Florida, Iowa, Maryland, Minnesota, Missouri, Nebraska, Oregon, Pennsylvania, and Washington State. The review found that federally funded abstinence-unless-married programs showed little evidence of sustained, long-term impact on adolescents' attitudes favoring abstinence or on teens' intentions to abstain. Importantly, in only one of the ten states did any program demonstrate short-term success in delaying the initiation of sex, and none showed long-term success in impacting teen sexual behavior.

### *Six-Month Extension of Welfare Law Approved by Both Chambers*

The value of federal funding for abstinence-unless-married programs has also been raised in the context of the welfare reform bill, which has become a vehicle for moral- and value-laden initiatives. Since it was first enacted in 1996, the bill has authorized $50 million annually for these programs. The 1996 law (PL 104-193) was set to expire in September 2002, but for the second year in a row, Congress failed to reauthorize the legislation governing the welfare program. Instead, lawmakers extended the program seven times for six months each time and have left it to the 109th Congress to resume negotiations on a long-term reauthorization.

As a result, the $50 million authorization for abstinence-unless-married education funding for states that is contained in the bill will remain intact until the next round of negotiations. If and

when the bill is considered, comprehensive sex education supporters are likely to renew efforts to modify the restrictive language, armed with recent evaluations of state abstinence programs that make clear that these programs are not effective.

Senators Rick Santorum (R-PA) and Evan Bayh (D-IN) attempted to earmark funds to "strengthen" marriages, based on the belief that marriage is a defense against women's reliance on welfare. Although a Pew poll conducted in 2002 suggested broad opposition to a general government initiative promoting marriage, a campaign focused more narrowly on welfare recipients would be far more popular. Senators Santorum and Bayh failed in their last-minute attempt to add legislation to a six-month extension of the law that would authorize a $200 million marriage promotion effort and a $100 million responsible fatherhood program. The marriage promotion program, which would provide voluntary educational and counseling programs to low-income couples, is a top domestic priority for the Bush Administration. The new initiatives would have been paid for by shifting money from other welfare programs, such as the federal bonus paid to states that reduce the number of children born out of wedlock.

While the House passed its reauthorization bill in February 2003, the Senate bill was pulled from the floor on April 1, 2004 after Democrats sought an amendment that would increase the federal minimum wage. Supporters argued that a minimum wage increase is necessary if welfare recipients are to leave the ranks of the poor. Republican leaders said there was no point in voting on the politically sensitive minimum wage issue, since Senate Democrats were likely to block the welfare bill from going to conference with the House.

### *HHS Secretary Thompson Switches Oversight Agency for Two Largest Federal Abstinence Education Grant Programs*

As of the beginning of FY 2005, HHS Secretary Tommy Thompson moved the two largest federal abstinence education grant programs from the agency's Health Resources and Services Administration's Maternal and Child Health Bureau to its Administration for Children and Families (ACF), an agency that has a distinctly "friendlier" view of the programs. ACF Assistant Secretary for Children and Families Wade Horn said that Thompson moved the $50 million Title V abstinence program and the $104 million community-based abstinence program to ACF -- the same federal agency that "promotes marriage and responsible fatherhood" -- so the programs could gain the "broader positive youth-development perspective that we have been pursuing."

# HPV Still Key Component of Conservatives' Pro-Abstinence, Anti-Condom Campaign

Politicizing public health messages about the human papillomavirus (HPV) remained a key component of conservatives' strategy to promote abstinence-unless-married education in 2004. A provision inserted into the FY 2001 Labor, Health and Human Services, and Education (Labor-HHS) appropriations bill by former Representative Tom Coburn (R-OK), who was elected to the Senate in November, continued to provide the impetus for 2004's action on HPV. Two reports on HPV were released with contrasting recommendations and a House subcommittee hearing was held under the auspices of examining progress on the HPV mandates in the FY 2001 Labor-HHS spending bill.

### *Public Health vs. Politics on HPV – Again*

HPV is the most common sexually transmitted disease (STD) in America. According to the Centers for Disease Control and Prevention (CDC), almost 80 percent of sexually active Americans will be infected with HPV at some point in their lives. Although almost all cases are cleared without intervention, infection with certain high-risk strains, if left undetected and untreated, can develop into cervical cancer over time. While condoms remain the best protection available against a range of STDs, including HIV, they are not recommended as primary prevention for HPV because the virus is spread through skin-to-skin contact. Condoms can only protect the area that they cover. However, condom use has been shown to reduce the risk of contracting cervical cancer. Conservatives have taken this complex public health issue and twisted the facts to suit their political agenda. They have continued to argue that condoms are not highly effective in preventing HPV and since HPV can lead to cervical cancer, then the only safe way to avoid death from cervical cancer is to reduce the prevalence of HPV by abstaining from sex.

The public health community continued ongoing education efforts to counter this message by urging policymakers to support sound public health messages regarding cervical cancer, i.e., that cervical cancer is preventable and curable and almost all cervical cancer deaths could be avoided if women followed cancer screening and follow-up recommendations. Advocates noted that in a practical sense, the most important risk factor for cervical cancer is not the presence of HPV infection, but a failure to receive timely Pap test screening and follow-up care. They cautioned that promoting fear-based messages, which overstate the risk of HPV and suggest that it is unsafe to use condoms, actually jeopardizes the health of sexually active Americans. Scaring sexually active people away from using condoms will not reduce the prevalence of HPV, but it will increase public misunderstanding of HPV and put sexually active individuals at risk for life-threatening STDs such as HIV.

### *Medical Institute Report Supports Conservative Efforts to Promote Abstinence*

Abstinence proponents kicked off the new year with a report, "Human Papilloma Virus: A Major Unrecognized Epidemic," released January 22 by the Medical Institute, a Texas-based organization whose mission is seemingly to spread fear-based information on STDs in order to promote abstinence.

The chief author of the report was none other than W. David Hager, MD, a controversial member of the Food and Drug Administration's (FDA) Reproductive Health Drugs Advisory Committee who voted in December against making emergency contraception available without a prescription and renewed his call for an FDA review of mifepristone's availability. Although the Medical Institute's report contained a great deal of factually accurate information, it overstated the cervical cancer risk associated with contracting HPV, while paying scant attention to strategies to reduce cervical cancer, such as the need for better access to Pap tests and treatment among at-risk women. By failing to emphasize that the vast majority of people infected with HPV are not at risk for cervical cancer, and that cervical cancer is treatable and curable, the authors made clear that their true goals were to disparage condoms and promote an abstinence-unless-married agenda.

### *CDC Report Emphasizes Importance of Regular Cancer Screening and Follow-Up Care*

A second HPV-related report, "Prevention of Genital Human Papillomavirus," was delivered to Congress in late January by the CDC in order to fulfill a requirement in the FY 2001 Labor-HHS spending bill. Conservatives ignored the bulk of the report and simply used select phrases to provide ammunition for their anti-condom, abstinence-unless-married agenda. A press release from Focus on the Family claimed that "the traditionally condom-crazy CDC spotlight[s] abstinence and monogamy as the best ways to avoid certain sexually transmitted diseases…." The release had former Representative Coburn repeating his view that "There should be a warning on every condom…" Conservatives also claimed that the report supported their proposition that condoms are ineffective against HPV. In reality, the report's conclusions are far more nuanced.

The CDC report makes clear that while condoms are not a primary prevention tool for HPV, "there is evidence that indicates that the use of condoms may reduce the risk of cervical cancer." The report states, "Cervical cancer is an uncommon consequence of HPV infection in women, especially if they are screened for cancer regularly with a Pap test and have appropriate follow-up for abnormalities." The report also notes that "of women in the United States who develop cervical cancer, about half have never had a Pap test." According to the report, the absence of a usual source of health care and lack of health insurance are among the most common reasons that women do not receive regular Pap tests. The report concludes that "regular cervical cancer screening for all sexually active women and treatment of precancerous lesions remains the key strategy to prevent cervical cancer."

### *House Hearing Raises Concern Over FDA Action on Condom Labeling*

Testimony at a politically charged hearing heightened concerns that the FDA would soon require labels on condoms to warn users that they do not protect against HPV. The issue of changing the condom label has been on the back burner since the issue first surfaced in 1999 when Senator Coburn, as a member of the House, pushed for legislation to require mandatory condom labels to inform users that condoms do not protect against HPV.

In 2000, Coburn prevailed in getting language into the FY 2001 Labor-HHS funding bill that directed FDA to "reexamine existing condom labels" and "determine whether the labels are medically accurate regarding the overall effectiveness or lack of effectiveness of condoms in preventing sexually transmitted diseases, including HPV." The FY 2001 bill also required CDC to conduct HPV public education and surveillance. (NFPRHA, in conjunction with the mainstream medical and reproductive health community, worked to ensure that the final Coburn language inserted into the FY 2001 spending bill on HPV and condom labeling did not mandate any label changes.)

These provisions provided the foundation for the March 11 hearing held by the House Government Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources. Subcommittee Chairman Representative Mark Souder (R-IN) wanted to publicly chastise the FDA and CDC for not having made sufficient progress on requirements mandated by the law and renewed the call for condom labeling. Representative Souder also took the opportunity to question condom effectiveness, praise abstinence-unless-married education as a key cervical cancer prevention strategy, and express his support for condom warning labels regarding HPV.

The arguments against condom warning labels are the same today as they were when family planning advocates first fought against them: the HPV-cervical cancer link remains complex and warning labels could likely confuse the average user; condoms do actually provide some, although not complete, protection against HPV-related disease. Also, given that condoms are highly effective in protecting against HIV and other STDs, promoting fear-based messages suggesting that it is *unsafe* to use condoms jeopardizes the health of sexually active Americans.

Daniel Schultz, M.D., head of the FDA's Office of Device Evaluation testified that the condom labeling issue would be addressed as part of an updated FDA labeling guidance that was expected to be released at the end of the year. However, despite many rumors about ongoing activities at the FDA, no proposed labeling had been issued before the close of the year.

In addition, representatives from the CDC and the National Cancer Institute testified on the progress of their agencies in addressing the issues surrounding HPV and cervical cancer. NFPRHA, in conjunction with the American Social Health Association (ASHA), was instrumental in arranging for J. Thomas Cox, M.D., Director of the Women's Clinic at the University of California in Santa Barbara, and Jonathan Zenilman, M.D., Professor of Medicine at the John Hopkins University School of Medicine in Baltimore, M.D., to testify at the hearing. Their testimony focused on providing clarity to the public health messages regarding prevention of cervical cancer, suggesting that promoting abstinence-only and "condoms don't work messages" are not practical public health solutions. The hearing also featured a number of witnesses who were abstinence-unless-married supporters, including former Representative Coburn. Following the hearing, NFPRHA and ASHA, in conjunction with the Congressional Progressive and Pro-Choice Caucuses, held a briefing for Congressional staff on HPV and cervical cancer.

# No Change in Lackluster Support for International Family Planning

The United States remained in full retreat from its historic role as a world leader in promoting reproductive health and family planning. Against the odds, international family planning supporters in Congress and in the advocacy community doggedly pursued efforts throughout the year to boost funding and remove the policy restrictions that have hampered service delivery, such as the Global Gag Rule.

