

How McCain, Obama will change abortion policy

High court vacancies will create opportunities for president to alter policy

By Tom Curry
National affairs writer

MSNBC

updated 4:06 p.m. ET, Sun., Oct. 12, 2008

WASHINGTON - *This election season, msnbc.com is presenting a weekly series assessing the issues and controversies that the next president will confront once he takes the oath of office.*

In this Briefing Book, we look at abortion and where the candidates stand on the Supreme Court's role in regulating it.

Why it's a problem

Traditionally abortion laws were the province of state governments. Prior to 1973, abortion was legal in some states, but not in others.

But in 1973, the United States Supreme Court decided that "the right of privacy... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

In his majority opinion, Justice Harry Blackmun emphasized "the distress, for all concerned, associated with an unwanted child."

In the 1992 Planned Parenthood v. Casey decision, the high court reaffirmed the holding of Roe v. Wade, but said some state restrictions on abortion would be permissible.

It upheld the Pennsylvania law that required a 24-hour waiting period before a woman could get an abortion and a requirement that she be provided with specific information about the nature of the procedure.

Every year in the United States, about 1.2 million abortions are performed.

The abortion debate has roiled American politics, and especially the politics of Supreme Court nominations, since the 1980s.

The abortion controversy partly derailed President Reagan's 1987 nomination of conservative jurist Robert Bork to the Supreme Court and it nearly barred Clarence Thomas from winning Senate confirmation in 1991.

The abortion furor led high court nominees such as Stephen Breyer, David Souter, John Roberts, and Samuel Alito to tip-toe around the question of whether Roe v. Wade was precedent that they would not overturn.

The controversy also divides both political parties, making them more sectional and doctrinaire than they might otherwise be.

The Republican Party's anti-abortion orientation alienates some libertarians and liberal northern Republicans.

The Democratic Party's leadership has an abortion rights commitment. Most Democratic candidates who succeed in states such as Tennessee and Mississippi must be officially anti-abortion, which puts them out of step with the leadership of their national party and with most of the big Democratic campaign donors.

Where the candidates stand

On few other issues do Republican presidential candidate Sen. John McCain and Democratic candidate Sen. Barack Obama differ so sharply as on abortion.

McCain has a consistent record of voting to restrict abortion.

Last August, when Rick Warren, the pastor of the Saddleback Church in California, asked McCain, "(At) what point is a baby entitled to human rights?" McCain replied, "At the moment of conception."

Obama supports abortion rights and is a co-sponsor of a Senate bill called the Freedom of Choice Act that would declare it a fundamental policy of the United States that a woman has a right to get an abortion.

If enacted, the bill would invalidate any federal or state law that interfered with a woman's right to get an abortion. It would, for instance, make void any state law requiring that parents of a daughter under age 18 be notified when she seeks an abortion.

The bill would give women the right to file civil suits against any person or government agency that sought to limit their ability to get an abortion.

Warren asked Obama in August, "At what point does a baby get human rights, in your view?"

Obama's answer: "Whether you're looking at it from a theological perspective or a scientific perspective, answering that question with specificity, you know, is above my pay grade."

Obama denounced the Supreme Court 2007 decision which upheld the ban on the procedure known as partial-birth abortion, in which a fetus is partially removed from the womb before the doctor ends its life.

He said "conservative Supreme Court justices will look for other opportunities to erode *Roe v. Wade*."

McCain praised the court's decision, calling the partial-birth procedure "one of the most odious aspects of abortion."

Unanswered questions

How soon will the pro-abortion rights majority on the Supreme Court be broken up by a justice's retirement or death?

The pro-abortion rights majority consists of Justices Souter, Breyer, John Paul Stevens, Anthony Kennedy, and Ruth Bader Ginsburg.

Stevens, who will turn 89 next April, has served on the court for 33 years.

According to Supreme Court expert Stuart Taylor of the National Journal, Souter, 68, is longing to retire to his native New Hampshire.

When a vacancy opens, the next president will have an opportunity to fill it with an abortion rights jurist, such as Stevens, or with one such as Thomas or Alito who might well vote to restrict abortion and perhaps overturn *Roe v. Wade*.

If Obama wins on Nov. 4, will he fill a vacancy with a liberal who might spur Republican conservatives to wage a fight, and perhaps even mount a filibuster?

