

THE POWERS OF THE PRESIDENT: Reproductive Freedom and Choice



The outcome of the 2012 presidential election very well could determine whether abortion remains legal and accessible for the next generation of American women.

Reproductive freedom is in extreme peril nationwide. In 2010, anti-choice candidates for Congress and state houses across the country ran on the promise of creating jobs and improving the economy – then once in office turned their attention with a vengeance to social-policy attacks. As a result, the right to choose is under legislative assault on multiple fronts.

The occupant of the White House wields more power over reproductive rights than any other person. The U.S. Constitution and American tradition give the president a wide variety of means to influence the laws and policies that govern freedom of choice. Depending on who occupies the office, that unique authority can be used either to protect or to take away our rights.

As the 2012 elections approach, this updated report documents the powers of the president that impact reproductive freedom and choice.

Judicial Nominations

Supreme Court

“There is no single issue on which the next president, by himself, will have any greater impact than the Supreme Court.”

— Wendy Long, Judicial Confirmation Network

“The Supreme Court trumps everything for conservatives. The shape of the court has the most long-term effects.”

— Karlyn Bowman, American Enterprise Institute

The next president could nominate enough Supreme Court justices to determine the future of *Roe v. Wade* and women’s constitutional right to choose.

Through a systematic, decades-long campaign, the anti-choice movement has succeeded in moving the court to the right. Recent cases concerning abortion rights have been decided 5-4 – and in fact, one critical decision was reversed from pro-choice to anti-choice in just seven years as a result of only one retirement from the bench. Simply put, on the Supreme Court, choice hangs by a thread.

Since 1970, Supreme Court justices have retired at the average age of 79, and three justices now serving on the bench – Justices Ruth Bader Ginsburg, Anthony Kennedy and Antonin Scalia – are age 75 or older. Should any justice retire before 2016, including but not limited to one or more of these three, the president could be presented with an opportunity to tip the court’s balance.

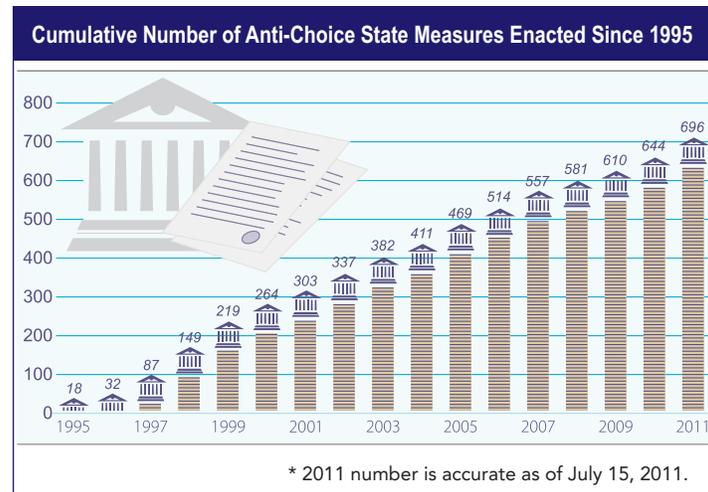
Federal Appellate and District Courts

In addition to the Supreme Court, the president nominates judges to the federal appellate and district courts. The power to select lower-court judges often is underappreciated by policy observers and the public alike – but as explained below, has particular impact when it comes to choice-related laws.

In 1973, *Roe* affirmed that privacy is a fundamental constitutional right, and said government efforts to limit that right must be met with “strict scrutiny” by the judiciary. The strict scrutiny standard caused many restrictions on the right to choose to be struck down.

However, in 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court abandoned the “strict scrutiny” standard, instead adopting a less rigorous standard that allows states to impose abortion restrictions as long as they do not “unduly burden” a woman’s right to choose. The *Casey* court stopped short of overturning *Roe*, but dramatically diminished protection for the fundamental right to choose.

Consequently, since 1992, many lower federal courts have interpreted the Supreme Court’s “undue burden” standard to allow states to impose severe new restrictions on a woman’s right to choose. Anti-choice laws now in effect across the states include various types of abortion bans, laws that compel women to hear biased counseling and endure mandatory delays, gag rules on doctors, insurance-coverage bans, policies that allow health-care corporations to refuse to provide medical services, laws designed to close abortion providers’ doors by overregulating their medical practice, and more.



The role of lower courts in this regime is pivotal because the vagueness of the “undue burden” standard leaves much room for judicial interpretation. At least initially, lower courts decide whether new abortion restrictions are constitutional. And because very few cases ever reach the Supreme Court, for many women, the word of lower courts often is effectively final.

So, while much media and public attention is focused on the Supreme Court, its rulings, and its confirmation battles, when it comes to reproductive rights, the presidential appointment power has a similarly profound effect at the lower-court level.

Vacancies

The next president will have the opportunity to fill many judicial vacancies, ensuring that his or her influence over the issue of legal abortion will extend for years to come.

In recent years, presidents have had the opportunity to nominate, on average, 239 individuals per each four-year term to the lower federal courts – just over a quarter of the federal judiciary. Thus, the winner of the next presidential election will have the ability to make lifetime appointments of many like-minded judges to these critical positions – shaping the judiciary branch in a profound way and impacting the future of women’s reproductive health far beyond his or her term of office.