### *Efforts to Allow UNFPA Contribution in FY 2005 Fail in House Appropriations Committee*

In July, for the third year in a row, the State Department denied the U.S. contribution to the United Nations Population Fund (UNFPA) that had been approved by Congress as part of the FY 2004 foreign aid spending bill. The $34 million that was appropriated would have been used to slow the spread of HIV/AIDS, prevent maternal deaths, and provide family planning services. The Administration's decision was based on false and discredited allegations that UNFPA supported or participated in the management of a program of coercive abortion or involuntary sterilization and, therefore, violated the Kemp-Kasten provision of U.S. law prohibiting such activity.

In an effort to ensure that the fate of UNFPA funding improved in FY 2005, one of the agency's foremost champions in the House, Representative Nita Lowey (D-NY), made a valiant attempt to amend the Kemp-Kasten provision during the House Appropriations Committee mark-up of the foreign aid spending bill on July 9. Lowey's amendment was defeated on a vote of 26 to 32. Two Republicans – Representatives Mark Kirk (IL) and Rodney Frelinghuysen (NJ) -- joined 24 Democrats in support of the amendment, and two Democrats -- Representatives Alan Mollohan (WV) and Marion Berry (AR) joined 30 Republicans in opposition. Absent committee members included: Representatives Culberson (R-TX), Fattah (D-PA), Hinchey (D-NY), LaHood (R-IL), Murtha (D-PA), Sweeney (R-NY), and Taylor (R-NC).

Representatives Lowey and Kirk gave clear and compelling arguments in support of the life-saving work of UNFPA. However, Foreign Operations Subcommittee Chair Jim Kolbe (R-AZ) expressed his "reluctant" opposition to the amendment citing potential complications to enactment of the bill posed by the attachment of a controversial amendment. Kolbe's opposition combined with strong lobbying by the White House and the House Republican leadership of Republicans on the committee doomed the amendment. The House bill provided $425 million in FY 2005 funding for international family planning programs funded through the United States Agency for International Development (USAID) and $25 million for UNFPA.

### *Senate Appropriations Committee Approves Pro-family Planning Language, Higher Funding*

As always, the outlook in the Senate for international family planning programs was far brighter. The version of the FY 2005 foreign aid spending bill approved by the Senate Appropriations Committee on September 15 included good – if only temporary – news. The Committee-approved bill boosted international family planning funding relative to the House version and reversed the "Mexico City" global gag prohibition on U.S. funding for certain private family planning organizations that offer, counsel or advocate for abortion services -- even where legal

and with non-U.S. funds. Under the Senate-approved version, even if the gag rule remained in place, condoms for the purpose of HIV/AIDS prevention and contraceptives for the purpose of reducing the incidence of abortion would be exempt from its requirements. In addition, the Senate Foreign Operations Committee bill succeeded where Representatives Lowey and Kirk failed in modifying the Kemp-Kasten provision in a way that would allow U.S. funding to UNFPA. The pro-family planning language prohibited funding to "any organization or program that *directly* supports coercive abortion or involuntary sterilization." The President quickly issued a veto threat because of these changes.

The Senate bill included "not less than" $450 million for international family planning/reproductive health programs funded through USAID – a $25 million increase over the level approved by the House in mid-July. In addition, the bill contained $34 million for the U.S. contribution to UNFPA, $9 million more than the House-passed bill.

### *Kemp-Kasten Restriction Continues to Prevent U.S. Contribution to UNFPA for FY 2004 Funds, Outlook Unchanged for FY 2005*

Unfortunately, none of the Senate's pro-family planning language was adopted in the final omnibus spending measure. USAID programs received a small but welcome boost in the final FY 2005 omnibus spending bill. The bill provided a total of "not less than" $441 million for USAID international family planning programs, a slight increase above the $432 million provided in FY 2004 and $16 million more than the President's request. UNFPA was funded at $34, a $9 million increase over the President's request.

The FY 2005 omnibus bill also addressed the fate of UNFPA funds for FY 2004, dictating that the $34 million that had been withheld by the Administration be divided equally between USAID family planning programs and the Administration's anti-trafficking programs; the Administration had declared that it planned to reprogram all of the money to its anti-trafficking program. Assuming that the Administration denies U.S. FY 2005 funding to UNFPA, new language specifies that all monies withheld from UNFPA under Kemp-Kasten must be reprogrammed to USAID for family planning and reproductive health programs.

Other good news in the foreign aid spending bill for FY 2005 was the $8 million increase for microbicide development, for total funding of $30 million. The bill also significantly boosted overall funding for HIV, TB and Malaria programs authorized by the Global AIDS Bill to $2.9 billion -- up from $2.4 billion in FY 2004. Of the FY 2005 total, $2.3 billion is contained in the foreign operations appropriations bill, with the bulk of the remainder flowing through the Centers for Disease Control and Prevention and the National Institutes of Health. The omnibus bill also adds new report language recommending that the Global AIDS Coordinator "promote greater linkages and coordination between family planning and maternal health programs and global HIV/AIDS activities."

### *Abstinence-Unless-Married Education Funds Authorized by Global AIDS Bill Awarded*

Anxious to make good on the Administration's pledge to export its abstinence-unless-married agenda to the many nations in Africa ravaged by HIV/AIDS, USAID awarded $100 million in

new abstinence-unless-married grants in October. These funds had been authorized as part of the $15 billion Global AIDS bill enacted in 2003. Nine of the eleven organizations that won the five-year grants were faith-based. The grants are intended to assist adolescents, teens and young adults in avoiding behaviors that put them at increased risk of HIV/AIDS infection in 15 countries that are home to more than 50 percent of HIV infections worldwide, including: Botswana, Cote d'Ivoire, Ethiopia, Guyana, Haiti, Kenya, Mozambique, Namibia, Nigeria, Rwanda, South Africa, Tanzania, Uganda, Vietnam and Zambia. It is too early to know the degree to which these programs will provide medically accurate information about condoms in compliance with the law. However, advocates fully expect the emphasis to fall squarely on the "abstinence" and "be faithful" components of the ABC approach.

### *HHS Withholds Funds for Global Health Meeting*

The Administration's anti-family planning bias was apparent in a decision to rescind $170,000 in support for a June conference held by the Global Health Council, a Washington-based education and advocacy group that the federal government had supported for 30 years. The decision came after Republican congressional staff members and conservative groups such as the Traditional Values Coalition lobbied the Administration to rescind support, claiming that the pro-family planning organization promotes abortion. Conservatives objected because representatives from the International Planned Parenthood Federation, UNFPA and MoveOn were invited to speak at the conference.

# FDA Denies OTC Status for Plan B Emergency Contraception, But Dual Rx/Non-Rx Status Pursued

The saga regarding over-the-counter access to Plan B emergency contraception continued throughout the year. The year began on a high note, with advocates buoyed by the December 16, 2003 joint hearing before the U.S. Food and Drug Administration's (FDA) Reproductive Health Drugs and Over the Counter Drugs Advisory Committees. The joint committee had voted 23 to 4 in favor of recommending that Plan B be switched from prescription to non-prescription status, deeming it safe and effective for over-the-counter (OTC) use.

Despite this promising beginning, it was not long into the New Year that public confidence in the process began to wane and fears that political concerns were overtaking scientific decision-making began to grow. Friday, February 13 was a turning point. Just before the beginning of the President's Day holiday weekend, the FDA announced that the agency would extend its review of the Plan B application for up to 90 days. It was reported that Barr Laboratories, maker of Plan B, was asked to submit additional data on adolescent use.

The decision to extend the review process immediately raised questions in the scientific community. The April 8 edition of the *New England Journal of Medicine* contained an editorial "The FDA, Politics, and Plan B," suggesting that, "…the FDA's decision-making process is being influenced by political considerations." The editorial commented that the safety and efficacy of Plan B were not in dispute. The editors noted that the FDA has an enviable international reputation for integrity and stated, "To squander that trust by allowing political pressure to delay a decision to make safe and effective emergency contraception available over the counter seems to us a serious error."

Speculation ended on May 6 when the FDA issued a "not approvable" letter to Barr Laboratories officially denying its application to sell Plan B without a prescription. The letter to Barr was signed by Dr. Steven Galson, Acting Director of Drug Evaluation and Research. Galson took full responsibility for overruling the recommendations of agency staff and the scientific advisory panels charged with assessing the available scientific evidence. Despite the fact that the data reflected the demographic users of EC, the FDA said they denied the application because the company did not submit any data on subjects younger than 14 and only contained limited data on adolescents aged 14-16.

### *Congress, Scientists, Providers and Advocates Swiftly Condemn FDA Decision*

The FDA decision was swiftly condemned by scientists, public health experts, some members of the FDA's scientific advisory committee that had reviewed the evidence, and major medical and women's health groups. In an especially strongly worded statement, the American College of Obstetricians and Gynecologists labeled the decision "morally repugnant," "a tragedy for American women," and "a dark stain on the reputation of an evidence-based agency like the FDA."

In addition, pro-family planning Members of Congress responded with a steady torrent of opposition to the FDA's decision to deny OTC access to Plan B. The day after the

announcement, 37 House members sent a letter to the FDA condemning the decision. At a May 12 press conference, a dozen members of Congress called for the resignation of the two FDA officials most responsible for the decision – Acting FDA commissioner Lester Crawford and Galson. And on May 17, Representatives Carolyn Maloney (D-NY), Joe Crowley (D-NY) and 15 other members of Congress introduced legislation (HR 4377) that would give the FDA Commissioner 30 days to review the decision and affirm that it was not based on politics. Also on May 17, Representative Henry Waxman (D-CA) and 27 members of Congress sent a letter to the General Accounting Office to investigate whether the FDA's decision was affected by political considerations. And in June, 24 Senators requested an oversight hearing to explore troubling reports about irregularities in the FDA decision-making process. No action was taken on any of the Congressional requests.

### *Administration Denies the FDA Decision Was Politically Motivated*

The FDA strongly denied that its decision was influenced by the high profile campaign waged by conservative advocates and members of Congress against making Plan B available OTC. Despite scientific evidence to the contrary, Plan B opponents continued to argue that OTC access would be unsafe for teens and would increase promiscuous sexual activity and infection with sexually transmitted diseases among women of all ages.

The outrage from Plan B supporters was fueled by the blatant politics surrounding the decision. Those familiar with the drug approval process noted that it was unprecedented for the FDA to move away from the issue of safety and efficacy and to attempt to take into account how some people might change their behavior because a drug is more available. One Plan B supporter noted that the makers of anti-heartburn pills were not asked if people would eat more cheeseburgers when their drugs became available OTC.

Several former FDA officials said they could not remember another instance in which a career officer had overruled recommendations from both an advisory committee and FDA staff, and that "not approvable" letters are usually issued earlier in the process by much lower level staff. In adopting a harsher approach, Galson signaled that he disagreed very strongly with the staff and the advisory board. Even he admitted that his decision was not the norm.

### *Barr Pursues Dual Strategy: OTC for 16 and Over, Rx for Younger Teens*

The FDA's letter to Barr rejecting the OTC application did hold out the possibility of a future approval. Barr submitted a formal response to the FDA in support of its Supplemental New Drug Application (SNDA) for an OTC product on July 22, incorporating the FDA's suggestions for additional information regarding the marketing of Plan B as a prescription-only product for women 15 years of age and younger and a nonprescription product for women 16 years and older. By regulation, the FDA had six months to review the application and make a determination, giving the FDA until January 20 to respond to Barr's latest submission.