Will Democrats have a [filibuster-proof Senate majority](#) of 60 next year?

Will any of the conservative justices die or decide to retire during the next president's term?

If the next president's appointment of new justices moved the court to the left on the abortion issue, would it re-consider a precedent such as the 1980 decision *Harris v. McRae* which upheld the policy of not funding abortions for low-income women?

If McCain wins, will a Democratic-controlled Senate block his nomination of a conservative nominee in the mold of Roberts or Alito?

Evolution and shifts in position

McCain has long had an anti-abortion voting record, but has at times professed what seem to be contrary views.

During his unsuccessful bid for the 2000 GOP presidential nomination, McCain said of the *Roe v. Wade* decision, "I'd love to see a point where it is irrelevant and could be repealed because abortion is no longer necessary. But certainly in the short term, or even the long term, I would not support repeal of *Roe vs. Wade*, which would then force X number of women in America to (undergo) illegal and dangerous operations."

After a furor broke out in conservative ranks over that comment, McCain issued a statement which said, "I have always believed in the importance of the repeal of *Roe vs. Wade*, and as president, I would work toward its repeal."

But he added that an effort to undo *Roe* "must take place in conjunction with a sustained effort to reduce the number of abortions performed in America."

In his rhetoric and his voting record, Obama has been consistently in favor of abortion rights. Like McCain, Obama talks about his desire to "work together to reduce the number of unwanted pregnancies" so as to reduce the number of abortions.

How they have voted

McCain voted to ban the procedure known as partial-birth abortion.

In 2006, McCain voted for, and Obama voted against, the Child Custody Protection Act. It would have prohibited transporting a minor girl across state lines to obtain an abortion, if transporting her would infringe on the right of her parents under their state's law to be notified or give consent to her getting an abortion.

Last year, McCain voted for, and Obama against, a proposal to codify in federal law the Bush Administration policy of giving states the option of covering unborn children under the State Children's Health Insurance (SCHIP) program for children of low-income families.

In 1994, McCain voted against a bill to establish federal criminal and civil penalties for those who use force, the threat of force, or physical obstruction to block access to abortion clinics.

McCain has voted for every nominee to the Supreme Court who has opposed the Roe v. Wade decision, or voiced doubt about its validity, either prior to joining the court or after joining it.

In 1987 he voted to confirm the nomination of Robert Bork, who had written that Roe v. Wade was "an unconstitutional decision, a serious and wholly unjustifiable usurpation of state legislative authority."

But McCain has also voted to confirm the nominations of Souter in 1990, Ginsburg in 1993, and Breyer in 1994 — even though he told Rick Warren in his August interview that he wouldn't have nominated them had he been president.

Ginsburg's abortion rights views were quite clear before her nomination. Souter's and Breyer's became clear after they joined the court.

Obama voted against the nominations of Alito and Roberts.

While serving in the Illinois legislature, Obama opposed a bill that would have defined an aborted fetus that showed some signs of life as a "born-alive infant." The bill would have entitled such a fetus to legal protection, even if doctors believed it could not survive outside its mother's womb.

Obama said he would have supported a similar federal bill that President Bush had signed in 2002, because it contained language noting that it did not expand the rights of an infant or fetus in the womb. If the bill had given rights to the unborn fetus, it would have undermined the Roe v. Wade decision.

According to FactCheck.org at the Annenberg Public Policy Center of the University of Pennsylvania, "Obama voted in committee against the 2003 state bill that was nearly identical to the federal act he says he would have supported. Both contained identical clauses saying that nothing in the bills could be construed to affect legal rights of an unborn fetus..."

Surprises for the new president

Donna Crane, policy director at NARAL Pro-Choice America, said she does not see scientific or medical developments fundamentally changing the nature of the political debate over abortion.

"There's some discussion about whether advances in caring for prematurely born babies will affect the debate," Crane said.

But she added "even if there were advances in caring for preemies, there's still a line, which is when a baby's lungs can hold air, and that's not changing. You can get the best care possible for preemies and care for the ones that are strong, but if their lungs are not developed there's not a lot that can be done."

© 2008 MSNBC.com

URL: <http://www.msnbc.msn.com/id/27035396/>

[MSN Privacy](#) . [Legal](#)

© 2008 MSNBC.com