Executive-Branch Appointments

The president appoints a cabinet and hundreds of senior executive-branch officials, including the attorney general, the secretary of the Department of Health and Human Services (HHS), the commissioner of the Food and Drug Administration (FDA), and the directors of the National Institutes of Health (NIH) and the Centers for Disease Control and Prevention (CDC), among many others.

Each of these appointees wields significant power over reproductive freedom and health. For instance, the attorney general either can actively deter and punish clinic violence or choose not to make it a priority. Moreover, as anti-choice John Ashcroft chillingly demonstrated when he subpoenaed women's private medical records across the country in 2004, an ideological attorney general can use the tremendous powers of his office to carry out a political agenda. The HHS secretary, in addition to administering the Title X family-planning program, carries an enormous responsibility in overseeing implementation of the new health-reform law – a law with perhaps the greatest potential in a generation to improve women's reproductive health. The FDA commissioner is responsible for approving new contraceptives and medical-abortion options – or, conversely, stalling them, as previous appointees by anti-choice presidents did. The NIH director supervises vital biomedical research nationwide, including work with embryonic stem cells. And the CDC director oversees preventive services and protects the public health.

A president's views on reproductive rights set the overall policy and political tone for each of these key appointments and the many policy decisions that follow.

Executive Actions

The president can take executive actions, generally relating to the conduct of the executive branch, that have the force of law. Executive actions are particularly powerful tools because the president can issue them independently.

In recent years presidents have taken executive actions on the following choice-related topics:

- ◆ The gag rule on family-planning centers
- ◆ The global gag rule on overseas health centers
- ◆ The U.S. contribution to the U.N. Population Fund
- ◆ Embryonic stem-cell research
- ◆ The Federal Refusal Rule, a broad policy that allowed health-care corporations to refuse to provide or refer for abortion care and a broad range of other health-care services
- ◆ Federal funding for abortion services

The Federal Budget and Appropriations Riders

A president's position on reproductive rights often is embodied in the budgets he or she sends to Congress. Each year's federal budget cycle begins with a presidential proposal. This document sets forth the administration's views and signals the president's opinion about which policy priorities deserve public investment. This has an effect on both the budget decisions Congress makes and the public's opinion of various government programs. In other words, because the president is the elected leader of the nation, his or her budgets are seminal statements about – and have the power to help shape – American values.

Reproductive-health programs whose funding levels are set annually in budget bills include:

- ◆ Title X, the nation's domestic family-planning program
- ◆ Teen pregnancy-prevention programs
- ◆ Family-planning services through the U.S. Agency for International Development
- ◆ The U.S. contribution to the U.N. Population Fund
- ◆ A wide variety of other preventive and public-health programs that support reproductive health

Presidential budgets also sometimes include policy recommendations. These are important both because they can influence Congress' actions legislatively and because they signal the administration's policy priorities for the coming session. It was telling, for instance, that in his first budget, anti-choice President George W. Bush proposed repealing the law guaranteeing federal employees equal access to birth control. In contrast, pro-choice presidents sometimes propose lifting some or all of the current-law abortion-coverage bans on low-income D.C. residents, federal employees, and women who receive their health insurance through the federal government.

Other Powers

Statements of Administration Policy

The president expresses his or her views on pending legislation by issuing memoranda to Congress when major bills reach the House or Senate floor. Typically these Statements of Administration Policy include the administration's position on the proposal, an indication of whether the president would sign or veto it, and requests for changes to any of the provisions. These statements are important because they influence members of Congress, help shape legislative provisions, and sometimes even affect the outcome of a vote. When it comes to issuing

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Statements of Administration Policy on choice-related bills, obviously, the first and most important standard that guides the document is a president's position on the right to choose.

Veto Power

Anti-choice forces currently control one chamber of Congress – the House – and while the Senate majority is in pro-choice hands, numerically, the margin in that chamber is extremely narrow, with only 40 reliably pro-choice votes. Given this precarious situation in Congress, it is as vital as ever that a pro-choice president occupy the White House. And should anti-choice forces pick up even one more Senate seat

in the coming election, there may be an insufficient number of senators to stop anti-choice attacks in that chamber. In that scenario, the president will be the only firewall protecting American women from anti-choice politicians in Congress.

Leading a Political Party

The president traditionally serves as the head of his or her political party and, among other things, sets the national party's platform. Although Americans of all ideological stripes support freedom of choice, at present, the national Democratic and Republican parties' platforms diverge starkly on this issue, as excerpts illustrate:

Democratic Party Platform on Choice

"The Democratic Party strongly and unequivocally supports Roe v. Wade and a woman's right to choose a safe and legal abortion, regardless of ability to pay, and we oppose any and all efforts to weaken or undermine that right."

Republican Party Platform on Choice

"We support a human life amendment to the Constitution, and we endorse legislation to make clear that the Fourteenth Amendment's protections apply to unborn children."

Conclusion

The right to choose has been under systematic attack for nearly 40 years, and as a result, now hangs by a thread in the Supreme Court, lower courts, Congress and state houses. The situation has become especially critical in recent months, as a result of electoral shifts and the legislative attacks on reproductive freedom

that followed. In this environment, as we approach the 2012 elections, the president's role as a uniquely empowered firewall between politicians bent on ending legal abortion and a woman's right to choose has never been more vital.

Acknowledgement

This report is an updated version of *The Powers of the President: Reproductive Freedom and Choice*, first published in 2000. NARAL Pro-Choice America gratefully acknowledges staff who researched and wrote the original report.

Disclaimer

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