Unfortunately, the cards appear to be stacked against the OTC application. In addition to questions about whether it is possible under current law for the exact same drug to be sold both as an OTC product and by prescription, the post-election political climate has not helped the

cause. In addition, many FDA experts said that if the FDA were seriously considering approval of the application at a later date then a more routine action would have been for them to issue an "approvable" letter at the outset, which outlined specific actions the company needed to take.

### *Maine Becomes Sixth States to Allow Women to Obtain EC Directly From Pharmacists*

While federal efforts to expand EC access remained in limbo in 2004, Maine became the sixth state to allow pharmacists to dispense EC without a prescription (joining Alaska, California, Hawaii, New Mexico and Washington). Four of these states (Alaska, California, Hawaii and Washington) allow pharmacists to distribute EC when acting within a collaborative-practice agreement with a physician. Three states (California, Maine and New Mexico), allow pharmacists to distribute EC in accordance with a state-approved protocol (California allows for both collaborative practice agreements and for distribution with a state-approved protocol).

# Federal Legislative Efforts to Improve Access to Emergency Contraception Continue

***New Federal Bill Introduced to Improve EC Access for Military Women***

Although the 108th Congress adjourned without making any progress on legislation to improve access to emergency contraception (EC), a new bill to make EC available by prescription to women in the military was introduced on July 22 by Representative Michael Michaud (D-ME). HR 4976 would require EC to be included on the uniform formulary of pharmaceutical agents of the pharmacy benefits program of the Department of Defense.

Introduced in 2003, two bills seeking to improve access to EC received no additional consideration in 2004. Senator Patty Murray (D-WA) and Representative Louise Slaughter (D-NY) introduced the Emergency Contraception and Education Act (S 896/HR 1812), legislation to establish a public education and awareness campaign regarding EC. In addition, the Compassionate Assistance for Rape Emergencies Act (S 1564/HR 2527) was introduced by Senator Jon Corzine (D-NJ) and Representative James Greenwood (R-PA). The legislation requires hospitals to provide EC to sexual assault survivors.

***Alabama Continues to Provide EC Despite Pressure from Christian Coalition***

In April, Alabama's Department of Health – the sole Title X grantee in the state –began requiring its county health clinics to counsel every female client about EC, provide her with a brochure on EC, and offer to provide EC in advance of need. The Alabama Christian Coalition caught wind of what was viewed by many as sound public health policy – particularly in a state with high unintended pregnancy rates-- and began an assault on the state. They began a targeted email campaign to all state health department staff spreading misinformation about EC and incorrectly labeling it an abortifacient.

Alabama Representative Robert Aderholt (R) got in on the action by sending a letter to U.S. Health and Human Services Secretary Tommy Thompson reiterating the Christian Coalition's misinformation about how EC works and asking whether the provision of EC was required by the Title X program. Deputy Assistant Secretary for Population Affairs Alma Golden responded to Representative Aderholt stating that EC was not required by Title X, but that Title X clinics were free to offer it.

Armed with a paper trail between Alabama and the federal Regional Office providing Title X guidance over Alabama dating back to 1997 calling on Alabama to require its clinics to provide EC, Alabama's Chief Health Officer wrote to Dr. Golden asking for further clarification. Golden's August letter in response to the state of Alabama reiterated her previous communication with Representative Aderholt, stating that Title X clinics were not required to offer EC, but were encouraged to offer it as part of the broad array of contraceptive methods. Alabama did not change its policy.

# "Back-Door" Reform Efforts in Key States Lay Groundwork For Federal Medicaid Reform

Revenue shortfalls in every state, coupled with rising numbers of uninsured Americans in need of Medicaid services continued to fuel the call for Medicaid reform. Even though Congress kept Medicaid largely intact, it is clear that state activity in 2004 was laying the groundwork for future federal reform efforts. As we head into the new Congress, the integrity of the Medicaid program faces perhaps the most immediate and gravest threat in the history of the program.

### *Medicaid: A Vital Source of Health Care for American Women*

Medicaid, the national health care program for poor and low-income people, is vital to the health and well-being of American women, with women comprising nearly 71 percent of beneficiaries age 19 and older. Medicaid coverage ensures that low-income women have access to primary health care services including regular check-ups, preventive screenings, early diagnosis and treatment of chronic illness, and reproductive health care. Currently, Medicaid pays for nearly 40 percent of births in this country and it is the single largest source of public funding for family planning services and HIV/AIDS care in the United States. More than half of all public dollars spent on contraceptive services and supplies in the United States are provided through Medicaid and approximately 5.5 million women of reproductive age – nearly one in ten women between the ages of 15 and 44 – rely on Medicaid for their basic health care needs.

### *Reform Efforts to Block Grant Medicaid Are Bad for Women's Health*

In 2003, President Bush proposed a major Medicaid reform initiative in his FY 2004 budget that would have given states the option of converting a large portion of their Medicaid program into a federal block grant. In exchange for accepting the block grant, states would have been given broad flexibility to limit eligibility, cut services and impose co-payments, e.g., states could have excluded family planning coverage and/or charged co-pays for many enrollees.

After this proposal met with lukewarm support from the nation's governors, President Bush backed away from putting forth a major Medicaid reform proposal in 2004 choosing instead to aid and abet key states in radically reforming their Medicaid programs through the waiver process. Judging by some of the state waiver proposals submitted, it is clear that the Administration remains committed to pressuring states to accept some form of a capped federal allotment – essentially a block grant for Medicaid. Because they represent the majority of adult beneficiaries, a block grant would disproportionately impact women.

Currently the Medicaid program operates as an open-ended entitlement program, i.e., all Medicaid eligible individuals under the program are guaranteed Medicaid services. The federal government matches state Medicaid spending and in this way shares the burden of rapidly rising health care costs. Under a block grant, the federal funds would be capped, and once states run out of their allotment, they would be solely responsible for covering additional Medicaid spending. It is not a mystery what happens when states run out of money. Almost every state has a constitutional or legislative requirement to balance its budget and every state has already

acted to contain Medicaid costs by either cutting eligibility, reducing coverage for essential services, or lowering reimbursement to health care providers.

***Medicaid Family Planning Services Could Be Jeopardized***

More specifically, a Medicaid block grant could dramatically impact access to family planning services. Presently the higher federal matching rate of 90 percent for family planning services provides states with a financial incentive to maintain and expand Medicaid family planning services. Under a block grant, the matching rate system would disappear and family planning services could become targets for cuts. Block grants could also have a detrimental impact on the Title X family planning clinic system. Not only could Medicaid reimbursements for Title X patients decrease, but more women could become ineligible for Medicaid yet continue to need subsidized family planning services. This additional burden is one Title X agencies could ill afford without significant increases in funding.

In addition, advocates are also concerned about the possible impact of a cap or block grant on family planning waivers. As of January 1, 2005, 21 states had been granted waivers to by the Centers for Medicare and Medicaid Services to expand Medicaid eligibility for family planning services to low-income women who would not otherwise be covered. Although eligibility under the waivers varies by state, some have expanded services to women losing Medicaid postpartum, women losing Medicaid for any reason, or women with incomes above the ceiling for Medicaid eligibility.

***State Reform Efforts Set Troubling Examples for More Widespread Reform***

While Medicaid waivers have been key to expanding family planning services in a growing number of states, public health advocates warned that many other types of waiver proposals that have been approved by the U.S. Department of Health and Human Services or are currently being considered would significantly weaken America's most important women's health program. Many are concerned that the approval of more far-reaching Medicaid waivers will lead to service cutbacks in states like Tennessee and Florida with large numbers of uninsured. In these states, waiver proposals call for radical changes that would allow the state to limit eligibility and cut benefits in exchange for accepting some form of a capped federal contribution – essentially a block grant. This could ignite a domino effect of sorts, easing the way for other states to use those waiver applications as templates that could be quickly approved.

Regardless of the pace of state waiver initiatives, it is clear that Republicans are planning to push for some major changes in Medicaid financing which could result in dramatic cuts to the program. This fight could come in the first few months of the new Congress after President Bush submits his FY 2006 budget. NFPRHA considers this a top priority and will continue working with a broad-based coalition of advocates united in opposing any reform efforts seeking to cap federal funding or block grant the Medicaid program.

# "Putting Prevention First Act" Sets High Water Mark for Family Planning Legislation
## *March for Women's Lives Makes Herstory*

In a year that often appeared to lay the groundwork for bad things to come, the March for Women's Lives energized advocates early in the year and provided momentum for reproductive health supporters to plant a few good seeds of their own. Three new bills were introduced seeking to improve and expand access to contraception, protect patient privacy and secure reproductive rights respectively. Although no action was taken on any of the bills, supporters in Congress agreed that the bills set the high water mark for women's health care legislation and would be key pieces of the pro-active legislative agenda in the 109th Congress.

### *1.15M Americans Descend Upon Washington to March for Women's Lives*

Making it one of the largest marches in U.S. history, an estimated 1.15 million people descended on Washington, DC on April 25 for the March for Women's Lives, including more than 200 family planning advocates, family and friends who marched with the NFPRHA delegation. Advocates, many of whom had never left their home state, came to Washington to deliver an urgent wake-up call to government leaders and the nation –that women's lives are at stake and lawmakers should stop intruding on a woman's right to access critical reproductive health services. Marchers demanded better access to the full spectrum of reproductive rights, including universal access to family planning services.

On the morning of April 25, a line-up of inspiring speakers rallied the troops in preparation for the historic march. In the company of such notables as Sarah Weddington, who argued *Roe v. Wade* before the Supreme Court at the age of 26, and dance music guru Moby, NFPRHA President/CEO Judith M. DeSarno took the stage to address the crowd. In her spirited remarks, DeSarno warned the crowd to "be afraid" of the Bush Administration's attempts to restrict women's access to contraception. DeSarno noted, "When it comes to the War on Women, the Bush Administration is intent on LEAVING *ALL* WOMEN BEHIND."

As the crowds gathered that day, the Bush Administration wasted no time in signaling its opinion of the March. During an interview with CNN's Wolf Blizter, Karen Hughes, former White House communications director who returned to Washington in 2004 to assist with President Bush's reelection campaign, drew a comparison between being pro-life and anti-terrorist or, conversely, pro-choice and pro-terrorist. Blitzer asked Hughes whether abortion would be an issue in this election. "Well, Wolf, it's always an issue," she answered. "And I frankly think it's changing somewhat. I think after September 11th the American people are valuing life more and realizing that we need policies to value the dignity and worth of every life." Just in case anyone did not understand her point, she added that "the fundamental difference between us and the terror network we fight is that we value every life."

**Full text of Judith M. DeSarno's Speech to the March for Women's Lives (April 25, 2004)**

I am Judith DeSarno – the President of the National Family Planning and Reproductive Health Association. I represent the family planning clinics across America that provide birth control and other preventive health services to millions of low-income Americans every day. These clinics are on the front lines in the fight to preserve access to subsidized family planning services. They, and the patients they serve, have borne the brunt of this Administration's war on women for the past three years.

I am here to tell you that it is time to be afraid – *VERY* afraid. For the past three years, there has been a stealth campaign attacking the very backbone of our rights – and attacking the most vulnerable among us. The threats we are facing right now are much broader than the right to abortion – as important as that is. The right to make choices throughout our reproductive lives – to decide WHEN or WHETHER to have a child – is at stake. This right, at its core, begins with the right of all women to have correct and timely access to unbiased sexuality education – as well as access to affordable contraceptive services when needed.

The stealth attacks on accurate and unbiased information are hallmarks of this Administration – followed by limiting funding to make affordable contraception available to poor women and to young women. These are easy targets – and these guys neither believe that Americans are noticing – nor do they care. We are here to say that we are noticing and that we do care.

Over the past three and a half years, when family planning clinics have been forced to close their doors because of lack of funding, we have seen nearly one billion dollars spent on abstinence-unless-married programs – programs that deny young people accurate information on contraception and condoms on the theory of WHAT YOU KNOW WILL HURT YOU. When, of course, the opposite is true.

When the overwhelming majority of the scientists at the FDA recommended making emergency contraception available over the counter, without a prescription, anti-family planning zealots moved in and forced a delay.

When it comes to the War on Women, the Bush Administration is intent on LEAVING ALL WOMEN BEHIND. Their opposition to contraception is unacceptable. So we are challenging them: a bi-partisan group of Members of Congress has filed a bill called PUTTING PREVENTION FIRST. It's a common-sense initiative designed to improve access to programs and services that help reduce the staggering rates of unintended pregnancy, STDs, and abortion in this country. The bill is built on the premise that contraception is not controversial – it is a basic health care necessity.

In fantasyland – and not a very happy one – everyone abstains from sex until marriage. But in the real world, nine out of ten individuals are sexually active before they get married. And not surprisingly, most Americans use contraception to protect their health. Maybe someone should tell the President that "life" is sexually transmitted. Preserving access to contraception protects your health!!

Gone are the days of "keep 'em barefoot and pregnant." And WE WILL NOT GO BACK!

### *"Putting Prevention First Act" Aims to Expand and Improve Access to Contraception*

To keep the momentum of the March going after advocates went home, a bipartisan group of Members of Congress introduced landmark legislation, the "Putting Prevention First Act of 2004" (S 2336/HR 4192), at an April 21 press conference, just in time for family planning advocates to urge support for the bill in their March-related lobby visits. The bill, spearheaded by Senators Lincoln Chafee (R-RI) and Harry Reid (D-NV) in the Senate, and Representatives James Greenwood (R-PA) and Louise Slaughter (D-NY) in the House, is an omnibus family planning initiative that seeks to expand access to preventive health care services and education programs that help reduce unintended pregnancy, infection with sexually transmitted diseases, and the need for abortion.

The omnibus prevention legislation contains a provision to increase funding for the national family planning program – Title X of the Public Health Services Act – in addition to a number of initiatives previously introduced, including provisions to: give states the option of expanding access to Medicaid family planning services, require private health plans to cover prescription contraceptives to the extent they cover other prescription drugs and devices, provide funding for an emergency contraception (EC) public education campaign, require emergency rooms to provide access to EC to victims of sexual assault, and provide federal funding for comprehensive sex education programs and teen pregnancy prevention programs.

Support for the legislation came from a broad range of health care providers, medical organizations, and women's health advocates who argued that the long-overdue bill addresses an overwhelming need in this country for better access to family planning services and information. They noted that the United States continues to have the highest rates of unintended pregnancy and STDs among industrialized nations. The bill did not receive further consideration, but bill sponsors have already indicated that they may reintroduce the bill in the 109th Congress.

### *Patient Privacy Bill Introduced in Response to DOJ Request for Patient Records*

Senator Hillary Rodham Clinton (D-NY) and Representative Jerrold Nadler (D-NY) introduced S 2827/HR 5126, the Patient Privacy Protection Act, a bill that would amend the federal rules of evidence to protect the confidentiality of doctor-patient communications. The bill states that a patient's medical records and any communication about his or her medical history are confidential unless a judge determines that the public interest in those records significantly outweighs the patient's privilege. In cases where the judge orders the records to be disclosed, identifiable information is to be eliminated.

This legislation, introduced on September 22, was a response to U.S. Attorney General John Ashcroft's efforts to obtain private medical records of thousands of women who had abortions at various facilities around the country to defend three challenges to the federal abortion procedures ban. The women were not parties to the lawsuits. The Justice Department argued that Americans have no expectations of medical privacy. The Patient Privacy Protection Act amends the Federal Rules of Evidence to create an explicit privilege to preserve medical privacy.

### *Freedom of Choice Act Introduced*

On January 22, the 31st anniversary of *Roe v. Wade*, Senator Barbara Boxer (D-CA) and Representative Jerry Nadler (D-NY) introduced the Freedom of Choice Act (FOCA, HR 3719/ S 2020), a bill designed to secure and restore reproductive rights. The bill would codify the right to choose in the broadest sense in the event that Roe is further eviscerated or overturned. Given the potential for multiple Supreme Court vacancies, the need for this legislation could not be greater (see separate story on judicial nominations).

# Stalemate on Contraceptive Coverage Bill Reaching EPICC Proportions
## *States Make Significant Gains but Gaps Remain*

Congress failed to act on the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC, S 1396/HR 2727), although it was included as a key component of the Putting Prevention First Act measure. Although Congress has been slow to act, new research released in 2004, along with two court victories, confirm that real progress is being made toward ending discrimination by insurance plans against coverage of prescription contraceptives.

### *Limited Action on EPICC in the 108th Congress*

EPICC, first introduced in 1997, would require private health plans to cover prescription contraceptives approved by the Food and Drug Administration and related medical services to the same extent that they cover other prescription drugs and services. The legislation seeks to establish parity for prescription contraception within the context of coverage already provided by health plans. EPICC was introduced in the 108th Congress on July 11, 2003 by Senators Olympia Snowe (R-ME) and Harry Reid (D-NV) and July 15, 2003 by Representatives Nita Lowey (D-NY) and Jim Greenwood (R-PA).

EPICC was also included as part of an omnibus family planning bill, the Putting Prevention First Act (S 2336/HR 4192, see separate story), introduced earlier in 2004. In addition, recall that in March 2003, pro-family planning Senators Patty Murray (D-WA) and Harry Reid offered an amendment to the abortion procedures ban that rolled together a number of women's health prevention bills, including EPICC. Although the procedural vote on the amendment fell short of the 60 votes needed to pass, the vote did demonstrate majority support in the Senate for contraceptive equity.

While there was no movement on a stand-alone measure to require contraceptive coverage, the 108th Congress did not adjourn totally empty-handed. A provision in law requiring Federal Employee Health Benefit programs (FEHBP) to provide equitable coverage for contraception remained on the books without a fight. However, the Bush administration took a step back from the requirement and broke new -- and not necessarily desirable -- ground this year in its "faith-based" agenda by offering federal employees an option to enroll in a plan administered by OSF Health, a unit of the Sisters of the Third Order of St. Francis, a Catholic health plan that specifically excludes payment for contraceptives, abortion, sterilization, and artificial insemination. According to Abby Block, a senior official in the Office of Personnel Management, which manages the FEHBP, this is the first time a plan for federal workers "has tailored its benefits in line with asset of tenets that are supported by the Catholic Church." The decision to allow OSF Health to participate in the federal program goes beyond the handful of plans exempted by name from the 1999 law, which requires plans to offer contraceptive coverage.

### *AGI Study Finds Contraceptive Coverage Improves Largely as a Result of State Laws*

The good news for women on the contraceptive coverage front is that things are getting better. "U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates," a study released in June by The Alan Guttmacher Institute (AGI), found that insurance coverage of contraception has increased dramatically over the past ten years.

According to the study, as of 2002, nearly nine in ten group health insurance plans purchased by employers covered a full range of prescription contraceptives. The recent survey also found that plans are as likely to cover reversible contraceptives as they are to cover abortion, sterilization or prescription drugs generally. Also, major differences in coverage between individual methods that had been apparent in 1993 had disappeared. By 2002, 86 percent of employer-purchased plans typically covered the full range of contraceptive methods, compared with just 28 percent in 1993; the proportion of plans covering no method at all plummeted from 28 percent to only 2 percent during this period.

The study found that state laws mandating insurance coverage of contraception were a major factor in the increase. Health plans in states with these laws have significantly more extensive coverage than plans that are designed specifically to provide coverage in states without such mandates. For example, health maintenance organizations in states with mandates covered contraception 92 percent of the time, as compared with only 61 percent of the time if the plans were designed for states without a mandate. For preferred provider organizations, the gap was even wider -- 92 percent verses 47 percent.

However, the study cautioned, the degree to which these improvements are evident across the entire insurance market remains unclear. As the study notes, "too little information was available from employers who self-insure." About half of all employee benefit plans fall into this category, and were not included in the survey. Also, by law, these self-insured plans are exempt from state coverage requirements, so the presumption is that they are less likely to cover contraception.

### *Settlement Reached in Suit against Albertsons Grocery Store Chain*

Albertsons grocery and pharmacy chain joined the growing ranks of employers providing contraceptive coverage as a result of a nationwide class-action settlement reached with the federal district court in Phoenix, AZ on February 9. The settlement requires that Albertsons provide all its female employees across the country with coverage for prescription contraception as part of their employee health benefit plans. The far-reaching agreement was negotiated by attorneys at Planned Parenthood Federation of America and Planned Parenthood of Western Washington; the law firm of Goldstein, Demchak, Baller, Borgen & Dardarian; local attorneys in Arizona, and the Phoenix office of the Equal Employment Opportunity Commission (EEOC).

Albertsons, which employs approximately 200,000 people nationwide, is one of many employers that have agreed to provide prescription contraception coverage since a federal court in Washington State ruled in 2001 that excluding such coverage violates Title VII of the 1964 Civil Rights Act and the Pregnancy Discrimination Act of 1978. That case, known as *Erickson v.*

*Bartell Drug Co.*, held that "the exclusion of women-only benefits from a generally comprehensive prescription plan is sex discrimination under Title VII." The *Bartell Drug* ruling closely followed a previous determination by the EEOC that exclusion of prescription contraceptives from a generally comprehensive insurance policy constitutes sex discrimination under Title VII. The Albertsons settlement resolved complaints brought to the EEOC by six female employees regarding the denial of coverage for prescription contraceptives in their otherwise comprehensive health plan.

***Supreme Court Rejects Appeal by Catholic Charities for Exemption from Contraceptive Coverage Law***

On March 1, the California Supreme Court ruled 6 to 1 that a California state law requiring employers that provide prescription drug benefits to include contraceptive coverage does not exempt Catholic Charities from requirements of the law. The California Supreme Court ruling required that contraceptives be included in the prescription drug plan provided to employees of Catholic Charities of Sacramento. Catholic Charities immediately appealed the lower court ruling to the U.S. Supreme Court and on October 5, the high court rejected the appeal without comment.

The Women's Contraceptive Equity Act (WCEA) of 2000 requires that all health care plans that include coverage for prescription drugs also include contraceptive coverage. The law includes an exemption for religious employers, which include churches, mosques, and temples, whose main purpose is to inculcate religious values and who primarily employ and serve people who share their religious beliefs.

Catholic Charities, which employs 1,600 people in California, filed a challenge to the state law in 2000, arguing that the law violated its first amendment right to exercise freedom of religion. The California case was closely watched nationwide because the act's exemption has been viewed as a model accommodation between efforts to extend health care and claims for religious liberty.

The California Supreme court ruled that institutions like Catholic Charities, an organization that employs and serves the general public and receives government funding to offer secular, not religious services, cannot discriminate based on their religious beliefs. Catholic Charities conceded that it does not provide a religious service, that 74 percent of its employees are not Catholic, and that it serves the public at large. Interestingly, the lone dissenter in the California Supreme Court case was Justice Janice Rogers Brown, the President Bush's controversial nominee to the U.S. Court of Appeals for the Ninth Circuit.

California is one of 21 states that require contraceptive coverage if the health plans have prescription drug benefits. The Supreme Court's decision not to hear the appeal by Catholic Charities means that the justices will likely stay out of similar cases. Catholic and Protestant organizations currently are challenging a similar New York state contraceptive coverage law.

***Despite Positive Action at the State Level More Work Remains***

Despite progress at the state level and in the courts, a patchwork of coverage still exists that leaves many families unprotected. Wisconsin became the 21st state to require the inclusion of prescription contraceptives in health insurance plans that cover other prescription drugs but still, half of all U.S. women live in the 29 states that do not require plans to cover contraceptives. States that do not have contraceptive coverage laws include the following: Alabama, Alaska, Arkansas, Colorado, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wyoming. With this in mind, family planning supporters plan to continue the fight to enact federal contraceptive coverage legislation.

In addition, advocates remain worried that support in Congress for new health insurance arrangements known as "association health plans," or AHPs, could spell trouble for state contraceptive equity laws. On June 19, the House passed the Small Business Health Fairness Act (S 545/HR 660) by a vote of 252-162. This legislation would establish AHPs and effectively nullify state laws and protections for the millions of Americans estimated to purchase the plans. AHPs are promoted as a cost-effective way to provide health coverage to those who cannot afford traditional health care plans. However, under the controversial proposal, AHPs would not have to comply with state laws assuring contraceptive equity, cervical and breast cancer screening and treatment, STD screening, clinical trials, emergency services and mental health services. NFPRHA joined many health care advocacy groups in opposing this legislation. No action was taken on this proposal in the Senate.

# Judicial Nominations Controversies Continue as Stage is Set for Supreme Court Battle

When President Bush introduced his first nominees for federal appeals courts at a White House ceremony in 2001, he called for a "return of civility and dignity to the confirmation process." There is general agreement on both sides of the aisle that this phrase did not capture, in the least, last year's activity on judicial nominations. The year began with President Bush circumventing the Senate confirmation process altogether and appointing two anti-choice zealots to federal appellate courts during a brief congressional recess. The year ended with President Bush throwing down the gauntlet once again and setting the stage for a contentious 2005 with his announcement that he would renominate 20 of the judicial candidates that the Senate had not confirmed, three of whom were filibustered by Senate Democrats.

To round out a difficult year, the Supreme Court announced days before the general election that Chief Justice William Rehnquist was suffering from a seemingly aggressive form of thyroid cancer and had undergone surgery and chemotherapy treatments. Once again, speculation mounted about a Supreme Court vacancy due to the possible retirement of the Chief Justice. Republicans will be eager to win easy confirmations early in 2005 of Bush's more conservative nominees because of the bigger fight ahead for the Supreme Court if the Chief Justice indeed retires.

Senate Majority Leader Bill Frist (R-TN) and other Republicans are hoping that the results of the November elections will persuade Democrats to drop their opposition to Bush's nominees, but President Bush's renomination of highly controversial candidates to the federal bench seems designed to taunt Democrats, and ultimately, to pack the courts. Republicans seem be basing their hope on momentum from the defeat of Democratic Senate leader Tom Daschle (SD), who was accused by Republicans of obstructing Bush's agenda. So far, though, Democrats seem in no mood to back down. Senator Chuck Schumer (D-NY) summed up Democratic frustrations at Bush's plan to renominate judicial candidates by accusing the President of ignoring the Senate's constitutional role to provide "advice and consent" on presidential nominees. Schumer stated, "This opening shot shows he will only be happy if every judge is approved, which is not what the Founding Fathers intended."

Often lost in the crossfire is the fact that the Senate has confirmed the vast majority of President Bush's first term nominees – over 200 – and that his appointments alone represent 24 percent of the current federal judiciary. Rather than highlight this impressive number, Republicans launched an all-out media campaign against the Democrats, charging that the filibustering of a few questionable nominees was obstructing the process.

### *Four Extremists Seated on Federal Bench: Pickering, Pryor, Holmes, Sykes*

On January 16, just days before Congress returned from its congressional recess, President Bush appointed anti-choice, anti-civil rights U.S. District Court Judge Charles Pickering to the U.S. Court of Appeals for the Fifth Circuit (Louisiana, Mississippi and Texas). The recess appointment, rare but within the President's scope of authority, infuriated Senate Democrats who had sustained a filibuster of Pickering's appointment before leaving in December 2003 for the

holiday recess. Pickering's appointment stood until the start of the 109th Congress in January 2005. A Senate confirmation fight was avoided when Pickering announced at the end of 2004 that he would retire.

Another real blow came in February when, before the Pickering dust had settled, President Bush took advantage of another Congressional recess to jumpstart the stalled and controversial nomination of Alabama Attorney General William Pryor to the 11th U.S. Circuit Court of Appeals (Alabama, Georgia and Florida). Pryor's recess appointment on February 20 elicited cries of foul play from Senate Democrats, who mounted successful filibusters against Pryor in 2003. Both Pryor and Pickering are staunch opponents of a woman's right to choose. Pryor labeled *Roe v. Wade* the "worst abomination of constitutional law in our history," and Pickering called for a constitutional amendment banning abortion. Pryor, until his appointment, was Alabama's attorney general, and now sits on the Eleventh Circuit until the end of the next session – January 2006 – when the Senate will have to vote whether to confirm him at that time.

These unconventional appointments drew sharp criticism from Senate Judiciary Committee members, including Senator Schumer, who again accused President Bush of using recess appointments to bolster himself with Republican conservatives before the fall election. "Regularly circumventing the advise and consent process is not the way to change the tone in Washington," Senator Schumer said. Judiciary Committee Ranking Member Patrick Leahy (D-VT) also reacted strongly, saying that "The President has divided the American people and the Senate with his controversial judicial nominees, and none is more controversial than Mr. Pryor."

The President argued that the recess appointment was necessary because "a minority of Democratic Senators has been using unprecedented obstructionist tactics to prevent him (Pryor) and other qualified nominees from receiving up-or-down votes. Their tactics are inconsistent with the Senate's constitutional responsibility and are hurting our judicial system."

Following the recess appointments, the nominations process ground to a halt when Senate Democrats began blocking all of President Bush's nominees – both judicial and executive – in an effort to extract a promise from the President to forego recess appointments for the remainder of President Bush's term. Democrats feared that the White House would use the Memorial Day recess to circumvent the normal Senate confirmation process and appoint controversial nominees. On May 18, the White House and then-Senate Minority Leader Tom Daschle reached a deal to bring an end to the gridlock. Senate Democrats agreed to allow votes on (not filibuster) 25 "non-controversial" circuit and district court nominees awaiting full Senate consideration, in return for the White House's commitment to not make another recess appointment during the remainder of President Bush's term.

The "noncontroversial" deal did include votes on two publicly anti-choice nominees that NFPRHA opposed – U.S. District Court for the Eastern District of Arkansas nominee James Leon Holmes who believes women should be subservient to their husbands and U.S. Court of Appeals for the Seventh Circuit (Illinois, Indiana and Wisconsin) nominee Diane Sykes who was lenient in the sentencing of two repeated clinic protestors in 1993. Sykes was confirmed on June 24, and Holmes was confirmed on July 6 – but not before anti-choice Senator Kay Bailey Hutchison's (R-TX) passionate and surprising speech on the Senate floor opposing his

nomination because of his archaic views on women. She was one of five Republicans who broke ranks to vote against his nomination, but with two Democrats joining the Republican majority and three senators absent, his nomination was confirmed on a 51-46 vote – the narrowest confirmation vote of President Bush's first term.

### *Nominations of Allen, Other Outspoken Opponents of Choice Remained Stalled*

Brett Kavanaugh, nominated to the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit), received a hearing in April in the Senate Judiciary Committee, but his nomination did not go further in 2004. Kavanaugh, through his recent service as associate counsel at the White House, was responsible for overseeing some of the President's judicial nominees and is considered by many to be the mastermind behind the Administration's attempts to pack the federal courts with right-wing ideologues. A *New Republic Online* article from May 5 describes him as "a political, not an ideological, animal – and that is precisely what makes him so dangerous." Kavanaugh's other claim to fame is that he served as associate counsel to Kenneth Starr during the inquiry that led to the 1998 impeachment of President Bill Clinton. Kavanaugh wrote part of the now infamous Starr Report. President Bush included Kavanaugh in the list of candidates he plans to renominate in the 109th Congress.

Initially nominated over 15 months ago, anti-family planning Deputy Secretary of the Department of Health and Human Services (HHS) Claude Allen remained stuck in a holding pattern in the Senate Judiciary Committee throughout 2004, without ever coming up for a committee vote. Senate Judiciary Committee Chair Orrin Hatch (R-UT) chose not to force a vote on Allen's nomination to the U.S. Court of Appeals for the Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, West Virginia) because of controversy over his nomination stemming from the fact that he is from Virginia – but has been nominated to fill a seat on the Fourth Circuit traditionally held by a Marylander. An enthusiastic supporter of unproven and dangerous abstinence-unless-married programs, Allen has stated that contraceptive services are a last resort that should be available to "risk-takers," such as drug addicts, HIV-positive or homeless individuals. President Bush did not renominate Allen for the 109th Congress, but instead promoted him to serve as the President's domestic policy advisor.

### *Senate May Go "Nuclear" in 2005 to Put Extremists on Federal Bench*

In contrast to the House of Representatives, the voice of the minority has long been protected in the Senate and is part of its honored tradition of consensus building and negotiation, making the Senate Republican leadership's proposed rule change to eliminate the use of the filibuster on judicial nominees extremely controversial. Known as the "nuclear option," the proposed change reflects Republican frustration over the perception that Democrats will be able to sustain filibusters even in light of their shrinking ranks. Senate rules allow a minority of the chamber to filibuster a measure by refusing to allow it to come up for a vote. It takes 60 votes to invoke cloture (end a filibuster). Republicans will have 55 of the 100 Senate seats in the 109th Congress, up from 51 during the last session.

By the end of the year, Majority Leader Bill Frist had gone so far as to call the filibustering of judges "tyranny by the minority" and said, "We must leave this obstruction behind." But

approval of the nuclear option is not a done deal. A small number of Republicans are not convinced that this procedural change would be in the long-term interest of Republicans or the Senate. For instance, when Majority Leader Frist floated the possibility of banning filibusters for judicial nominations in 2004, he ran into objections from senior members of his own party, such as Senator John Warner (R-VA). Republican Senators Olympia Snowe (ME), Lincoln Chafee (RI) and John McCain (AZ) already have publicly opposed the proposed rules change. However, with Republicans having a bigger majority in the 109th and several conservative freshmen saying they would support such a change in the rules, the demise of the filibuster may be too tempting for Republicans to avoid.

Democrats argue that eliminating the ability to filibuster judicial nominees would give the executive branch too much power and Senate Minority Leader Harry Reid (D-NV) has vowed to tie the Senate into procedural knots if Majority Leader Frist tries to change the filibuster rule. If not sooner, pundits believe we will have the chance to see if the filibuster rule survives when Chief Justice Rehnquist announces his retirement – Republicans may use this moment to "go nuclear" to ensure confirmation of President Bush's choice for a Supreme Court replacement.

***Specter Agrees to Support Administration's Agenda in Exchange for Judiciary Committee Chairmanship***

After spending much of November fighting for his political life against social conservatives bent on denying him the chairmanship of the Senate Judiciary Committee that he has long coveted, Senator Arlen Specter (R-PA) got the unanimous backing of his colleagues on the Committee for the position on November 18, assuring his approval by the entire Republican caucus in January 2005.

But getting the green light for that chairmanship was hard work and came at a high price. Senator Specter's trouble stemmed from a comment he made on November 3, just after being elected to his fifth term in the Senate. In response to a question at a press conference of whether the Senate would confirm an anti-choice nominee to the U.S. Supreme Court, the sometimes pro-choice senator said, "When you talk about judges who would change the right of a woman to choose, overturn *Roe versus Wade*, I think that is unlikely." Many felt he was simply stating the political facts of life that Republicans next year will be five votes short of the 60 needed to break a Democratic filibuster that is almost certain if Bush names a resolutely antiabortion person to the Supreme Court – unless Republicans successfully "go nuclear."

Nevertheless, the comments triggered a conservative backlash and two weeks of intense public scrutiny and nearly cost him the coveted slot. Christian antiabortion groups held a "pray-in" on Capitol Hill to try to block Specter, while conservative groups such as the Family Research Council, Traditional Values Coalition, and Concerned Women for America called for Specter's rejection, with some of them bitterly recalling that Specter joined with Democrats in blocking the Supreme Court nomination of Robert H. Bork, a conservative hero, in 1987.

Senator Specter was forced to lobby skeptical colleagues for the seat with phone calls, television appearances and sit-down chats to convince them that he would push for swift action on Bush's judicial nominations, regardless of whether nominees share his views in favor of abortion rights.

By November 17, Specter had won over the current chairman of the committee, Utah Senator Orrin Hatch. However, in order to allay fears that he would not be a strong advocate for the President's judicial nominees, and before he received the unanimous backing of his fellow Judiciary Committee Republicans, he issued a statement saying "I have not and would not use a litmus test to deny confirmation to pro-life nominees. I voted to confirm Chief Justice Rehnquist after he had voted against *Roe v. Wade*. Similarly, I voted to confirm pro-life nominees… I have assured the president that I would give his nominees quick committee hearing and early committee votes so floor action could be promptly scheduled. I have voted for all of President Bush's judicial nominees in committee and on the floor, and I have no reason to believe that I'll be unable to support any individual President Bush finds worthy of nomination….I have already registered my opposition to the Democrats' filibusters with 17 floor statements and will use my best efforts to stop any future filibusters. If a rule change is necessary to avoid filibusters, there are relevant recent precedents to secure rule changes with 51 votes."

Senator Specter's pledge of allegiance to all Bush nominees is certain to be echoed by all Republicans on the Committee – which will be even more conservative than the 108th Congress with the addition of two staunchly anti-abortion conservative Senators Sam Brownback (R-KS) and Tom Coburn (R-OK) – clearly added to the committee to keep an eye on Specter and ensure that the Administration's anti-choice agenda is given its due. Newly elected Senator Coburn is the only committee member who is not a lawyer; he is a family practice doctor. Already on the 19-member panel are three GOP senators who are members of the Federalist Society, a group of lawyers that has been advocating for the appointment of more conservative federal judges.

# Frustrated by Recent Court Rulings, House Conservatives Took Aim at Federal Judiciary

Conservatives in Congress were not content to see the vast majority of the President's nominees confirmed. They also pursued other creative efforts to overhaul the federal judiciary, including two attempts at stripping all federal courts, including the U.S. Supreme Court, of the power to determine the constitutionality of certain Congressional activity, followed by an attempt to split the U.S. Court of Appeals for the Ninth Circuit into three separate federal circuit courts. Conservatives were motivated by their frustration with the Ninth Circuit's ruling that the "under God" phrase in the Pledge of Allegiance was unconstitutional and their fear that federal courts would be asked to consider whether the Defense of Marriage Act was constitutional following Massachusetts' Supreme Court decision legalizing gay marriage in that state.

### *House Passes Two Bills to Strip Federal Courts of Jurisdiction over Congressional Activity*

Eager to vent its collective anger about the Massachusetts Supreme Court ruling that the state's constitution allowed for same-sex marriage, the House voted 233-194 to pass HR 3313, the "Marriage Protection Act." The measure would bar federal courts from hearing challenges to the Defense of Marriage Act (DOMA), federal legislation signed into law in 1996 that allowed states to refuse to recognize same-sex marriages of other states and defined marriage in federal law as the union between a man and woman. HR 3313, which was not taken up by the Senate, would have denied all federal courts – including the Supreme Court – the jurisdiction to review the constitutionality of DOMA. In essence, the federal judiciary would be stripped of its powers over Congressional activity.

A few months later, prodded by a desire to punish the U.S. Court of Appeals for the Ninth Circuit, the House succeeded in its second attempt to limit federal court jurisdictions. On September 23, by a 247-173 vote, the House passed the "Pledge Protection Act" (HR 2028) barring federal courts – again, including the Supreme Court – from hearing constitutional challenges to the Pledge of Allegiance. Again, the measure was not taken up by the Senate. The measure was pressed by social conservatives in response to a 2002 ruling by the Ninth Circuit that the phrase "under God" in the Pledge violates the First Amendment prohibition against government establishment of religion. Although the U.S. Supreme Court later overturned the Ninth Circuit ruling on procedural grounds in June 2004, the case added fuel to charges of "judicial activism."

While limited in scope, both pieces of legislation, if enacted, would set a dangerous precedent that would disrupt the traditional separation of powers and undermine the longstanding role of the federal judiciary in safeguarding constitutional rights and freedoms, including reproductive rights. NFPRHA joined other national organizations in urging Congress to oppose these bills.

### *House Attempted to Retool Ninth Circuit*

Declaring a need for "judicial efficiency" and rejecting claims of partisan politicking before the general election, Representative Mike Simpson (R-ID) and other House conservatives pushed through an initiative on October 5 intended to break the U.S. Court of Appeals for the Ninth

Circuit into three separate federal circuit courts. The measure, an amendment to a Senate-passed bill calling for additional federal bankruptcy court judges (S 878), passed the House by a narrow vote of 205-194. Several Republicans who were originally opposed to the amendment, switched their votes to support it when it appeared that the amendment was about to be defeated. If enacted, California and Hawaii would sit in a circuit along with Guam and the Northern Marianas Islands. Alaska, Arizona, Idaho, Nevada, Oregon, Washington and Montana would make up two new circuits.

Despite claims to the contrary, supporters of the amendment sought to split the Ninth Circuit so that more conservative states would not be affected by what some consider the left-leaning court. Alaska Representative Don Young (R) noted, "This is good for the State of Alaska because we will no longer be governed by adverse court decisions made for San Francisco and that way of life."

Fortunately, the bill never made it to a House-Senate conference committee and essentially "died" with the conclusion of the 108th Congress. However, the bill would have faced significant opposition in the Senate, led by California Senator Dianne Feinstein (D) who stepped onto the Senate floor moments after the House vote to declare that she was putting a hold on the bill, preventing the Senate from sending it to conference. "Essentially, what the House did was to poison a worthy bill, a bill that was meant to alleviate the crisis of an overwhelming workload under which the Federal judiciary is struggling. The House did so by adding language to split the Ninth Circuit into three circuits. In doing so, the House has essentially taken the new judges as hostages to a starkly partisan and controversial ploy," stated Feinstein on the Senate floor.

Emboldened by the general election that produced a more conservative Senate, House conservatives are sure to try these and other means to cripple the federal judiciary in the 109th Congress.

# Federal Judges Find Federal Abortions Procedure Ban Unconstitutional

Pro-choice advocates won the first crucial round in blocking enforcement of the federal abortion procedures ban, the so-called "Partial-Birth" Abortion Ban Act, signed into law by President Bush in November 2003. Three separate challenges to the federal law were filed immediately after the legislation was enacted and federal judges in all three cases ruled in 2004 that the abortion procedures ban was unconstitutional and could not be enforced.

The federal law banned abortions as early as 12 to 15 weeks in pregnancy and did not include an exception to protect a woman's health. All three judges struck down the federal law because it did not include a constitutionally required health exception and banned several safe, common and medically appropriate pre-viability abortion procedures. They had issued temporary injunctions halting enforcement of the law during consideration of the lawsuits.

Planned Parenthood Federation of America (PPFA) challenged the law in California on behalf of doctors who either perform or make referrals for abortions for PPFA. The American Civil Liberties Union and Wilmer Cutler Pickering Hale and Dorr LLP filed suit in New York on behalf of physicians who are members of the National Abortion Federation (NAF). A third challenge was filed by the Center for Reproductive Rights in Nebraska on behalf of Dr. LeRoy Carhart and three other physicians.

In 2000 (*Stenberg v. Carhart*), the Supreme Court struck down a Nebraska state law similar to the federal ban because it did not include an exception to protect a woman's health. Instead of including the constitutionally required health exception, Congress added more than a dozen pages of Congressional "findings" attempting to make the case that such a procedure is never medically necessary to protect a woman's health.

U.S. Attorney General John Ashcroft defended the federal ban on behalf of the federal government on the grounds that the federal law would prohibit only one specific procedure and that the specific procedure is never medically necessary to protect a woman's health.

### *DOJ Demand for Private Patient Medical Records Prompts Support for Privacy Protection Bill*

One of the more outrageous chapters in the trials took place in February when it was widely reported that the U.S. Department of Justice (DOJ) was demanding that certain hospitals turn over hundreds of private patient medical records on specific abortions performed there. DOJ lawyers claimed that they needed the records to determine whether the procedure was medically necessary, a key part of their defense of the procedures ban. The requests for private patient records were immediately challenged by hospitals and providers who argued that this was a gross intrusion on patient privacy. DOJ eventually dropped efforts to pursue the records after judges had sided with the hospitals and providers.

However, the pursuit of patient records prompted Senator Hillary Rodham Clinton (D-NY) and Representative Jerrold Nadler (D-NY) to introduce the Patient Privacy Protection Act (S

2827/HR 5126), a bill that would guarantee the confidentiality of doctor-patient privilege under federal law. The Patient Privacy Protection Act amends the Federal Rules of Evidence to create an explicit privilege to preserve medical privacy. The bill, introduced September 22, did not receive further consideration in 2004.

### *San Francisco Judge First to Rule in PPFA v. Aschcroft*

U.S. District Judge Phyllis Hamilton was the first to rule, issuing her 117-page decision in *Planned Parenthood Federation of America v. Ashcroft* on June 1. Judge Hamilton relied heavily on the Supreme Court's 2000 decision in ruling that the law was unconstitutional on three grounds. She argued that: 1) the law would ban abortions performed at any time during a pregnancy, regardless of gestational age or fetal viability, thus imposing an unconstitutional undue burden on a woman's right to choose abortion before fetal viability; 2) that the law is unconstitutionally vague because it does not give physicians fair notice of what abortions are banned; and 3) even if construed as banning only one type of procedure, the law lacked a constitutionally required exception for procedures needed to protect a woman's health.

Judge Hamilton accused Congress of misrepresenting scientific facts about abortion procedures and said that she owed no deference to congressional findings, claiming, "It is noteworthy that all of the government's own witnesses disagreed with many of the specific congressional findings." She wrote that "Congress' grossly misleading and inaccurate language…appears to have been intentional. Congress was aware that the Act as written applied to previable fetuses." According to Hamilton, "…this court finds that Congress' conclusion that the procedure is never medically necessary is not reasonable and is not based on substantial evidence."

### *NY Judge Reprimands Congress in National Abortion Federation v. Ashcroft*

U.S. District Judge Richard Casey's 94-page decision issued on August 26 in New York City was critical of arguments from both sides but was pointedly critical of Congress. Casey argued that in claiming that the procedure is never medically necessary, lawmakers had overlooked Congressional testimony to the contrary. Casey wrote, "While Congress and lower courts may disagree with the Supreme Court's constitutional decisions, that does not free them from their constitutional duty to obey the Supreme Court's rulings…" The New York case was the most closely watched of the three challenges, in part because of its scope. Judge Casey's decision blocks enforcement of the law against NAF members nationwide. NAF members care for more than half the women who have an abortion each year in the U.S.

### *Carhart v. Ashcroft Familiar Territory for Nebraska Judge*

U.S. District Judge Richard Kopf of Lincoln, Nebraska was on familiar ground, having struck down the Nebraska state law in the *Stenberg* case that was ultimately decided by the Supreme Court in 2000. In his September 8 ruling on the federal law, Kopf issued a mammoth 444-page opinion, arguing, "According to responsible medical opinion, there are times when the banned procedure is medically necessary to preserve the health of a woman…It is unreasonable to ignore the voices of the most experienced doctors and pretend they do not exist…The long and short of it is Congress arbitrarily relied upon the opinions of doctors who claimed to have no (or very

little) recent and relevant experience with surgical abortions and disregarded the views of doctors who had significant and relevant experience with these procedures."

***Déjà Vu for the Supreme Court?***

Reproductive health advocates were obviously pleased with the unanimous rulings of all three courts but acknowledged that the fight continues. DOJ is appealing the rulings.

Conservatives expressed disappointment, but promised to continue the fight. The next stop appears to be the federal circuit courts of appeal, however, conservatives are quick to point out that any of the three cases could ultimately be decided by the Supreme Court. National Right to Life Committee Legislative Director Douglas Johnson said after the Nebraska ruling, "Future appointments to the Supreme Court will determine whether partial-birth abortion remains legal."

# Anti-Choice Conservatives Push Key Pieces of Agenda with Much Success

Conservatives can count 2004 as one of their more productive legislative years despite failing to overcome three separate court challenges to the abortion procedures ban law (see separate story). A new bill focusing on fetal pain was added to the short list of bills comprising the core anti-choice agenda, and support for the annual favorites picked up steam. And although they fell short of the votes necessary to approve a constitutional ban on same sex marriage, conservatives vowed to try again. Needless to say, reproductive health advocates are bracing for several tough battles in the 109th Congress.

### *Fetal Rights Legislation Signed into Law*

Fueled by publicity from a California state murder trial, election year fears, and the President's desire to cater to his political base, Congress enacted and the President signed into law on April 1 one of the cornerstones of the anti-choice agenda – the so-called "Unborn Victims of Violence Act" – capping a five-year fight over the legislation. Representative Melissa Hart (R-PA) sponsored the bill in the House of Representatives, and Mike DeWine (R-OH) sponsored the Senate companion bill (S 1019). The House approved the bill 254-163 on February 26, and the Senate approved it 61-38 on March 25.

UVVA states that if a "child in utero" is injured or killed during the commission of certain federal crimes of violence, then the assailant may be charged with a criminal offense on behalf of the fetus – there is no requirement that the underlying violence against the pregnant woman be prosecuted. The exact charge would depend on which federal law is involved, the degree of harm done to the child, and other factors. The law covers a considerable number of activities defined as federal crimes wherever they occur, including interstate stalking, kidnapping, bombings, and offenses related to major drug trafficking, and attacks on federal employees. In addition, the law covers federal geographical jurisdictions, such as federal lands and tribal lands, and the military justice system.

The law defines the "child in utero," as "a member of the species homo sapiens, at any stage of development, who is carried in the womb." As such, a fertilized egg, embryo, or fetus is a person under the new law, even if the woman does not know she is pregnant. This grants the fetus separate legal rights equal to and independent of the pregnant woman. As such, the bill undermines the 1973 U.S. Supreme Court decision in *Roe v. Wade*, in which the Supreme Court ruled "the word 'person' as used in the Fourteenth Amendment, does not include the unborn."

The law does not apply to any abortion to which a woman has consented, to any act of the mother herself (legal or illegal), or to any form of medical treatment. Enactment of the federal law does not supersede state unborn victims' laws, nor does it apply such a law for state crimes in a state that has not enacted one. Rather, the federal law applies only to fetuses impacted during the course of the *federal* crimes of violence that are listed in the law. People on both sides of the fetal rights and abortion issue have said the new law could have far-reaching consequences.

Opponents of the bill, including NFPRHA, argued that UVVA was the wrong approach and that it failed to address the very real need for strong, federal legislation to prevent and punish violence against women.

### *Fetal Pain Bill Unprecedented Intrusion on Doctor-Patient Relationship*

A new entry into the anti-choice arsenal was introduced by Senator Sam Brownback (R-KS) and Representative Chris Smith (R-NJ) on May 20 – the so-called "Unborn Child Pain Awareness Act" (S 2466/HR 4420). This unprecedented intrusion into the provider-patient relationship would require a doctor performing an abortion at 20 or more weeks to read the woman a statement saying that Congress has determined that the fetus will experience pain and then to offer to give the fetus anesthesia. In addition, a provider is required to offer a pregnant woman a government-drafted brochure containing the same information or to sign a waiver refusing the brochure. The woman must also sign a "decision form" explicitly requesting or refusing the administration of pain control medicine for the fetus.

It is clear that the new bill is intended to inflame the abortion debate and paint pro-choice legislators and pro-choice Americans in an unfavorable light. Opponents of the legislation say that women should indeed have all information necessary to make medical decisions. However, they caution, doctors and patients should decide what information and care patients receive – not Congress. Requiring physicians to read a congressionally mandated script is an outrageous intrusion on the doctor-patient relationship. This legislation is likely to be a key piece of the anti-choice agenda in the 109th Congress.

### *House and Senate Hold Hearings on Teen Endangerment Act*

Reintroduced in the first session of the 108th Congress, the so-called "Child Custody Protection Act" (CCPA, S 851, HR 1755) received hearings in both chambers in 2004. The Senate Judiciary Committee held a hearing on June 3 and the House held their hearing on July 20. Neither chamber voted on CCPA, although the House passed it in the 105th, 106th and 107th Congresses. The Senate never had considered the legislation.

CCPA, known as the Teen Endangerment Act by opponents, would make it a federal crime for any person, other than a parent or guardian, to knowingly transport a minor across a state line to obtain an abortion, if the minor had not met the requirements of the forced parental involvement law of her state of residence. People who assist the young woman would face both civil and criminal liability, including imprisonment for up to one year and fines of up to $100,000, or both. The bill would apply to interstate travel involving young women who live in a state that requires notification to or consent of a parent or legal guardian, or a waiver from a judge (known as a "judicial bypass") before young women can obtain abortions. The bill ignores geographic and economic realities and flaws with the judicial bypass system, fails to provide an adequate medical emergency exception, and violates principles of federalism –meaning that laws of a state apply only within the state's borders.

### *So-Called "Post-Abortion Syndrome" Focus of House Hearing*

Anti-choice Representative Joe Pitts (R-PA) introduced legislation (HR 4543) in June of 2004 to fund research at NIH on services for individuals with so-called "post-abortion depression and psychosis," as well as to fund services for women affected with the condition. On September 29, the House Energy and Commerce Subcommittee on Health held a hearing on the bill as well as on HR 846, legislation introduced in February 2003 by Subcommittee member Bobby Rush to authorize funds for NIH research and for service grants related to post-partum depression and psychosis, a recognized medical condition that can have serious consequences. Considering that the term "post-abortion depression and psychosis" is not recognized by the medical community and is merely intended to further stigmatize abortion, pro-choice members strongly objected to the pairing of the two issues at the hearing. Neither bill received further attention in 2004.

### *House Attempts to Squelch Clinic Violence Provision, but Senate Does not Bite*

Legislative language designed to make it more difficult for clinic protesters to avoid paying court-imposed fines or damages remained bogged down in Congress in 2004. For more than five years, Congress has wrestled with legislation to reform the nation's bankruptcy laws, with the clinic violence language, originally authored by Senator Charles Schumer (D-NY), at the heart of the ongoing controversy with the House.

In late January, House Republicans who strongly opposed the clinic violence provision combined the bankruptcy reform bill with an unrelated measure to extend bankruptcy protection to farmers passed by the Senate in 2003. This revised farm bill passed the House by a vote of 265-99 without the clinic violence provision. Senate Democrats vowed to block any version of bankruptcy reform that failed to include the clinic violence provision. In the end, the Senate did not act on the bill in 2004, and the dance will have to begin anew in the 109th Congress.

### *Congress Continues Tradition of Anti-Abortion Riders*

To protect the interests of thousands of American servicewomen currently serving abroad, Representative Susan Davis' (D-CA) mounted a challenge to the ban on privately-funded abortion services at overseas military hospitals that has been included in the Department of Defense (DOD) Authorization bill in recent years. Her amendment to lift the ban failed by a vote of 202-221 on May 19. Of the many anti-choice riders attached to authorization and appropriations bills, this was the only restriction that was challenged in 2004.

Senators Patty Murray (D-WA) and Olympia Snowe (R-ME) did not mount a similar challenge in the Senate, as they have often done in the past. Instead, Senator Snowe joined Senator Barbara Boxer (D-CA) in offering an amendment to allow federal funding to pay for abortions for women in the military when the pregnancy is the result of rape or incest. The amendment was accepted on June 22 without debate as part of the Senate's DOD Authorization bill, but was later stripped from the bill when House and Senate conferees met to negotiate the final bill. Currently, public funding for abortions for women in the military only is available in cases of life endangerment. Senator Boxer sought the change because of recently publicized reports of servicewomen being raped while on active duty abroad.

A host of other anti-abortion riders were carried forward in their respective appropriations bills, including:

- The Commerce, Justice and State bill will continue its ban on abortion services for women in prison, except in case of life endangerment or rape, as well as bar funding for the Legal Services Corporation to participate in any abortion-related litigation;

- The District of Columbia bill will again prohibit the city from using its own locally raised revenue to pay for abortions for Medicaid eligible women except in cases of life endangerment, rape or incest – a funding decision normally left up to the states.

- The Treasury bill will continue to prohibit federal employees from selecting health insurance plans that cover abortion services;

- The Labor, Health and Human Services and Education bill bans the Medicaid program from paying for abortions, except in cases of life endangerment, rape or incest, as well as adding the Weldon Federal Refusal Clause discussed earlier in this summary;

- The Foreign Operations bill continues the Global Gag Rule, prohibiting U.S. funding for family planning organizations that offer, counsel or advocate for abortion services abroad with their own, non-U.S. funds.

***Congress Fails to Garner Enough Votes for Constitutional Ban on Gay Marriage***

In a transparent effort to put Members on record on a socially divisive issue in an election year, both the Senate and the House considered respective resolutions proposing a constitutional amendment to ban same-sex marriage. While conservatives failed to garner the supermajorities needed to pass the resolution and send the amendment to the states for ratification, the votes in both chambers gave conservative advocacy groups the ammunition they needed to rally their base in an election year.

The constitutional amendment, supported by President Bush and sponsored by Senator Wayne Allard (R-CO) and Representative Marilyn Musgrave (R-CO), sought to define marriage as a union between a man and a woman. The language was designed to discriminate against same-sex couples and prohibit federal, state and local governments from recognizing those relationships.

The 48-50 Senate vote on July 14 fell 12 votes short of the 60 needed to cut off debate and proceed to consideration of the so-called "Federal Marriage Protection Amendment (SJ Res 40). It would have taken a two-thirds majority (67 votes) to pass the amendment itself. Six Republicans, Senators Campbell (R-CO), Collins (R-ME), Snowe (R-ME), Chafee (RI), Sununu (NH) and McCain (AZ), joined all but three Democrats in opposing the cloture motion to cut off debate. Democratic Senators Miller (GA), Nelson (NE) and Byrd (WV) voted for cloture. Senators Kerry (D-MA) and Edwards (D-NC) were not present.

On September 30, the House voted 227-186 in support of the so-called "Marriage Protection Amendment" (HJ Res 106), 49 votes short of the two-thirds (290 votes) needed to approve the language. Twenty-seven Republicans joined 158 Democrats and one Independent in opposing the amendment. Thirty-six Democrats voted for the amendment and 20 members did not vote.

Despite the decisive defeat of measures to ban same-sex marriage, conservatives vowed to carry on. Shortly after the Senate vote, Senate Majority Leader Bill Frist (R-TN) stated, "This issue is not going away." Evangelical Christian groups chimed in to say that they were down but not out and subsequently succeeded in getting anti-gay marriage initiatives approved in 11 states in the November elections (most states already have outlawed gay marriage by statute, the 11 ballot initiatives were to amend state constitutions).

# What's Ahead in 2005?
# Fasten Your Seatbelts, We're in for a Bumpy Ride!

A preview of the 109th Congress came in the final days of the second session of the 108th Congress as anti-choice members of the House and Senate, with the help of a supportive White House, flexed their muscle and inserted the anti-choice federal refusal clause into the omnibus appropriations bill –language now being challenged in federal court by NFPRHA.

### *Strengthened Conservative Majority in the Senate Spells Trouble*

Much of our concern regarding possible congressional action stems from the fact that the Senate is no longer able to fulfill its historic role as a daunting roadblock for abortion and family planning restrictions favored by a sympathetic House and a president committed to "a culture of life." The Senate's bigger, more conservative Republican majority will grow to 55 votes from 51 – and includes some of the most intense anti-choice conservatives in national politics today. While it may still be possible to win a vote on family planning issues in the Senate – that body is now virtually evenly divided between members considered "pro" and "anti" family planning – the exact political contours of the new Senate will become clear only when it begins to vote on these measures. But on issues related strictly to abortion rights, the odds of winning remain slim with solidly pro-choice members numbering about 30.

The strengthened Republican majority and the addition of senators for whom the abortion issue ranks very high could have a deeper effect on the Senate than a simple vote count suggests. Anti-choice activists are euphoric over the election of Tom Coburn, the new Senator from Oklahoma, who was an outspoken opponent of family planning and abortion rights during his six-year tenure in the House. He campaigned as "a committed defender of the sanctity of life in all of its stages." A physician, Senator Coburn has advocated the death penalty for doctors who perform abortions. While in the House, he sponsored anti-mifepristone legislation and fought (unsuccessfully) to ensure that emergency contraception was not available at school-based health centers.

Senator Coburn will be joined in the Senate by South Carolina Republican Jim DeMint, who gave up his House seat for a successful run for the Senate. Senator DeMint sponsored a great deal of anti-family planning and anti-choice legislation during his time in the House and is responsible for the adoption training requirement enacted by Congress in 2001. Also among the newly elected Senators is Republican David Vitter from Louisiana, formerly on the House Appropriations Committee, who, from that perch, tried to restrict clinics that provide abortions with non-federal funds from being eligible for Title X funds.

### *Judicial Nominations Battles Inevitable…and Lasting*

With Chief Justice William H. Rehnquist, 80, fighting cancer, and three other justices in their seventies or eighties, President Bush is expected to fill the Supreme Court's first vacancy in more than a decade. Many analysts speculate that the President could end up appointing as many as three justices to the high court. This significant turnover could have major implications for Roe v. Wade, and most court watchers agree that President Bush's promise during the 2004

presidential debates that he would not apply an abortion "litmus test" for nominees to the highest court rings hollow. Not one of his judicial nominations to the lower courts to date is on record defending *Roe*, and many are openly hostile.

***Outlook for Family Planning Unclear***

The degree to which family planning supporters will be playing defense against legislative and regulatory attacks is not yet clear. Historically, family planning programs have been less attractive targets in the legislative arena than abortion-related issues, with Title X generally emerging relatively unscathed. However, few would be shocked to see renewed attacks on the domestic family planning program designed to limit confidential access to teens, limit discussion of abortion as a medical option, or prohibit agencies that provide abortions with non-federal funds from being eligible for Title X funds. In addition, the Administration could well continue to take further steps to move the program away from its core mission of providing family planning services to low-income women, instead focusing on issues such as marriage promotion and abstinence.

Funding both domestic and international family planning programs could become even more of a challenge in 2005, which is likely to see some of the most important budget debates in years given the unprecedented and difficult fiscal situation created by the large tax cuts of recent years. As a result of the overall budget deficit, anemic budget requests for both domestic and international family planning programs are expected to continue, and efforts to cut discretionary programs may well be in the offing. Congress began this process by making modest cuts in FY 2005, with the President's budget calling for far deeper cuts starting in 2006. Other maneuvers to address the budget situation may include a cap on total annual expenditures for discretionary programs or the conversion of programs that serve low-income people to block grants.

As discretionary programs, both Title X and the international family planning program funded through the U.S. Agency for International Development could even find themselves engaged in the fight of their lives. In the international arena, the egregious Global Gag Rule is likely to remain in place for another year and the Administration's withholding of U.S. funding for the United Nations Population Fund could continue, despite the specious rationale for this policy.

The Administration is also expected to pursue cuts to entitlement programs – which the administration is labeling Medicaid "reform." In previous proposals, cuts have largely been achieved through block grants. As the largest public payer for family planning services, the defeat of harmful reform efforts will remain a key goal of family planning advocates. The good news is that President Bush's plan to shift more Medicaid costs to the states is attracting the attention of the nation's governors, who are in the process of mounting a bipartisan lobbying effort to stave off new federal limits on the program. Family planning providers and advocates will continue to be a key voice in opposition to capping, cutting funding or block granting the program.

On the positive side, family planning supporters in Congress have committed to continue their staunch support for Title X, and, with the support of advocates, better highlight the need for improved access to preventive health services.

### *Increased Efforts to Limit Abortion Access Expected*

President Bush and his allies in Congress already have said that they would continue to support an array of restrictions on abortion access and specifically have named the Child Custody Protection Act (CCPA), legislation to restrict access to young women, as a priority.

The continued denial of Medicaid funding for abortions is a given, but could be accompanied by efforts to add new restrictions on funding for abortion in cases of life, rape, and incest. In addition, the government could aggressively investigate providers of medical abortion by subpoenaing private medical records and sanctioning physicians who are not following exact protocols.

Anti-choice activists claim there is particularly strong support for one of their newest legislative initiatives, the proposed so-called Unborn Child Pain Awareness Act. They are hoping that this legislation – like the abortion procedures ban legislation – will stir up an emotional response from the public about what they assert is a much-too-unfettered right to terminate pregnancies. The bill would require a provider to read a script to women seeking an abortion after 20 weeks saying that Congress has determined that the fetus will experience pain.

### *Personnel Changes Likely to Affect Family Planning*

Senator Harry Reid (D-NV) will be the Senate Minority Leader in the 109th Congress, while Senator Richard J. Durbin (D-IL) clinched the race for minority whip in the 109th Congress. Both are staunch supporters of family planning. Although Reid is not pro-choice, the silver lining is that he has been one of the most outspoken backers of family planning legislation in the Senate and will vigorously lead the fight against extremist judicial nominees.

On the Appropriations front, there is little good news to be had in either the Senate or the House. Anti-choice, anti-family planning Senator Thad Cochran (R-MS) will take over as Appropriations Chair from mixed-record Ted Stevens (R-AK). Senator Cochran, while not pro-family planning, is not an outspoken critic. On the Labor, Health and Human Services and Education (Labor-HHS) Appropriations Subcommittee, Senator Arlen Specter (R-PA) may continue to be chair although that decision had not made as of early January 2005. Pro-choice, pro-family planning Senator Tom Harkin from Iowa will stay on as the Ranking Democrat. Despite Senator Specter's failure to keep the federal refusal clause out of the FY 2005 bill, his record of support for family planning on many other occasions makes the alternatives appear far worse.

In the House, Republican Jerry Lewis from California – anti-choice, but mixed in his support of family planning – won his hard fought bid to become Chair of the Appropriations Committee, leaving fellow contender Ralph Regula (R-OH) to continue as chair of the Labor-HHS Subcommittee. Although Representative Regula led the fight to retain the federal refusal clause in 2004 and has boosted abstinence funding for a number of years, he is not considered aggressively anti-choice or anti-family planning.

***Why We Should Still Have Hope***

New polling results should provide some comfort for Americans who support reproductive rights, despite the fact that the mainstream press seemed relentlessly compelled to write about the 22 percent of the country's voters who said on November 2 that they cared most about the ambiguous phrase "moral values." Lost among the countless stories about these voters was other polling data showing that 55 percent of voters believe that abortion should be legal in all or most cases, while only 16 percent believe it should be illegal in all cases. In addition, an Associated Press-Ipsos poll conducted November 3-5 found that 61 percent of Americans "think President Bush should nominate Supreme Court justices who would uphold the *Roe v. Wade* decision" that protects a woman's right to an abortion, while only 34 percent think justices who will overturn the decision should be appointed.

As a result, one of the main goals of pro-choice legislators and NFPRHA members as advocates is to highlight what is at stake and make clear that incremental restrictions on both family planning and abortion are just part of a long-term plan to marginalize women's health. Most importantly, the programs and patients NFPRHA represents have survived the past four years and we fully expect them to do so for the next four!

***Partisan Make-Up of 109th Congress***

| | House | Senate |
|---|---|---|
| **Republicans** | 233 | 55 |
| **Democrats** | 201 | 44 |
| **Independents** | 1 | 1 |